NO NEW PROPERTY

Richard A. Epstein*

I. A CONSTITUTIONAL LANDMARK

* 376 U.S. 254 (1964) (public official must prove actual malice before recovering damages for defamatory falsehoods relating to his official conduct).

2 5 U.S. (1 Cranch) 137 (1803).
3 60 U.S. (1 How.) 393 (1856).
4 163 U.S. 537 (1896).
6 198 U.S. 45 (1905).
7 410 U.S. 113 (1973).
8 376 U.S. 254 (1964) (public official must prove actual malice before recovering damages for defamatory falsehoods relating to his official conduct).
9 369 U.S. 186 (1962) (announcing the "one man, one vote" rule).
10 Reich, The New Property, 73 YALE L.J. 733 (1964), cited in Goldberg, 397 U.S. at 262 n.8. Justice Brennan also quotes extensively from Reich's companion piece directed at welfare benefits in particular. See Reich, Individual Rights and Social Welfare:
one of those rare efforts to transform a set of academic and philosophical insights about the nature of property into the imperative language of constitutional law. Although the decision itself has been subjected to endless elaboration, qualification and even contraction over the years, its importance, if not its influence, continues to grow with time. The case has been the subject of extensive commentary, which, with some exceptions, has been largely sympathetic to its aspirations, even if somewhat troubled about the application of its doctrine in discrete contexts. I hope that it will not be treated as a sign of disrespect to say that Goldberg v. Kelly was wrongly decided. There is no "new property," and Justice Brennan's efforts first to create and then to defend the "new property" are in my view likely to do more harm than good.

The outline of this Article is as follows. In section II, I shall identify various types of property in order to determine which of them require special legal treatment and which do not. I begin this section by examining the justifications that might be offered for the old standard forms of property at common law, with its orientation that property rights arise from the actions of the people governed, and not by the dictates of the state. In section III, I shall apply the general analysis to what I call, somewhat inelegantly, "the old, new property," beginning with copyrights and patents, the forms of "new" property expressly contemplated under the Constitution, and then continuing the analysis to cover broadcast frequencies and corporate limited liability, new forms of property (and in a sense, "antiproperty") for which there is no explicit constitutional authorization.

Emerging Legal Issues, 74 Yale L.J. 1245, 1255 (1965) [hereinafter Reich, Individual Rights].


Section IV then turns to the "new, new property," specifically welfare benefits. In it I urge that, unlike the forms of property just considered, welfare benefits should not be protected against termination on the ground that they are "property" under the due process clause. In order to find some warrant to give constitutional protection against termination of welfare grants, some explanation must be given to displace the ordinary rule in private transactions that the party making a grant may condition that grant as the party sees fit. Yet even after the doctrine of unconstitutional conditions is incorporated into the law, that cannot be done absent some showing of the institutional abuses that flow from allowing welfare departments to determine their internal procedures. But that showing cannot be made, for there is no good theoretical or empirical reason to believe that the total efficiency of the welfare program, its budget held constant, is improved by the introduction of any constitutional safeguards against wrongful termination.

II. Property from the Bottom Up

In order to make out my claim about the different forms of new property, it is necessary to sketch out briefly the way in which a system of common law property rights meshes with the ideals of the constitutional order. The great American experiment in government was marked by a striking departure from the English view of property rights, starting with that most traditional form of property, land.\textsuperscript{14}

In the feudal English system the King occupied two roles. On the one hand he was the ultimate protector of the realm who intervened whenever any person \textit{vi et armis}, by force and arms, challenged the peaceable possession of any subject of the realm. On the other hand, the King was the first lawful possessor of property rights from whom all persons obtained their title to land. Property therefore arose not by occupation, but from a grant by the sovereign, and was subject to whatever terms and conditions the sovereign attached to that land.

If the English theory of property rights in land had carried over to the United States, then no private holdings of property

\textsuperscript{14} The most complete account of the early origin of the English system of land holdings is 1 F. POLLOCK & F. MAITLAND, A HISTORY OF ENGLISH LAW 229 (1898).
would be more secure than the government grant that conveyed
them. If the grantor imposed certain conditions that had to be
satisfied in order to keep the land, then the grantee would be
required to accept the bitter with the sweet, as it is said, usually
by Justice Rehnquist.\textsuperscript{15} Of course, any prospective grantee could
make the judgment ex ante that the condition attached to the
land was too onerous to make the grant worthwhile; museums
make those judgments about bequests all the time when they
turn down artworks left to them on condition. But having made
the fatal decision to accept the property, the grantee, then as
now, is stuck with the condition, however onerous.

The English system of property rights in land, however, did
not carry over to the United States. Ours was not a system in
which property rights started from the top down. Quite the op-
posite, as inheritors of the Lockean tradition, the basic theory
was that property rights emerged from first possession, from
first occupation, from homesteading, and not from state grant.
At this point there was no bitter to take with the sweet. The
basic conception of property rights allowed the owner to take
from the center of the earth to the outer reaches of the heav-
ens.\textsuperscript{16} It reserved the rights of possession, use and disposition
over the property until the end of time. It was this bundle of
rights that was good against the rest of the world, and which
government had to respect and defend when it imposed taxes or
restrictions upon use for the common good. Since this first
round of holdings was not dependent upon the will of the state,
the logic of the bargain, hard but fair, has no foundation on
which to rest, for the state cannot withhold property at will.
Limited government is never (or at least in theory should never
be) free to act as it sees fit. It must always justify what it takes
when it takes it.

The due process clause of the fifth amendment provides
that no person shall "be deprived of life, liberty or property,
without due process of law."\textsuperscript{17} Analogous language in the four-

\textsuperscript{15} See, e.g., Arnett, 416 U.S. at 153-54 (plurality opinion by Justice Rehnquist); Ma-
theus, 424 U.S. at 319 (opinion by Justice Powell holding that evidentiary hearing is not
required prior to termination of disability benefits).

\textsuperscript{16} See Edwards v. Sims, 232 Ky. 791, 793, 24 S.W.2d 619, 620 (1929). On the excep-
tions, see the discussion of broadcast frequencies, infra.

\textsuperscript{17} U.S. Const. amend. V.
teenth amendment limits the power of the states. Neither of these restrictions should be trifled with. If the question were put to a good Lockean at the time of the founding, he would have been unable to identify any legal interest that was not swept into life, liberty or property. The standard Lockean account of government calls upon each individual to surrender some portion of his property and liberty to the state, and to receive in exchange the protection that only a well organized set of civic institutions is able to provide him. The hypothetical deal is not tentative or partial; there are no things so valuable that the individual citizen is able to keep them outside the social contract that leads to the formation of the state. Quite the opposite, the state can take what it needs of property and perhaps liberty (as with the draft) insofar as they are needed to discharge its fundamental mission. But that mission is to protect all things of value that all individuals have. Life, liberty and property exhaust the domain of things and relationships capable of legal protection.

To what extent is this grand Lockean social transaction contingent upon the conceptions of liberty and especially property that were recognized and understood at the time of the founding? In essence the strong claim contains two parts: (a) the common law provided (and still provides) a complete and self-consistent set of entitlements, and (b) it is only those entitlements that deserve the protection of the state. On this view, stability is acquired through government, but, arguably, only at the very high price of the loss of innovation. While the rules for conveying real estate may well be stable, the constant emergence of new technological possibilities has rendered feasible, if not imperative, the creation of new forms of property. These new forms should be recognized by the common law, and by implication included within the scope of constitutional guarantees. The framers gave no thought to the question of how to allocate property rights in the broadcast spectrum, computer software, or new micro-organisms. If we insist that property rights were fixed in total at the time of the framing of the Constitution (or the pas-

18 U.S. Const. amend. XIV, § 1. Amendment XIV, section 1 provides that no "State deprive any person of life, liberty, or property, without due process of law . . . ."

19 See the very unsatisfactory discussion of the issue in The Selective Draft Law Cases, 245 U.S. 366 (1918) (upholding congressional power to compel military service).
sage of the fourteenth amendment), then these new forms of property lie wholly outside the scope of constitutional protection. But to whose benefit?

These observations place us in something of a dilemma. On the one hand, we can assume that there are no new forms of property rights, in which case it becomes quite difficult to explain some of the most commonplace institutions of our modern social life. On the other hand, we can admit that there are various forms of new property, but then have to face the prospect that these will rise up in such rich profusion as to swamp the traditional forms of property rights to which the Constitution undoubtedly does apply. Stated otherwise, the question that must be answered, especially in defending the claim that there is no "new property," is this: how can we admit new types of interests into the common law system of property rights without having to accept the proposition that the state has untrammeled discretion to create, and by implication, to abolish, all forms of property rights by legislative decree? The challenge here is in a sense universal, for it confronts those (like me) who think that the common law ideas of property, as embodied in the due process clause, are sufficiently determinate to provide genuine constitutional protection against government misconduct. Yet if this form of property is entitled to protection, so too are all the others. Thus in Goldberg, Justice Brennan quotes Professor Reich as follows:

Society today is built around entitlement. The automobile dealer has his franchise, the doctor and the lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.20

At one level the argument is overstated because the creation

20 397 U.S. at 262 n.8, quoting Reich, Individual Rights, supra note 10, at 1255.
of property rights in various forms of intangibles (welfare rights not included) has long been recognized by judges. To quote but one instance, consider the language of Judge Grosscup, penned nearly seventy years before Goldberg, in National Telegraph News Co. v. Western Union Telegraph Co.:

Property, even as distinguished from property in intellectual production, is not, in its modern sense, confined to that which may be touched by the hand, or seen by the eye. What is called tangible property has come to be, in most great enterprises, but the embodiment, physically, of an underlying life—a life that, in its contribution to success, is immeasurably more effective than the mere physical embodiment. Such, for example, are properties built upon franchises, on grants of government, on good will, or on trade names, and the like. It is needless to say, that to every ingredient of property thus made up—the intangible as well as the tangible, that which is discernible to mind only, as well as that susceptible to physical touch—equity extends appropriate protection.21

In this passage the ordinary forms of business property are recognized as subject to ordinary legal protection. But there is no obvious extension from these forms of rights to the case of "welfare rights" that both Brennan and Reich lump together with them under their banner of "new property." The implicit logic of Justice Brennan's argument is that the procedural protection of welfare rights against improper termination rests on the parallel between those rights and other forms of intangibles. I think that much profit can be gained, first by disaggregating Professor Reich's list, and second by examining as well certain other types of rights which he failed to include.

My proposed disaggregation has three separate categories. First, there are those new institutional arrangements that are fully accounted for by traditional legal modes of organization: the long term contract, the pension trust, and the stock option may be new in the sense that they were not commonly employed in earlier times. But there is no alteration in the structure of common law rights that is necessary to make them viable. There may be new contracts, but no new contract law has to be, or should be, devised in order to account for them. No further dis-

The second category I shall call "the old forms of new property." This category covers rights that have close parallels to classic common law rights in land and chattels. One example from this class from Professor Reich's list is broadcast frequencies. In my view the argument can be made to protect these forms of new property—patents, copyrights, frequency allocations, and corporate shares, for example.

Finally, I do not believe that it can be made with respect to the third class on Professor Reich's list, namely, the new sort of new property to which Goldberg v. Kelly in principle applies, and which (given the redistributive element) extends to other forms of subsidies often of ancient lineage, such as those provided to farmers. Professor Reich spends far too much time worrying about the benefit of these programs to their recipients, and far too little time worrying about their far greater costs to the persons from whom the subsidies are exacted. "No new new property" makes a terrible title for a paper, even if it gives an accurate account of my basic position. It may well be that all sorts of subsidies and benefit systems are part of American public law. But their administration is not improved by endowing them with limited constitutional protection against various forms of procedural deprivation.

III. THE OLD NEW PROPERTY

A. Copyrights and Patents

Let us begin with an examination of traditional forms of intangible property. Within a general Lockean framework all property is not owned by the state: can the state then create new forms of property other than the classic forms that existed at common law? Yes, so long as it observes the basic conditions associated with its own raison d'être. In each case that it creates new property rights the state necessarily limits the common law liberty or property rights of other citizens, for conduct which was once legal now becomes an invasion, or an infringement, of the new set of rights that are established. So creation of copyrights and patents is in derogation of common law rights of property and labor. But stating that point does not end the inquiry. While the system of patents and copyrights infringes on ordinary common law freedoms, it also affords in-kind compen-
sation for the loss of those rights. It could be that the new rights in question are worth more to the citizenry and each of its members than the rights that are removed. It all depends upon what rights are created. The situation need not be static. The point itself is made quite clear in the Constitution itself. Article II, section eight confers upon Congress the power: "To promote the Progress of Sciences and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Inventions."

The clause is remarkable in many of its particulars. First, it only makes sense if the catalog of property rights is not regarded as both fixed and closed by the common law. There can be new rights created, and these may be created only for overtly utilitarian ends: only the sciences and the useful arts need apply. In addition, there is no requirement that the rights so created be in slavish imitation of the fee simple in land or the perpetual ownership in chattels. Quite the opposite, the power to create new rights is for "limited times" only, not in perpetuity. But make no mistake about it, even the limited rights thus created are necessarily in conflict with the traditional common law rights. The common law system allows persons to use their things so long as there is no trespass on the property of another. There is no trespass when one person copies the text of a novel written by another or reproduces out of his own materials a device that is invented by another. Yet the moment that a system of "exclusive rights" is created in both "writings and inventions," the Constitution authorizes a system of new property rights that must now uneasily cohere with the older, displaced system of common law property rights. How can it be done?

It is here that we have to look to the other side of the bargain—implicit in-kind compensation—and ask not only what has been lost, but also what has been gained by creating new rights in writings and inventions. Those gains are abundant. Initially, it is quite clear that the system of copyrights and patents that has developed has far more than simple redistributive consequences. The flow of writings and inventions that takes place is not independent of the legal regime designed to secure the protection of these rights once created. While there may well be enormous debates as to the optimal scope and period of protec-
tion for both writings and inventions\textsuperscript{22} (and good reason to believe that these are not the same in both cases), it is easy to imagine some system of protection that trumps the common law rule of ownership that limits property rights to those things reducible to exclusive physical possession. The incentive to produce depends upon the rate of return from labor, and it is to "promote" useful labor that the system of protection is there for Congress to provide if it so chooses.

Substantial gains, therefore, can emerge from the protection of writings and inventions, and these gains easily exceed the costs of running an administrative system (a registry or patent review process) necessary to secure them. In addition, there is also reason to believe that these gains will be widely distributed across the population as a whole. The system of copyrights and patents allows everyone to participate. It gives greater protection to the exertion of labor than does the pure common law system, and that surely is a theme that resonates with the Lockean labor theory of acquisition. The gains moreover are not confined to those lucky or skillful enough to procure patents and copyrights. Through a system of voluntary exchange, the gains can penetrate every nook and cranny of society. Now all of us can purchase the goods and services made possible or cheaper by more extensive patent and copyright protection. There is new property here, but not the "new, new" property. Rather, it is a form of new property that honors the old verities that lie at the root of a common law system of property rights. The bottom line constitutionally is clear: there should be no question that the individual claims to patents and copyrights created pursuant to congressional statute do qualify as property, protected against taking without just compensation under either the due process clause or the eminent domain clause.

B. Broadcast Frequencies and Limited Liability

There are other forms of new property that exist quite comfortably alongside the old property, and here it should suffice to give but two examples: the broadcast spectrum and limited liability for corporations.

The broadcast spectrum is not a patent or a copyright. Yet the creation of new property in broadcast frequencies shows how a common law method can be invoked to override the exclusive rights of possession normally associated with the common law ownership of land. Thus without any special system of property rights in broadcast signals, the common law must treat any broadcast as a physical invasion of someone else's property for which damages, and most critically, injunctive relief are appropriate. The net result of applying this common law regime of property rights is that no broadcaster could ever overcome the coordination problems necessary to send messages to an eager but vast class of listeners. The value that each landowner has in excluding broadcasts is purely negative—to hold out in order to achieve some portion of the gain generated by others. Yet because so many landowners each have that same holdout position, none of them can exploit it against broadcasters. Preserving the common law rights to exclude broadcast frequencies thus means the end of the broadcast industry. The alternative system, which allows broadcasts routinely over the possible objections of any single landowner or group of landowners, works to landowners' universal advantage, for they can then receive the signals that would be denied to them under a common law regime of absolute exclusion.

There remains still the question of how these frequencies should be allocated among broadcasters and in this context, the first possession rules and the trespass law are relevant in a second guise. Historically broadcast frequencies were allocated to the first users, and the trespass analogies were generally used to prevent broadcasts over another person's frequency. As signals do not keep to sharply defined channels, there was necessarily some fuzziness at the margins, but those reciprocal de minimis interferences were (as they are today) handled by live-and-let-live type rules drawn by analogy from the law of nuisance.24


Shortly after the emergence of radio, the government, spurred on by the Department of the Navy, called in all the frequencies for reallocation by the Federal Radio Commission. Is there any question that these actions called for scrutiny under the takings clause? Given that these property rights were well established by customary use, were subject to tort protection, were subject to alienation by agreement, and were subject to taxes, they surely attained the status of property. It was only the decision by government to allow existing users to receive valuable frequencies under its revised program that provided, again in-kind, the compensation needed for the new government program. The broadcast spectrum is a form of new property well covered by the old common law rules.

C. Corporations and Limited Liability

The issue of limited liability is subject to a similar analysis. All corporations depend on some level of abstraction, for they give investors ownership in an intangible class of assets, namely corporate shares, that do not have the solid tangible heft of land and chattels. But at the same time it is absolutely necessary to guard against the problem of double counting. The shares are not one thing of value, and the underlying assets another. We cannot increase social value by piling on an endless array of holding companies to house the same tiny set of assets.

The gains from incorporation come from other quarters. Incorporation facilitates the trade of part interests in common assets, for it is far easier to sell one hundred shares of IBM than to convey a tiny fractional interest in each and every bit of property, in each and every contract or lawsuit in which IBM has a stake. In part, incorporation adopts by contract an elaborate scheme of governance for common ventures, and in so doing partakes of the old property of associations and partnerships. In this regard the sole distinctive feature of the corporation is one that it cannot achieve by private agreement, but for which it needs state assistance: limited liability against tort claims. Ordinary contracts between private parties cannot limit the rights of strangers, yet limited liability does that with respect to the assets which shareholders commit to corporations. If creating

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26 See Coase, supra note 23, at 1-7; EMORD, supra note 23, at 167-74.
copyrights and patents necessarily infringes upon common law rights, then limited liability does so as well.

Nonetheless this form of new property is also justified by the enormous set of gains that it creates. Like patents and copyrights, limited liability is a feature open to all who select the corporate form, at least after the nineteenth century reforms made special charters of incorporation a practice of the past. All can avail themselves of the corporate form. More to the point, the institution of limited liability may well increase the level of protection that individuals receive against tortious harms caused by strangers, an odd but fortunate paradox of regulation. Without limited liability, the size and scope of common ventures would be small; persons of genuine means would not be likely to commit their capital to risky ventures that carried with them high chances of loss. But persons with modest wealth might well be willing to do so, because insolvency is a better barrier against satisfying tort claims than any corporate veil. The individual entrepreneur keeps all the gains from major risks but escapes most of its burdens. Once limited liability is in place, it is possible to coax wealthy individuals into committing some fraction of their capital to common ventures. The new innovations can be backed by a pool of assets larger than those held by any single individual, and the innovations that are developed may well be safer than those of the obsolete cottage industry technology that they displace. Any residual concerns with tort liability can be answered in part by a requirement of liability insurance—a corporate asset that can be set in fixed amounts and made available exclusively to tort creditors. Limited liability is a form of new property, but it is one whose mission is directed toward the enhancement of the old virtues of industry and production.

Limited liability thus creates a new distribution of property rights, and it is, I believe, endowed with limited constitutional protection. The individuals who are protected by limited liability when they make an investment should be able to keep that protection even if the legislature subsequently decides to strip corporate shareholders of their protection. A limited liability statute creates the new baseline for transactions that were initi-

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ated when it was still law. The state may decide to repeal limited liability prospectively in the general case; it cannot do so with respect to transactions that were undertaken on the strength of the old rules. Suppose the state declares by statute to X, “You owe $100 to Y,” whereupon Y can sue to collect the debt. Surely there is a state taking of the $100 from X, which is then transferred to Y. How does the situation differ if limited liability, once sanctioned as a legitimate protection, is stripped away in midstream, thereby exposing a shareholder to the full extent of individual assets? There is no sharp division between manipulation of the rules of liability and the rules of takings.\(^2\)

To allow protections once given and already justified to be removed without cause is an invitation to political intrigue. Yet so long as the state has it in its power to change the prospective rules across the board, truly bad systems of liability will not long remain in place. The fact that limited liability rules are regarded as a permanent part of the legal landscape shows that the initial judgments made above are correct: ex ante gains swamp losses.

IV. WELFARE BENEFITS AND NEW “NEW PROPERTY”

A. Property, Old and New

Public benefits have a pedigree vastly different from that of any of the other forms of new property with which they are sometimes confused. The use of the grand category of “new property” to cover all property in opposition to land and chattels thus has the unfortunate consequence of obscuring the striking differences in function and design between benefits systems and the intangible property rights already considered. The welfare benefits of *Goldberg v. Kelly* (like farm subsidies) arise out of a conscious scheme of income support and wealth redistribution, arguably justified (unlike farm subsidies) by the differential marginal utility of money—utility which is normally posited to decline with increases in wealth.

Note the relevant differences. Welfare rights are not designed to allow the exploitation of new forms of wealth, nor to facilitate the aggregation and efficient use of capital against insuperable holdout problems that otherwise block its use. Welfare

benefits are transfer payments that rely on the taxes imposed upon some in order to provide the benefits that are received by others. This system of benefits is subject to a number of objections, as regards the resources that it consumes and the unfortunate incentives that it creates—incentives that lead people to substitute efforts to obtain or retain wealth through political means that only transfer, but never create wealth. Whereas fashioning a regime of property rights in patents, copyrights, and the broadcast spectrum works to create ex ante win/win situations, the same cannot be said of any system of welfare rights, which creates only win/lose situations.

One could argue that these objections to the transfer system are so conclusive that the welfare rights strain of the new property is "bad" property or should not even be regarded as property at all. But for the purposes of this Article I shall ignore any difficulties arising from the coercion that is imposed upon the transferors. Instead I shall treat the revenues that are thereby rendered available to the state as though they were manna from heaven. The only relevant questions for this analysis are directed to the relationship between the recipients and the wealth provided them under the benefits program in question.

Even from this perspective, clear and critical differences emerge among the different forms of new property. As noted earlier, there is strong reason to believe that patents, copyright and broadcast frequencies are types of private property that can only be taken by the state upon payment of just compensation. Even limited liability once conferred could only be removed if compensation for the increased exposure to loss is provided to shareholders whose assets are placed at risk. Do we want to create eminent domain protection for the set of welfare benefits at issue in Goldberg v. Kelly? Is it possible to say that once the state institutes a system of welfare that promises to pay the recipient $100 per week, thereafter it may eliminate that benefit payment only if it pays the recipient an equivalent capital sum sufficient to fund the purchase of a $100 per week lifetime annuity? Similarly, if benefit levels are reduced, must the annuity be purchased to offset that reduction? Or should welfare benefits

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28 I have done so on practical and constitutional grounds. See, e.g., id. at ch. 19. See also Epstein, Luck, 6 Soc. Phi. & Pol'y 17 (1988).
be adjusted upward automatically, to reflect levels of inflation?

I think that everyone (including Justice Brennan) would recoil from these implications. So long as resources are scarce, there is the clear expectation that no recipient has any vested rights in the continuation of present welfare schemes. Future welfare payments are made only so long as the scheme as a whole is in effect, such that any rights to future payments depend upon the decision of the legislature to continue with the funding program in question. Just as no special warrant is necessary to increase the level of welfare benefits, so too none is necessary to decrease that level, or cut out the program in its entirety. The past practice, in other words, affords neither a ceiling nor a floor for future practices or future politics. Welfare benefits are precarious and may be terminable by the state without the consent of the recipient.29

B. Unconstitutional Conditions and the Rule of Law

Thus far I have established that the "new property" of welfare benefits is not private property entitled to the protection of the takings clause. Can welfare benefits be property for any other purpose? Here the argument is that while the state may decide to remove the entire system of support at its free will and pleasure, it does not have a similar degree of freedom with respect to the benefits paid to any individual under the system. To be sure, the point here does not constitute a total attack on all conditions associated with individual benefit payments. The state can condition welfare on the willingness to avoid crime or drunkenness, to seek work, to furnish various reports, to produce identification cards, or to satisfy a host of other requirements. Yet even here the area bristles with complications, for the state is not a private party. In its role of public trustee it may be subject to certain constraints that would not exist for private donors.

At this point the procedural protection of welfare benefits under the Constitution lurches inexorably to the problem of unconstitutional conditions that has proved such a persistent ana-

29 Note that in this regard, welfare payments are no different from other rights that government gives out, such as the grazing rights under the Taylor Act, which were held revocable at will without compensation in United States v. Fuller, 409 U.S. 488 (1973).
lytical sore point under modern American constitutional law.\textsuperscript{30} The source of the difficulty is the extent to which various claims of constitutional protection are waived when an individual receives some benefit from the state by contract or grant. In the private context it is clear that persons need not offer a certain benefit at all; therefore it is said they possess the "lesser power" which allows them to offer the benefit subject to whatever terms and conditions they see fit to impose. This greater/lesser argument flows comfortably from the classical view of contract, which does not seek to guess the relative strength, merits or legitimacy of the subjective preferences of the parties. Their consent is sufficient protection against any form of exploitation, and once manifested allows a court to enforce the contract without first satisfying itself of the substantive soundness of the bargain for either side.

Clearly the greater/lesser argument does not hold in its universal form as against the state. The state cannot offer benefits only to those individuals who agree, for example, to vote to keep incumbents in office. In effect the wealth that is taken by force from the citizenry at large is now being used to alter the behavior of private parties, with the sole object of enhancing the political fortunes of persons in power. It hardly matters that recipients who accept the condition are willing to help public officials to enrich their private coffers, or to finance their reelection bids at public expense. Where there are such implicit redistributions of wealth along such forbidden axes as race, religion and sex, the unconstitutional conditions doctrine strikes at its hardest.

More generally, the doctrine of unconstitutional conditions is tied to the potential abuse of government power. It does not require a per se invalidation of all conditional grants. The question that one has to ask in the context of \textit{Goldberg v. Kelly} is whether the prospect of abuse in the welfare context is sufficiently great to call for some limit on the ability of the state to

impose various procedural conditions on individual welfare recipients. It is just this position that is maintained, implicitly in Goldberg, and explicitly in the impressive array of academic writing that follows on its heels.

At one level the arguments in favor of Goldberg border on the formalistic or the ritualistic. It is said that under the Constitution the state has the right to fashion property interests as it sees fit—itself a conclusion that is at complete variance with the Lockean tradition of bottom up property, but one indispensable for having any system of welfare benefits at all. By the same token it is then said that while the state has freedom with respect to the substantive dimensions of property, it lacks under the due process clause a similar freedom to condition those benefits upon acceptance of certain procedural norms. But why is the waiver not as good in the one context as in the other? It is certainly not because there are certain or inherent limitations on the nature and the structure of the grants. The ordinary grantor could condition the receipt of a future sum of money on the filing of certain papers by the donee at the public recorder’s office; similarly the payment of welfare benefits could be conditioned upon the recipient’s agreeing to procedural norms.

If the limitation of the procedural side of the state grant does not rest upon some inherent disability of the state as grantor, then it must rest upon functional concerns. In one sense unconstitutional conditions resonate with the principle of the “rule of law,” which tries to limit the arbitrary power of the state. And any system which just allowed the state to take welfare benefits away from individuals on a whim could be attacked on just those grounds. William Simon defends the decision in Goldberg on this line of argument. But I think that his defense of the rule is misplaced in this context. The rule of law works at its best within the framework of the minimal state in which the sole functions of government are (i) to protect the liberty and property of all persons, and (ii) to overcome (via takings only with just compensation) the raft of holdout and coordination problems that attend ordinary political and social life. Under

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31 The connection between the rule of law and the pretermination hearing in Goldberg is stressed in William Simon’s criticism of this paper. See Simon, The Rule of Law and the Two Realms of Welfare Administration, 56 BROOKLYN L. REV. 777 (1990).

32 This is the theme of F. HAYEK, ROAD TO SERFDOM 72-75 (1944).
those circumstances a sensible system is one that minimizes the level of political discretion in order to promote the stability of individual entitlements and expectations, and to limit the corrosive effects of faction and political intrigue.

Within this framework the rule of law should be understood to require the normal requisites of procedure—notice, opportunity to be heard, and the presenting of evidence—in any private common law action. The rule of law may be successfully carried over to administrative contexts as well, at least where the function of the agency is to restrict those forms of common law wrongs (fraud on the market, widespread pollution) that are not easily remediable by private individual suits. In essence the procedural safeguards of notice and hearings that are introduced at the administrative level become the functional substitutes for the procedural safeguards that are otherwise made available in ordinary civil litigation.

With both common law adjudication and administrative decision making, however, the safeguards associated with the rule of law principle work because the government acts chiefly in the role of umpire and enforcer of private rights. But in the context of welfare rights, the government abandons its nightwatchman role and becomes an active participant in the social life of the community. On the other side, the citizen does not wish to resist government intrusion, but to obtain government benefits. The change in both public and private roles has a powerful effect upon the rule of law. Under its traditional conception, the rule of law limits the discretion of the state, but it simultaneously confers widespread freedom of contract on private actors, who normally have complete discretion to make or refuse to make any private agreement.

As a contracting party, should the state have any less discretion than its private counterpart? Why can't the state express its preferences exactly as it sees fit? If private parties can act at will on the strength of their "appetites," why can’t the state when acting as a (public) contracting party, or for that matter a (public) donor? Contracting requires discretion, and redistribu-

33 Indeed, the most celebrated exposition of the rule of law was put forward precisely because of the concern over the potential for abuse by administrative bodies. See A. Dicey, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 203-04 (9th ed. 1941).
tion requires even more of it. Many of the difficulties with the doctrine of unconstitutional conditions can be traced to the state's dual role first as market participant and then as an independent regulator. No invocation of the rule of law requires a state to start or to continue a welfare program. That is purely a political decision, which, once made, requires toleration of broad public discretion. Why then does the rule of law require that individual welfare benefits be cut off or reduced only after a pretermination hearing? Simon is right to insist that I should be very nervous about the exercise of arbitrary power, given my belief in limited government. I am. But he is wrong to expect the same fidelity to the rule of law once government embarks on the extensive redistributive activities and welfare payments that he champions. Limited governments, bound by the stark conception of the rule of law, do not engage in these activities at all.

The state's dual role in the welfare system thus requires us to look closely at the content of any individual condition to see whether the state acts more as market participant or more as regulator. The inquiry is a familiar one: Does the imposition of that condition result in any factional or political abuse similar to the cases mentioned above, that is, receipt of welfare on condition of payment to political party coffers? If so, then the case for constitutional intervention on the question is securely founded to combat the destructive political games that factions routinely engender. If government officials seek to condition welfare grants upon political loyalty, they should be subject to severe sanctions, both civil and criminal. But even this possibility leaves us a long way from Goldberg itself because it does not speak to the necessity of any particular pretermination remedy. With or without any pretermination hearing, officials who so misbehave could be, and should be, subject to extensive liabilities at the hands of individual recipients. The legal system is surely able to develop powerful alternative remedies—tort damages, criminal prosecution, loss of official position—to cope with those forms of systemic misconduct, which are as likely to be directed against new applicants for welfare (as yet not covered by Goldberg) as existing ones.

The case for Goldberg's discrete constitutional conclu-
sion—that pretermination hearings are required—cannot rest therefore on the need for curbing official misbehavior. Rather it must rest on the question of whether the interests of welfare beneficiaries require hearings prior to termination of benefits by officials who are acting properly. How then might the argument be made out in this restricted context? One possibility is that the condition in the grant that denies pretermination rights unfairly exploits the vulnerable position of the poor. But surely the grant of welfare subject to condition does not make the recipients worse off than they would have been without any welfare benefits at all, even if it does make them worse off than having the grant without the condition. More specifically, the want of a pretermination hearing does not appear to spearhead any official effort to capture a disproportionate fraction of the gains from certain private activities, or to disrupt the operation of competitive markets, of the sort that occurs whenever certain conditions are imposed upon the use of public highways or on the ability to ship goods in interstate commerce. The conditions, at least to this outsider, appear to be a decided mixed blessing. They are the source of potential hardship to persons whose benefits are wrongfully terminated, but a much needed weapon to strike at potential abuse by recipients.

C. The Budget Constraint

There is an instructive way to test this last point. Let us suppose that a certain sum of money is budgeted to the welfare system. The question then arises how the funds should be allocated internally to the various parts of its operation. In the simplest model, the money can be spent either on direct payments to recipients or on procedural safeguards (such as a pretermination hearing) for those same recipients. But since the budget is fixed, the designer of the welfare system faces one iron constraint. Every dollar that is spent on procedural safeguards is a

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36 This point was stressed in Justice Black's dissent, where he noted that the difficulties of getting individuals off the welfare rolls may lead to a greater initial reluctance to put them on. See Goldberg, 397 U.S. at 278-79 (Black, J., dissenting). The theme is also picked up with great force in Verkuil, supra note 12, at 367-69.
dollar that cannot be spent on direct payments. The question is, what allocation gives the maximum system delivery for recipients—present and future—from the available funds?

One possible allocation is to spend every last cent on recipient benefits and none on procedural protections. But there are risks to that approach because of the danger that benefits will be cut off by officials who are acting out of petty motives, personal hostilities, ignorance, laziness or sheer impatience: the problems the rule of law seeks to combat do not disappear with the administrative state. There is also some danger that conscientious officials will misapply or misinterpret the relevant rules and make erroneous cancellations. It may well be that the risks of erroneous or arbitrary determinations will lead to a decline in confidence in the system and to a rise of insecurity that reduces the value of the benefits paid out. A shift of some of the monies from direct payments to procedural safeguards against termination could be viewed (ex ante) by the class of potential recipients as well worth the reduction in the total cash benefits required to keep the budget in balance. The situation is hardly distinguishable from workers who are willing to accept some reduction in salary in order to obtain some protections (perhaps only informal protections that cannot be asserted in court) against arbitrary dismissal. There is no reason a priori to assume that recipients of welfare, employment or social security benefits want all cash and no procedures, and perhaps some good reason to think that they want some procedural protection.

But how much? Unfortunately, there is no natural cut that instructs us as to what fraction of resources should be devoted to procedural protection and what fraction to recipient payouts. If one looks at private employment systems, there is no single set of practices that uniquely identifies the level of procedural protection given to workers under contract. For some businesses with large workforces and stable employment relationships, it might be possible to give extensive protection. In other firms, buffeted by radical technological transformations, insecurity may be the order of the day for shareholder, manager, and employee alike. Likewise, private charitable organizations often try to give some procedural protection to their beneficiaries, but again it is not clear how much is appropriate for any particular case or whether the same amount is appropriate for all cases.
D. Micromanaging the Welfare System

It is here that we come to the crux of the difficulty with the constitutional enforcement of procedural standards. For these standards to be sensible we have to have a clear sense that there is some open avenue for political abuse, for it is against those shortfalls that constitutions are designed to guard. In addition, there has to be some reason for us to believe the courts know better than legislatures and administrators when abuse is likely to occur and what safeguards are likely to prevent it. But the basic problem of how to allocate the funds does not generate anything like a unique or ideal answer, even when the well-motivated, all-knowing single official is put in charge.

Where then is the certainty, or even the decent probability, that the type of pretermination hearing that a court demands is better than the type of post-termination hearing that the political process provides by statute? With eminent domain it is easy to trace the set of abuses that exist when property is taken without just compensation: the breakdown in the political process leads to costly factional struggles which result in property being forcibly transferred from higher to lower valued uses. The public thus loses in three ways. It expends valuable resources in order to achieve inferior allocative results, with skewed distributional consequences.

There is no parallel scenario for abuse with the termination of welfare, social security or employment benefits. Most critically, it is highly unlikely that the political process will yield no protection at all, for the persons who want to establish a welfare program generally want to do it right. And historically, the political system did generate some protections against arbitrary conduct. Indeed, as Justice Brennan observed in Goldberg, the applicable New York procedures required that notice be given seven days before termination, and that, at the recipient's request, any decision to terminate or suspend benefits could be subject to internal review before implementation.\(^7\) The petition of the recipient could be supported by a written statement. Any termination decision had to be supported by reasons given in writing, and could not take effect until that writing was delivered to the recipient. But there was no opportunity to be heard

\(^7\) Goldberg, 397 U.S. at 257-60.
in person prior to the termination, the asserted constitutional defect in the procedures.\textsuperscript{38}

In principle the single omniscient administrator should seek to ask the question of whether any additional precautions prior to termination are worthwhile, \textit{given} those that are in place. That determination requires an assessment of both forms of error—wrongful termination, and wrongful continuation—that exist under the two regimes. The analysis supports the additional protection only if some further gain in systemwide reliability is obtained at some acceptable cost. One should have thought, as Justice Black pointed out in his \textit{Goldberg} dissent, that this quintessential empirical question is not all that different from the question of whether a lender should be required to make an unsecured loan to a given borrower when the risk of default is high and the possibility of nonpayment substantial.\textsuperscript{39} Figuring out the business risks of alternative strategies should have led Justice Brennan in \textit{Goldberg} to offer a comprehensive analysis of the operational deficiencies of the welfare system. That discussion should in turn have forced an explicit confrontation with the question of whether the increased protection of present beneficiaries represents an overall improvement in the operation of the system for its present and future recipients. But Justice Brennan's opinion resists any detailed institutional evaluation and sticks instead to a very high level of generality. It makes no attempt to show that its new-found constitutional requirement leads to, or even should be expected to lead to a better legal order that reduces errors, and thus offsets the increased costs of running the system.

In most cases, the decision regarding allocation of public benefits falls to the legislature that appropriates the necessary funds. In general the judicial role is to intervene only where the court can detect some miscarriage in that process, which promises a net gain from intervention. But in \textit{Goldberg} I am hard-pressed to see that this gain is manifest, if it exists at all, and hence I am unconvinced that "property" in the due process clause should be used to disregard conditions that are otherwise imposed. Surely it is not possible to say here that the political process has failed utterly, even from Justice Brennan's perspec-

\textsuperscript{38} Id.
\textsuperscript{39} Id. at 277 (Black, J., dissenting).
tive, given the level of procedural protection that it did generate. Why then ask the courts to micromanage the difference?

There is one further indication of the structural weaknesses of Goldberg. Simply, the question is what happens after the original decision is taken? Under the view that I have urged, there is little constitutional work left to do: the political process is allowed to work out its accommodations as best it can, subject to rules that constrain its operation in cases of invidious behavior. If the relative costs and benefits change, the government is of course free to institute these hearings. I suspect that even if Goldberg had come out the other way in 1970, some pretermination hearing would have been introduced in welfare cases as a statutory or administrative matter shortly thereafter, but it is hard to be sure.

Under the Brennan position in Goldberg, however, the following questions cannot be avoided. If there is a hearing, what sort of a hearing must it be? When must it be given? Must counsel be allowed to appear? What kinds of evidence are admissible? What standards of review are required? Who receives the hearing? There are no authoritative, even plausible, constitutional answers. We cannot expect otherwise. The initial judgment in favor of the hearing required empirical estimations that were not made. How then can these more refined judgments be made once moral indignation is put to one side, so only matters of implementation remain? I don’t have the answers, but neither, I think, does anyone else.40

E. Reason, Passion—and Indirect Effects

In large measure my view of Goldberg echoes the doubts that Justice Black expressed in his forceful dissent in Goldberg itself.41 On balance I do not think that Justice Brennan’s original opinion meets any of Justice Black’s sensible objections. The same can be said, I think, of Justice Brennan’s more recent de-

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40 For empirical accounts of the burdens that hearings have imposed upon the welfare system, see D. Baum, The Welfare Family and Mass Administrative Justice (1974), noting that as of 1974 a staff of about 3,000 persons (2,500 front line personnel and about 500 supervisors) were needed to handle the caseload in New York City alone. The hearings are conducted by state, not city personnel, and are run on a mass production/assembly line basis.

41 Goldberg, 397 U.S. at 271 (Black, J., dissenting).
fense of his decision in *Goldberg* before the Association of the Bar of the City of New York in September 1987. In that speech Justice Brennan did not confront the entire controversy of unconstitutional conditions, nor did he make any claim that his conception of "positive liberty" carries with it the striking implication that there is some constitutional duty to provide for welfare benefits.\(^4\)

Instead he contented himself with a general proposition: that the desire for rational structures should not be so strong as to overcome the "passions" (I would say, "compassion," but the point is a detail) and deeper concerns that animate reasoning under the due process clause. He writes that while some have seen "*Goldberg* as a triumph of the model of reason," he preferred to look at it as "an expression of the importance of passion in governmental conduct, in the sense of attention to the concrete human realities at stake. From this perspective, *Goldberg* can be seen as injecting passion into a system whose abstract rationality had led it astray."\(^3\)

To reinforce that perspective he set out the account from the brief of recipient Angela Velez who suffered unspeakable personal tragedies from the erroneous cutoff of welfare benefits. It is of course not possible from this vantage point to verify the truth of the story, or to contest it by introducing other factors which may well place the entire unfortunate episode in a different light. But even if we waive the right of cross-examination, and take Ms. Velez's story at face value, many disturbing questions still remain. There is no certainty before proceedings are undertaken whether the cutoff of welfare benefits in a particular case is justified or not. A requirement of pretermination hearings may well protect persons in the position of Ms. Velez. But it

\(^4\) But just that claim is made in this Symposium by Charles Reich in his paper, *Beyond the New Property: An Ecological View of Due Process*, 56 *Brooklyn L. Rev.* 731, 733 (1990), which posits "communal responsibility" to provide "a full constitutional guarantee" of economic security. "[T]he due process clause must mean that no person can be denied the means to economic survival." *Id.* at 742. Reich must contemplate a constitutional duty to impose taxes to fund these obligations. But, if the system of taxation and distribution destroys the incentive to produce, his grand plan to make the state the provider of last resort will reduce us to a level of abject poverty. One cannot redistribute goods and services that are not produced.

will also create opportunities for those persons who abuse the system to remain on the welfare rolls longer than they should.

Justice Brennan has replied to that objection by pointing to the "drastic consequences of terminating a recipient's only means of subsistence." No one should make light of that risk, but the two questions here are interdependent. If the wrong persons remain on welfare, then there is less money available in the bank, given the budget constraints, to take care of persons like Ms. Velez. The effort to minimize the dislocations that come with wrongful termination may only increase the delays in getting other needy people onto the welfare rolls in the first place. In the interim they may suffer consequences as bad as those which attended the wrongful termination of Ms. Velez. The object of the system of welfare is not to minimize the human tragedies that follow wrongful termination. It is to minimize the human tragedies that follow from all phases of the operation of the system.

In this connection it is instructive to recall some of the indirect consequences of Goldberg that were outlined in powerful fashion by Professor Jerry Mashaw in 1985, two years before Justice Brennan's speech:

These administrative difficulties [after Goldberg] reinforced a political difficulty. Welfare rolls were already increasing rapidly. State legislators were unwilling to provide more funds either for well-constructed hearings or for welfare benefits. A strategy was needed that would preserve fiscal integrity and produce defensible decisions.

A number of tactical moves ultimately comprised the grand design. One was to tighten up and slow down the initial eligibility determination process. Another was to generalize and objectify the substantive eligibility criteria so that messy subjective judgments about individual cases would not have to be made and defended. This move led to the realization that professional social workers were no longer needed. Costs could be reduced further by lowering the quality of the staff and by depersonalizing staff-claimant encounters. If these reactions were not sufficient to restore fiscal balance, then payment levels could be reduced or allowed to remain stable in the face of rising prices. A tougher stance was also to be taken with respect to work requirements and prosecution of absent parents. Moreover, because hearings presumably protected the claimants' interests, internal audit procedures were skewed to ignore nonpayment and underpayment

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44 Id. at 972.
45 A point also stressed in Verkuil, supra note 12, at 369.
problems and to concentrate on preventing over-payments and pay-
ments to ineligibles.46

Mashaw’s account makes clear what we can expect to hap-
pen in practice when all the “concrete realities,” to use Justice
Brennan’s phrase, are taken into account. Intake, supervision,
and treatment are as important as retention. And they are all
interconnected by the inexorable budget constraints which drive
Mashaw’s analysis, but which Justice Brennan’s analysis ignores.
By focusing only on one aspect of the problem, Justice Brennan
understates the level of complexity that is attached to the deci-
sions that he makes, and he does so in a way that improperly
biases the inquiry in favor of the outcome in Goldberg. The
gains are paraded in public, but the losses remain undisussed.

There are of course further issues that must be explored by
persons closer to the welfare system than I. It is far from obvi-
ous that all the changes in the welfare system that followed
Goldberg were driven exclusively by the constitutional require-
ment of a hearing. It could well be that the increased number of
persons on the rolls sparked many of the profound institutional
changes that Mashaw reports. There is nothing which says that
some form of hearing, internally driven by the demands of the
welfare system is inappropriate. In his own contribution to this
volume, Commissioner Cesar A. Perales of the New York State
Department of Social Services defends the decision in Goldberg,
which by his own description runs on a production line basis.47
But even if this can be done at reasonable cost, the basic point
remains. If the hearings are introduced from within the system,
then they can be bent, modified and altered as seen fit, so that
they no longer remain an inflexible part of the overall apparatus
come hell or high water. Who requires a hearing is as important
as deciding what kind of hearing is required.

At root my disagreement with Justice Brennan rests on his
refusal to understand the role of indirect consequences in evalu-

46 J. Mashaw, Due Process in the Administrative State 34-35 (1985). I thank Pro-
fessor Peter Strauss for calling this quotation to my attention after I had written the
original theoretical discussion.

47 Perales, The Fair Hearings Process: Guardian of the Social Services System, 56
Brooklyn L. Rev. 889 (1990). “[H]earing officers face calendars of twenty-eight to thirty-
five scheduled hearings daily and draft decisions on a statewide computer system which
can print and issue a decision in Albany the same day.” Id. at 891. “The Department
schedules eight hundred hearings a day, every day.” Id. at 892.
ating the behavior of complex social institutions. His constant refrain is an appeal to human “dignity,” but the relevant inquiry is always how to maximize human dignity under conditions of scarcity. The failure to take into account the institutional responses to scarcity is a fatal gap in his analysis. Goldberg v. Kelly cannot simply bask in the glow of the winners from the system. A rational analysis of its consequences is not undertaken to oust passion or to undermine compassion. It is to insure that the question of ends does not submerge genuine doubts on the question of means, both political and legal. The literature on regulation is replete with instances of “unanticipated consequences” of rules that frustrate the very ends they seek to serve. Notwithstanding Justice Brennan’s impassioned defense, Goldberg amounts in the end to another regulatory misadventure, albeit one of constitutional dimensions.