The Bias of Constitutional Property: Toward Compensation for the Elimination of Statutory Entitlements

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Debate over the Constitution's protection for property is heating up after fifty years of relative calm.[1] As a result there is considerable fluidity to what is protected by the right.[2] On the one hand, individual prerogatives over property in land and commercial enterprise have grown as a function of deregulation. On the other, governmental obligations to holders of statutory entitlements like social security, only recently acknowledged as a new property right, seem to be diminishing. The rights associated with traditional forms of property, while perhaps less comprehensive than they appear to the public, have always been far more generous than the rights to property associated with the welfare state. Protection for entitlements, from education to social welfare programs, though more substantial than in the past, is a shadow of the protection traditionally afforded to property. This article proposes that statutory entitlements to property be given full property protection, including the entitlement-holder's right to just compensation under the Constitution's "takings clause." This would be a more equitable interpretation of the constitutional property right that would eliminate the bias in favor of some forms of property.

Property is conventionally associated with individual possession and control. Like all legal rights, however, property rights depend on the state and its governing apparatus for enforcement.[3]

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1. Martin Shapiro, *The Supreme Court's 'Return' to Economic Regulation*, in Studies in American Political Development (1986).

2. James L. Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 Wash. L. Rev. 583 (1981).

3. *See* C. Edwin Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. Pa. L. Rev. 741 (1986); John Brigham, Civil Liberties and American Democracy (1984); John R. Commons, The Legal Foundations of Capitalism 247 (1924).

The state grants a range of action to property-right holders. They can exclude others, accrue benefits, and otherwise enjoy what is theirs. The legal justification for this right is that settled or legitimate expectations deserve state protection.[4] The tradition of constitutional guarantees for property has been legally based on the due process and just compensation provisions of the fifth and fourteenth amendments.[5]

Since at least 1970, with *Goldberg v. Kelly*,[6] legitimate expectations to statutory entitlements such as Aid to Families with Dependent Children (hereinafter AFDC) have been recognized by the courts as property. This development suggests a property right which could be pivotal relative to both liberty and equality in the modern state.[7] Now more than ever, with commitments to public assistance under attack, property rights need even more comprehensive and searching attention than they might get in more charitable periods.[8]

This approach to entitlement policy combines political theory, public policy analysis and institutional jurisprudence. Law, in the form of judicial decisions interpreting the United States Constitution, is a source for the examination of bias in the meaning of constitutional property. The proposal, however, is not simply a description of doctrine handed down by the Justices as authoritative, nor a prediction of what future Justices will decide. This is a commentary on protection for property in the Constitution which operates from the premise that the fundamental law must be impartial and non-discriminatory in order for it to anchor a government that derives its authority from the consent of the governed.

The Constitutional Tradition

Once central to liberal theory, the property right has been missing, since at least 1937, from various treatments of the civil liberties protected by the Constitution.[9] The idea that property and liberty could be separated began in the industrial revolution.[10]

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4. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

5. *See* note 18 and accompanying text for discussion of these clauses. Background is also available in Laurence H. Tribe, American Constitutional Law 456-73 (1978); Gerald Gunther, Constitutional Law: Cases and Materials 441-500 (11th ed. 1985).

6. 397 U.S. 254 (1970).

7. Roger Cotterrell, *The Law of Property and Legal Theory*, in Legal Theory and Common Law 96 (William Twining ed. 1986).

8. *See* Kathi V. Friedman, Legitimation of Social Rights and the Western Welfare State: A Weberian Perspective 63-75 (1981).

9. *See* Henry Abraham, Freedom and the Court 9-15 (3d ed. 1977).

10. Charles Reich, *The New Property*, 73 Yale L. J. 733, 772-74 (1964).

Since the early part of the twentieth century, a period known in constitutional law as the "*Lochner* Era,"[11] reform movements attacked property as protection for the few over the many. The right was effectively expelled from the debate on constitutional principles governed by the post-1937 doctrine of the "double standard."[12] This standard emphasized civil rather than economic liberties,[13] and an "idea of progress,"[14] based in the promise of equal protection in the fourteenth amendment. Property has remained peripheral to the canon of civil liberties in spite of the economic implications in right to counsel, equal protection, and freedom of the press. Of course, protection of property has not disappeared, but its status as a civil liberty, a constitutionally protected right of every citizen, has received minimal attention.

Paradoxically, it may have been the growth of these political liberties in the last fifty years that called attention to property rights. Now, real estate and commercial interests draw support from civil liberties and from two generations of activism over fundamental rights. They are also getting more protection from an increasingly conservative federal judiciary.[15] Yet, particularly because property is associated with the civil libertarian promise of contemporary constitutional government, the right to property cannot serve simply as protection for the rich or a shield for the wealthy. The modern constitutional system requires that rich and poor be treated the same. This look at constitutional property attacks some troubling biases in constitutional law.

The Old Property

When the United States Constitution was written, the tension between possession of property under the common law with its principle of *salus populi*, or the public good, and the Lockean conception of property as a vested right, was particularly evident.[16]

11. The "Lochner" era derives its names from Lochner v. New York, 198 U.S. 45 (1905), a leading cure illustrating the Court's willingness to scrutinize and invalidate economic regulations pursuant to the due process clause. In *Lochner*, the Supreme Court struck down New York law that imposed a 60 hour work week limit on laundry workers. The Court held that the law was an unconsitutional infringement on the freedom to contract because the law was not directly and significantly related to the promotion of employee health.

12. Abraham, *supra* note 9, at 15.

13. Richard Funston, A Vital National Seminar: The Supreme Court in American Political Life 199-206 (1978); Gunther, *supra* note 5, at 467-470.

14. Alexander M. Bickel, The Supreme Court and the Idea of Progress (1970).

15. Sheldon Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 Judicature 324, 324-30 (1987).

16. We see, in the debates over ratification in this period, an older and more communal conception being challenged by the newer, "vested right" form of prop-

Mechanisms to protect economic interests appear throughout the Constitution. Article I established federal power to regulate commerce, coin money and punish pirates while limiting state power to impair "the obligation of Contracts."[17] Article IV provides for payment of debts against the United States. The term property, however, is initially used only in the fifth amendment which provides that no citizen "shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[18]

Rather than rely on the fifth amendment, the early Supreme Court protected economic interests by referring to the various other constitutional provisions. In the 1810 case of *Fletcher v. Peck*,[19] Chief Justice Marshall relied on the contract clause to prevent governmental whim from denying legitimate expectations.[20] Before the Civil War, slavery cast an ominous shadow over constitutional property in an industrializing economy. In this period, interests that ranged from judicial appointments and the legal status of appointment papers to franchises to do business were the contested forms of property.[21]

Due process protection of property emerged after the Civil War when property, grounded in the fourteenth amendment, began to be viewed in terms of its value in the market (exchange value) rather than for its utility (or use) value.[22] This made the right much more appropriate to an expanding industrial order and made the fifth and fourteenth amendments the basis for constitutional protection of property. Before judicial attention turned away from regulation of the economy in 1937, a conception of constitutional property had developed. This conception remained significant for a very long period due to the limited number of constitutional pronouncements on economic issues.

The Bundle of Rights

Justice Holmes set the conceptual framework for property in

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erty. *See* Carl J. Friedrich, *Rights, Liberties, Freedoms: A Reappraisal*, 57 Am. Pol. Sci. Rev. 841 (1963).

17. U.S. Const. art. I, § 10, cl. 1. *See generally* Benjamin F. Wright, Jr., The Contract Clause of the Constitution (1938); C. Peter Magrath, Yazoo: Law and Politics in the New Republic (1966).

18. U.S. Const. amend. V.

19. 10 U.S. (6 Cranch) 87 (1810).

20. *Id.* at 133-39. The case involved fraudulent land sales by a state legislature and the implications for innocent secondary purchasers.

21. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824).

22. John R. Commons, The Legal Foundations of Capitalism 11 (1924).

the Constitution, as he did for so many other aspects of modern constitutional law. In the 1922 case of *Pennsylvania Coal v. Mahon*,[23] he addressed a situation where a coal mine had been dug beneath land to which a Pennsylvania coal mining company held subsurface rights. Mahon, who lived in a house above the mine, tried to stop the tunnelling on the basis of a state statute prohibiting such activity. Giving new life to the fifth amendment just compensation clause, Holmes referred to the "extent of the diminution" of property rights[24] and treated property as a bundle of rights. This conception would modify the "takings" provision to allow property to be protected even though full legal title to the property did not change hands. Holmes wrote in *Pennsylvania Coal* that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[25] The Pennsylvania statute, the Court held, had "taken" mine property.[26] Since 1922, Holmes' concept of a "bundle" has called attention to the intangible rights in property and has provided the framework for a movement away from *things* and toward expectations.[27]

The "takings" issue has become a matter of evaluating expectations and balancing those that are found to be legitimate against the police power of the state. Some environmentalists have said that the compensation scale derived from the "bundle of rights" is a grant to propertied interests which unfairly limits the capacity of the state to regulate. Fred Bosselman, an influential environmental lawyer, David Callies and John Banta, argued for elimination of this framework in favor of holding regulations "invalid only if they fail to bear a reasonable relationship to a valid public purpose."[28] Bosselman and his colleagues who sought to strengthen the land use planning process, acknowledged that "[a]n actual appropriation of land for public use, such as for a park, highway or reservoir, must be accompanied by compensation."[29] While the policy behind any expropriation will inevitably be ripe for dispute, where there is a substantial expropriation under the police power,

23. 260 U.S. 393 (1922).

24. *Id.* at 413.

25. *Id.* at 416.

26. *Id.* at 414.

27. See for further discussion, C.B. MacPherson, *A Political Theory of Property*, in Democratic Theory: Essays in Retrieval (1973).

28. Fred Bosselman, David Callies & John Banta, The Taking Issue: A Study of the Constitutional Limits of Governmental Authority to Regulate the Use of Privately-Owned Land Without Paying Compensation to the Owners 246 (1973) [hereinafter Bosselman].

29. *Id.* at 254.

there is also a widespread expectation of compensation.[30] As a constitutional conception for the public health and welfare authority of the state, the police power stands against the autonomy of the property right. Under the Constitution, the power is limited by the due process and compensation provisions. This includes the traditional requirement that property could only be taken by the government from private hands for public use.[31]

The 1984 case of *Hawaii Housing Authority v. Midkiff*[32] is particularly illustrative of modern developments in the public use standard. In that case, the state instituted a land condemnation program to transfer property to tenants. According to Justice O'Connor, regulating oligopoly, like that of the Hawaiian landlords, and the evils associated with it was within the parameters of the traditional exercise of a state's police powers.[33] The existence of a transfer of property to private hands did not seem to matter. Justice O'Connor's decision draws on an old maxim that there are and always have been limits on property ownership. These limits were characterized by Justice Jackson thirty-nine years earlier, who said, "Rights, property or otherwise, which are absolute against all the world are certainly rare . . . ."[34] Today there is relatively little doubt about state power over property, but controversy continues over the legitimate reach of the police power and what constitutes the settled expectation behind a property right.

Settled Expectations

In his treatise on constitutional law, Laurence Tribe described a model of "settled expectations" as a distinctive form of constitutional adjudication.[35] According to Tribe, the Constitution places "restraints on government power" which vest rights in property on the grounds "that certain settled expectations . . . should be secure against governmental disruption, at least without appropriate compensation."[36] A review of Supreme Court decisions since 1789 reveals that property protection grounded in the Constitution is a matter of expectations that have been settled or legitimated in some fashion, as by title, grant or the decision of a

30. Baker, *supra* note 3, at 766-67.

31. U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation").

32. 467 U.S. 229 (1984).

33. *Id.* at 231.

34. United States v. Willow River Power Co., 324 U.S. 499, 510 (1945).

35. Tribe, *supra* note 5, at 456-57.

36. *Id.* at 456.

court, rather than by mere possession of tangible things.[37]

Property litigation often concerns what the state must pay the property owner—what constitutes adequate compensation.[38] *Penn Cent. Transp. Co. v. New York City*[39] illustrates one aspect of the contemporary doctrine of settled expectations where, as a theoretical basis for the decision, the Supreme Court balanced state power over historic preservation against expected gains on land held by the company. The case involved restrictions placed on development of historic landmarks by New York City. The Court of Appeals of New York held that the city had not denied due process to the corporation because the landmark regulation "permitted the same use as had been made of the Terminal for more than half a century" and "the appellants had failed to show that they could not earn a reasonable return on their investment . . . ."[40] The United States Supreme Court, in reviewing the decision, addressed whether denial of a permit to build over the landmark train station constituted a "taking." Writing for the majority, Justice Brennan admitted the Court had been unable to develop any set formula for determining when "economic injuries caused by public action [must] be compensated . . . ."[41] He indicated that although "takings" are more readily found where there is a "physical invasion"[42] by government, the broader understanding is that to require compensation, a "taking" may simply interfere with interests "sufficiently bound up with the reasonable expectation of the claimant to constitute 'property' for fifth amendment purposes."[43] The Court held that Penn Central was not deprived of a "reasonable beneficial use of the landmark site . . . ."[44] Hence the regulation did not amount to a constitutional "taking." The opinion reveals a commitment to evaluating the property right in terms of expectations.

Grounded in the relationship between individuals and the state, adjudication of compensation questions turns on expectations. There is not a hard and fast line. There are simply ways of acknowledging the relative autonomy of particular individual (or corporate) interests within the structure of constitutional author-

37. *See* John Brigham, *Property & the Supreme Court: Do the Justices Make Sense?*, 16 Polity 242 (1983).

38. *See* Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 Sup. Ct. Rev. 63, 65-66.

39. 438 U.S. 104 (1978).

40. *Id.* at 121.

41. *Id.* at 124.

42. *Id.*

43. *Id.* at 125.

44. *Id.* at 138.

ity. The relationship between the individual and the state is dealt with in the Constitution by a conceptual apparatus that triggers the just compensation clause when private control and use is diminished. An effort to balance social and individual interests through principled standards has characterized evaluation of property claims under the Constitution. The principled standards, however, have not applied to all forms of settled expectation to the same extent. The next section examines the newer expectations and considers the extent to which they can be distinguished from property in land and transferable forms of wealth.

"New" Property[45]

As far back as *Marbury v. Madison*,[46] in 1803, the Supreme Court recognized that actions by government create expectations. The things that were expected in the early nineteenth century ranged from William Marbury's judgeship[47] to Dartmouth College's charter[48] and monopolies like the one held by the Charles River Bridge Company.[49] More recently, the Supreme Court acknowledged that " '[p]roperty' . . . may be construed to include obligations, rights and other intangibles as well as physical things."[50] Now, with the rise of the welfare state and the federal regulatory apparatus, the range of expectations encompasses nearly all aspects of social life. The constitutional guarantee has meant that, where the expectations are legitimate or settled, they will be respected by government as property. Because these modern expectations have come to be known as new property, this terminology will be used in this article, although the thesis of the article is that the essence of the property right has not changed.

Given the longstanding recognition of a property right in intangible expectations, the thing that is new about property to which people are entitled by statute as part of the social service commitment of the modern state is the particluar interest, the intangible or tangible thing that is expected. Social Security is one of these relatively recent expectations, as is AFDC. Licenses to run nuclear reactors are "new" in much the same way. The application of the constitutional property right, however, in historical

45. *See* Reich, *supra* note 10. (Treatment proceeds as an historical survey with emphasis on the link between "old" and "new" property).

46. 5 U.S. (1 Cranch) 137 (1803).

47. *Id.*

48. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 519 (1819).

49. Charles River Bridge v. Warren Bridge, 26 U.S. (11 Pet.) 420 (1837).

50. Fidelity & Deposit Co. v. Arenz, 290 U.S. 66, 68 (1933).

practice grew out of comparable expectations based on licenses for economic activity and a great variety of grants from the government. These were some of the first subjects of constitutional protection as property.

The courts have had a great deal to say about which expectations would be considered legitimate or settled. At one time much was made of a distinction between individual rights surrounding the old property and privileges adhering in government largess. This distinction is evident in *McAuliffe v. Mayor of New Bedford*,[51] an 1892 opinion by Oliver Wendell Holmes when he was a judge in Massachusetts. In *McAuliffe*, Holmes wrote, "The Petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[52] The right-privilege distinction evident in *McAuliffe*, denied constitutional protection where a benefit or expectation was the result of government largess. In the Supreme Court, although the fifth amendment was read to tie due process to "real or personal 'property'," the extension of constitutional protection to modern forms of property has come only recently.[53] While once distinguishing traditional property from social welfare benefits, the right-privilege distinction began to break down by the mid-twentieth century especially in the areas of welfare benefits and public employment.[54]

Benefits and Employment

The initial application of constitutional property status to benefits involved Social Security. Since this program was set up along the lines of private insurance programs and insurance benefits are recognized as protected property, it is no surprise that the property right in entitlements emerged here. The Social Security Act was held constitutional in 1937.[55] Then in *Flemming v. Nestor*,[56] the Justices addressed the status of benefits owed to an otherwise eligible family where the wage-earner was being deported for having been a member of the Communist party.[57] The Court focused on the nature of an entitlement to Social Security and held that entitlement to benefits did not constitute an "ac-

51. 155 Mass. 216, 29 N.E. 517 (1892).

52. *Id.* at 220, 29 N.E. at 517.

53. Tribe, *supra* note 5, at 509-10.

54. *See* William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

55. *See* Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).

56. 363 U.S. 603 (1960).

57. *Id.*

crued property right,"[58] but that benefits were a form of interest that could be withdrawn simply on the basis of a rational justification.[59] Although the outcome went against the claimant, consideration of the case by the Court, the lower court decision and the dissents revealed support for fuller property protection of this interest. The lower court decision struck down the provision in the Social Security Act on which denial of benefits was based[60] and the dissents by Justices Black, Douglas, Brennan and Warren indicated support for the property right.[61]

The political climate in the 1960s brought increasing sensitivity to obligations arising from public assistance programs. In 1961, the Court held that when public employment was terminated there had to be an unusually important government need to outweigh the right of the individual being terminated to have a hearing.[62] A few years later, Charles Reich called statutory entitlements "the new property"[63] and set off a series of developments advancing the status of this form of property. In the second of his two articles on the subject, Reich argued that the welfare state had altered the status of individuals and that benefits like unemployment compensation, public assistance, and old-age insurance urgently need to be recognized by society as a right.[64]

The 1970 case which explicitly and authoritatively recognized statutory entitlements as property, *Goldberg v. Kelly*,[65] pitted New York City and state welfare authorities against beneficiaries who had been cut off without a chance to respond. The Department of Social Services terminated a recipient because he refused to accept counseling and rehabilitation for a drug addiction that he denied having.[66] Justice Brennan noted in *Goldberg* that, "[i]t 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."[67] Brennan referred to unemployment compensation, tax exemptions, and employment security as being the

58. *Id.* at 608.

59. *Id.* at 611. *See also* Bruce A. Ackerman, Private Property and the Constitution 268 n.115 (1977).

60. Nestor v. Folsom, 169 F.Supp. 922 (D.D.C. 1959).

61. Flemming, 363 U.S. at 621-40.

62. Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886 (1961).

63. Reich, *supra* note 10.

64. Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L. J. 1245, 1255-56 (1965).

65. 397 U.S. 254 (1970).

66. *Id.* at 256.

67. *Id.* at 262, n.8.

sort of property that fell beyond the old common law conception of property.[68] Property in statutory entitlements had gone beyond mere intelligibility and had become authoritative.

Entitlement as property was amplified soon after *Goldberg*. In *Perry v. Sindermann*,[69] the property interest amounted to continued employment at a Texas college derived from an "understanding fostered by the college administration."[70] In that case, Justice Stewart acknowledged that tenure could be an interest protected by a property right.[71] The Court stated that " 'property' denotes a broad range of interests that are secured by 'existing rules or understandings' " and that "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit."[72]

A subsequent decision held that "[p]roperty interests of course, are not created by the Constitution: Rather . . . by existing rules or understandings that stem from an independent source such as state law . . . ."[73] Protection would not necessarily be afforded to any general benefit prior to its being granted by the state.[74] The new right replaced minimal protection in cases of suspension and revocation of a benefit, with a presumption favoring continuation of the benefit.[75] In *Goss v. Lopez*,[76] the Court found such interests present where high school students were suspended from their classes without a hearing. The Court held that the deprivation was substantial enough to overcome concern about the educational process.[77] The decision reflected the "bundle of rights" scale suggested by Holmes,[78] in which due process was treated as variable and the nature of the property interest determined what process was due.

The Modern Practice

Although entitlement claims were less successful in the Supreme Court during the mid-1970s, and the conservatism of the

68. *Id.*
69. 408 U.S. 593 (1972).
70. *Id.* at 600.
71. *Id.* at 601.
72. *Id.* at 601 (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).
73. Bishop v. Wood, 426 U.S. 341, 344 n.7 (1976)(quoting Roth, 408 U.S. at 577).
74. *See* Reich, *supra* note 10, at 785-86. (Reich, however, mentioned a basis for his new property in the "individual's rightful share in the commonwealth.").
75. Reich, *supra* note 10, at 785.
76. 419 U.S. 565 (1975).
77. *Id.* at 584.
78. *See* Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922).

Justices affected case outcomes, the Court generally acknowledged the "new property" in entitlements. The Supreme Court allowed termination of federal disability benefits without a prior hearing, for instance, while granting that benefits provided by the government were a "statutorily created property interest protected by the fifth amendment."[79] Other litigants were unsuccessful before the Court, but the Justices at least acknowledged the "new property" in entitlements in situations such as a foster family desiring to remain intact,[80] a state prisoner facing transfer to another facility,[81] and a medical student claiming to have been unjustly dismissed from school.[82]

Some "new property" appeals to the Supreme Court have been successful. These cases have exhibited a sensitivity for the powerlessness associated more often with civil liberties than economic issues. In *Memphis Light, Gas & Water Div. v. Craft*,[83] the utility company claimed an absolute right to discontinue service when bills had not been paid. The Supreme Court, however, saw an exception when the bill was the subject of a "bona fide dispute."[84] The Court held that the company would be liable for damages if the dispute turned out to be legitimate.[85] State protection against termination of utility service, except for cause, amounted to a property interest the Court was willing to recognize.

Since protection for statutory entitlements came at a time of diminished concern for more marketable forms of property, legal commentators often drew on civil libertarian values to enhance protection of traditional forms of property.[86] This phenomenon is evident in a plea by constitutional authority Gerald Gunther that the status of civil rights be returned to old-fashioned property.[87] He sought support in Justice Stewart's observation that "[p]roperty does not have rights. People have rights."[88] Justice Stewart made his comment to support constitutional protections for homes and savings accounts by associating them with estab-

79. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (The Court did require a post-deprivation hearing).

80. Smith v. Org. of Foster Families, 431 U.S. 816 (1977).

81. Meachum v. Fano, 427 U.S. 215 (1976).

82. Bd. of Curators, Univ. of Missouri v. Horowitz, 435 U.S. 78 (1978).

83. 436 U.S. 1 (1978).

84. *Id.* at 10.

85. *Id.*

86. Gerald Gunther, Individual Rights in Constitutional Law: Cases and Materials 160-69 (3d ed. 1981).

87. *Id.*

88. *Id.* at 163 (quoting Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972)).

lished rights to travel and to the continuation of welfare benefits.[89] In 1981, by an 8-1 majority, the Supreme Court ruled that a worker who quits a job because it conflicts with religious beliefs may not be denied unemployment compensation.[90] The case involved a Jehovah's Witness who quit a factory job after he was assigned to work on armored military vehicles.[91] Here, religious belief constituted an adequate basis for a compensable loss of work for all the Justices but Rehnquist.[92]

After Justice O'Connor replaced Justice Stewart on the bench, the Court continued to draw on civil rights to protect economic interests. In his 1982 opinion in *Logan v. Zimmerman Brush Co.*,[93] Justice Blackmun boldly restated the definition of property as "an individual entitlement grounded in state law"[94] and ruled in favor of a shipping clerk with a short leg who claimed that he "had been unlawfully terminated because of his physical handicap."[95] The protected property was a traditional common law entitlement, a cause of action in the legal terminology,[96] provided by the Fair Employment Practices Act.[97] The opinion reveals an enthusiasm for protection of the powerless. This enthusiasm is at the core of contemporary concern for civil liberties and stands in sharp contrast to the attitude expressed by the Supreme Court 150 years earlier when it described the poor as a "moral pestilence."[98]

Another 1982 Supreme Court case provided further evidence of the civil libertarian influence on constitutional property. In *Loretto v. Teleprompter Manhattan CATV Corp.*,[99] a "takings" claim arose over a New York statute which provided that a landlord must permit a cable television company to install its equipment in her building. In holding that the statute amounted to a "taking" of property under the Constitution, Justice Marshall emphasized the personal aspects of ownership and the use-value of property when he wrote that "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's

89. Lynch, 405 U.S. at 552.
90. Thomas v. Review Bd., 450 U.S. 707 (1981).
91. *Id.* at 707.
92. *Id.* at 720-27 (Rehnquist, J., dissenting).
93. 455 U.S. 422 (1982).
94. *Id.* at 430.
95. *Id.*
96. *Id.* at 430.
97. *Id.* at 424. Illinois Fair Employment Practices Act, Ill. Ann. Stat., ch. 48, para. 851-58, *repealed by* P.A. 81-1509, Art. I, § 35 (1980) (Smith-Hurd 1987).
98. City of New York v. Miln, 36 U.S. (11 Pet.) 102, 142 (1837).
99. 458 U.S. 419 (1982).

property."[100] The concern was for a very old right in conflict with the state's support for a new technology and its corporate purveyors. The sensitivity to property in this case appears to be a consequence of the concern for civil liberties as much as the tradition of protection for economic interests.[101]

The discussion of property that follows anticipates increasing instability in this developing area of constitutional law. As the legislative and judicial branches seem likely to become increasingly polarized, judicial doctrine alone will become inadequate to fully explain the nature of the fundamental right. The character of a proposed impartial right is outlined along lines emphasizing constitutional principle and the practice of policy formation. Since it is naive to ignore the recent conservative backlash against entitlement protection, the argument relies, ultimately, on the conservative principle of obligation.

The Compensation Issue

Having identified the constitutional tradition of property with settled expectations and considered the modern development of constitutional property along civil liberties lines, it is now possible to examine a form of constitutional property that would *really* incorporate civil libertarian concerns. A conception of property that does not have an essential class bias requires seeing entitlements as property in the full sense of the term. The transformation of entitlements into fully-protected property under the Constitution remains incomplete, falling short of traditional protections for property by focusing exclusively on procedural due process protection. This provides only part of the constitutional protection accorded older forms of property.

In the traditional property calculation, rights have substance. For example, landowners who have to make way for a freeway or powerline are often well compensated.[102] Where expectations of entitlements are altered by a change in policy such as the 1983 Social Security benefit cuts, however, there is no compensation offered. At best, when faced with denial of benefits, a welfare recipient gets a hearing, but if his program is cut back, the govern-

100. *Id.* at 436.

101. *See also* Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983). The Supreme Court found the Mennonites had not been adequately notified about a sale of their property for nonpayment of taxes and stated that due process was as important as the property issue.

102. *See* Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985), for one of the more provocative recent treatments of this issue.

ment is not necessarily obliged by law to honor its promises although we call them entitlements. The following discussion of changes in policy begins with some traditional dimensions of statutory entitlements and then turns to the implications of a compensation calculus for entitlements holders.

Some Traditional Considerations

"Taking" is the expression in constitutional law for serious injury to property by government. When a constitutional "taking" is deemed to have occurred, some form of compensation must result.[103] Advocates of fundamental rights are generally satisfied with procedural protection for entitlement holders, rather than pushing for compensation.[104] This cautious approach may be due to the fact that, while the protection afforded by procedural due process is limited, it is certainly preferable to no protection at all. Images of the distinction between rights and privileges in the not too distant past and the judicial philosophies dominating the appellate bench in the *Lochner* era are sobering.[105] Before the civil rights revolution of the post-World War II period, the Supreme Court applied the constitutional guarantees for settled expectations in a manner that favored entrenched interests and protected those who already had the upper hand. Although this legacy and recent conservative appointments to the federal bench by the Reagan Administration cloud the future of the new property in the federal courts, that future will also be influenced by decades of sensitivity to civil rights.

The market conception of property, the cost distribution rationale of compensation, and constitutional sensitivity to *ex post facto* laws comprise aspects of policy analysis in the United States that explain the nature of constitutional protection for entitlements and show the limited protection for newer kinds of property. These traditional considerations have helped to define the protection of property in practice. These considerations will be examined below in order to assess the costs of a more just constitutional property right.

Market Factors

For commentators like Bruce Ackerman, the absence of con-

103. The expression is derived from the "takings" or "just compensation" clause of the fifth amendment which, in pertinent part, reads "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

104. *See, e.g.*, Tribe, *supra* note 5, at 543.

105. Goldman, supra note 15, at 324-27.

stitutional protection for statutory entitlements is due to a limited conception of property protected by the Constitution as "private wealth."[106] According to this theory, the basis for the protected right has been trade and the ability to transfer interests—a characteristic of some forms of statutory property, like liquor licenses, taxi medallions, and development rights, but not others, like welfare entitlements.[107] Compensation seems to symbolize the higher status accorded to property when the right is associated with the market. Although neither property rights nor the market could exist as we know it without the state, the tradition has been to protect commercial expectations more fully than those which may be private, but have no commercial potential,[108] like the expectations of parents with regard to benefits promised to their children.[109]

The puzzle about market or commercial considerations, as they come into play in the constitutional context, is that they have little to do with hard work or creativity and everything to do with expectations made legitimate in the law. Rights associated with the old property promise to protect wealth by a standard of market opportunities. In *Penn Central Transportation Co. v. New York City*,[110] for instance, the decision by the Supreme Court rested, at least in part, on how much the company could reasonably expect as a return on its property.[111] The Court's attention was on the legitimate expectation of return on corporate property when it held that the transportation company was not prevented from making substantial profits on its building because it was not absolutely precluded from altering the structure.[112] If New York City had interfered in such a way as to preclude the company from reaping a reasonable benefit from its land and building, it would

106. Ackerman, *supra* note 59, at 269. Little has been made out of the fact that the wording of the fifth amendment links compensation to "private property" but the potential for issues arising from the wording remains.

107. *Id.*

108. In *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Supreme Court struck down regulations impairing the claims of bond holders. In *Atkins v. Parker*, 472 U.S. 115 (1986), food stamp benefits were reduced with only general notice of a change in the regulation from the state.

109. *See generally Before the Hearings on H.R. 341 Subcomm. on Postsecondary Education and the Subcomm. on Elementary, Secondary, and Vocational Education*, 97th Cong., 2d Sess. (1982) (statement of Alice James, teacher) (opposition to the phase out and eventual elimination of Social Security Survivors benefits for post-secondary students affected by the Omnibus Budget Reconciliation Act of 1981) [hereinafter *Hearings*].

110. 438 U.S. 104 (1978).

111. *Id.*

112. *Id.* at 136-37.

have been required to compensate the transportation company.[113] This protection of future benefits has been broad ever since intangible interests came under the constitutional mantle.

In the 1986 case of *Connolly v. Pension Benefit Guar. Corp.*,[114] Justice White discussed the "takings" issue in the context of statutorily created financial liability of employers for contributions to a pension plan beyond those for which they had contracted. The Court held that Congress could increase private liability in the interest of public welfare and social responsibility without being obligated to consider compensation.[115] Protection for property grounded in market considerations, or what Justice White termed "investment backed" expectations, supported the idea that because the field of employee pension plans was already heavily regulated, employers had adequate warning that Congress may increase their liability.[116] This strange transposition of the "takings" logic suggests that the key to the interest protected by compensation is not commerce. Instead, the sovereign authority to protect the public welfare is consistently the primary consideration.

Distributing Costs

One way to understand the policy of compensation is in terms of the distribution of social costs. The traditional argument for compensation is that monetary payment to one suffering a loss distributes the costs resulting from public action.[117] A property owner whose backyard is needed for a subway station is not expected to make extraordinary personal sacrifices to subsidize the common good. Rather, the costs resulting from public action are distributed. Although owners can be forced to part with their land, compensation addresses the loss.

Welfare recipients with a legitimate expectation of benefits, who are often disabled or raising families on what they receive, might be expected to make the same claim as someone losing a piece of their backyard, that any losses due to government action affecting their expectation, like a cutback of benefits, be distributed. Historically, the public and the political response to threatened changes in benefit packages, like the 1983 Social Security changes dropping the education benefit for surviving chil-

113. *Id.*
114. 475 U.S. 211, 106 S.Ct. 1018 (1986).
115. 106 S.Ct. at 1024-28.
116. *Id.* at 1027.
117. *See e.g.*, Armstrong v. United States, 364 U.S. 40, 48 (1960).

dren,[118] has raised policy issues with regard to competing public goods and the significance of the affected groups for legislators.[119] The compensation requirement would ground the rights of entitlement holders in society's expressed commitment to the distribution of social costs. The effect would be to honor entitlements and the rights of those who claim this kind of property, just as the expectations of other kinds of property holders have traditionally been honored.

The tradition of distributing social costs has other policy dimensions. Beyond what the Court held in *Connolly* regarding the unfairness of forcing some to bear disproportionate social burdens,[120] compensating an owner may lessen the resistance and discontent caused by the threat of loss.[121] Compensation is thus an instrument of right and justice that can have some consequences, such as lessening the political resistance of those losing entitlements, that warrant careful examination.

Retroactivity

A more technical body of legislative concerns surrounds retroactivity. Protection from bills of attainder and *ex post facto* laws are among the most settled rights in the Constitution, and they establish a presumption that legislation should be prospective.[122] Early adjudication of constitutional property under the contract clause focused on when and under what conditions a legislature could change its mind. In *Fletcher v. Peck*[123] and *Trustees of Dartmouth College v. Woodward*,[124] the Court held that the Constitution limited the degree to which legislatures could rescind a prior action. Modern constitutional discussion of retroactivity draws heavily on the due process clause of the fifth amendment[125] rather than the contract clause. Consequently, the range of expectations covered is broader. This is evident in recent cases on pen-

118. *See* Paul Light, Artful Work: The Politics of Social Security Reform 33-44 (1985). Prior to the changes, surviving children received benefits until they were 22 if they went to college.

119. *See* Fred Block, Richard A. Cloward, Barbara Ehrenreich & Frances Fox Piven, The Mean Season 92-101 (1987); *See also Hearings*, *supra* note 109, at 36-43. *See generally* Anthony Champagne & Edward J. Harpham, The Attack on the Welfare State (1984).

120. *See supra* notes 114-15 and accompanying text.

121. Ackerman, *supra* note 59, at 150-67.

122. *See* Wright, *supra* note 17, at 10, 33-34.

123. 10 U.S. (6 Cranch) 87 (1810).

124. 17 U.S. (4 Wheat.) 518 (1819).

125. *See* Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984); *See also* Fort Halifax Packing Co. v. Coyne, 107 S.Ct. 2111 (1987).

sion funds.[126]

Justice Brennan, for a unanimous Court in *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*,[127] points out that the calculation of retroactivity rights in areas of socio-economic legislation carries the constitutional burden of showing that Congress has acted arbitrarily and irrationally.[128] The Court held that retroactivity must be examined in the context of a presumption in favor of constitutionality, but that retroactivity is a matter about which the Justices must be sensitive.[129] The analysis of state mandated pension requirements in *Gray* turns on the legitimate expectations of employers who are forced to fund the pensions. The claims of the employers for protection from what they call "retroactive legislation" fall short in the context of judicial restraint because legislative action was based on interests and expectations on the part of employees.[130] Those who have been promised a stipend from Social Security or a state license have legitimate expectations. If the expectation of a particular grant is extended for a fixed period, like Social Security survivor's benefits to children until they reach eighteen, then it would seem that a cutoff prior to that time should be a violation of legitimate expectations warranting compensation. These would not only be the present expectations of the children promised benefits, but also the past expectations of the parent, now dead, who paid into the system.[131] The same consequences and obligations arise where an AFDC recipient receives a fifty dollar per month allocation for each of five children. The state should acknowledge the expectation of that amount for those already receiving benefits, if policymakers, for instance, tried to then limit payment to three children due to budgetary stringency. In practice, "grandfathering,"[132] while it addresses some situations of this sort, is quite often a policy based on accommodation to interested parties and minimal protection in comparison to just compensation under the fifth and fourteenth amendments. A requirement of compensation for deprivation of statutory entitle-

126. See Nachman Corp. v. Pension Benefit Guar. Corp., 592 F.2d 947 (1979) for an elaborate retroactivity test.

127. 467 U.S. 717 (1984).

128. *Id.* at 729.

129. *Id.*

130. *Id.* at 729-32.

131. Wills and life insurance policies are enforced by the deceased parents' estate in order to accommodate the decedent's wishes in disposing of property.

132. Originally associated with the Confederate States of America, the practice of "grandfathering" extends the protection of past practice beyond its authoritative life. *See Hearings*, *supra* note 109, at 36-43.

ment property would mean that changes in policy would have to honor obligations already incurred.

Entitlements, like survivor's benefits and AFDC, often involve expectations bound up with family or life plans in the most intimate way. At the very least, they are comparable to the relationship established between employer and employee when undertaking a pension plan. In such situations, compensation for lost property in entitlements plays a part in the fabric of social life by distributing costs and honoring obligations in a way very similar to compensation for lost expectations in land and commercial interests.

The first section of this article considered the core meaning of property and grounded the constitutional property right in legitimate expectations. In applying the just compensation provision to statutory entitlements, however, questions about the market arise, along with traditional deference in constitutional law to socio-economic legislation. Interest in distributing social costs and a concern for generally prospective legislation offer the possibility of treating entitlements as property for purposes of the just compensation clause. The following part of the article explores the traditional tension in the policy process created by contrasts between rights such as property and interests such as keeping the costs of government down.

Rights and Policies

The conventional understanding that statutory entitlements are created by legislation has been used to justify a freedom to take entitlements away that is far greater than the historic constraints on the freedom to take property. In Anglo-American law, the practice with regard to vested rights has been that they stand above legislative authority and structure legislative prerogatives.[133] These practices have had a bearing on protection for entitlements since some Justices would hold that legislators are capable of stipulating the level of property that is created. Since legislators can stipulate the level of property created by a statute, the argument goes, they are also capable of narrowing the protected interest,[134] for instance giving financial aid but saying the amount can be reduced at any time.[135] One approach has distinguished the policy dimensions of property in entitlements from "accrued property

133. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); *See also supra* notes 19-20 and accompanying text.

134. *See* Bishop v. Wood, 426 U.S. 341, 344 (1976).

135. *See generally* Tribe, *supra* note 5, at 522-43.

rights" on the basis of the need for legislative flexibility.[136] Another exhorts the poor to take "the bitter with the sweet"[137] as if the inevitable price of getting protection from the state is being at its mercy.[138] Both formulations turn on the relationship between rights and policies. The following section will address "the bitter and the sweet" rationale for denying just compensation clause protection to statutory entitlements first and then turn to the concern that legislatures should not be locked into the status quo.

"The Bitter and the Sweet"

The conservative wing on the present Supreme Court, particularly Chief Justice Rehnquist, proposes that legislatures may adjust the constitutional due process provided for any specific entitlement as part of creating the entitlement in the first place.[139] Justice Rehnquist's position appears to be that when property is created by statute, the drafters are free to create precisely as much property as they want.[140] This argument for legislative discretion would seem to lead toward an untenable view that the legislature could pass a law making entitlement a totally discretionary matter, leaving it up to the head of the welfare agency, for instance, whether a benefit should continue. The "bitter and the sweet" perspective contains a very limited conception of constitutional protection of entitlements.

Justice Rehnquist's reasoning treats the policy process as if it were outside the Constitution, yet the constitutional tradition has meant that the legislature cannot create an entitlement in an arbitrary or discriminatory way.[141] The tension between policy shifts and settled expectations is central to the constitutional tradition and has been an object of judicial controversy since the Yazoo land deal that led to *Fletcher v. Peck*.[142] In general, the judiciary has been expected to defer to the legislature on broad matters of public policy. The limits on legislative prerogative are at the mar-

136. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603 (1960).

137. Arnett v. Kennedy, 416 U.S. 134, 154 (1974).

138. *See generally* William B. Lockhart, The American Constitution 252-59 (5th ed. 1981).

139. *See* Stephen J. Massey, *Justice Rehnquist's Theory of Property*, 93 Yale L. J. 541 (1984).

140. *See* Bishop v. Wood, 426 U.S. 341, 344 (1976).

141. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); *See also* Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985); Gerald Gunther, Constitutional Law 100 (Frederick Schauer, Supp. 1987).

142. *See supra* notes 19-20 and accompanying text.

gins.[143] The issue of just compensation arises from one of those limits—the fifth amendment.

The idea of "the bitter and the sweet" in entitlements law presents one view of the constitutional limits on legislation creating this form of property. This view was articulated in *Arnett v. Kennedy*,[144] in 1974, where a federal employee had been fired after accusing his boss of bribery. The firing took place according to a federal law that denied employees any right to a hearing until after they had been dismissed.[145] In a plurality opinion, Justice Rehnquist and Chief Justice Burger allowed the legislature to limit procedural protections in its civil service statutes. The Court held that the level of procedural due process required could vary in entitlement cases and that the decision as to how much process is "due" was for legislative bodies.[146] Justice Rehnquist's formulation applies to constitutional due process protection. When it comes to traditional just compensation issues Justice Rehnquist does not seem to talk of "the bitter and the sweet," but stands behind the legitimate expectations which bar state action without compensation.[147]

In the end, perhaps the greatest flaw in the conservative theory of "the bitter and the sweet" comes from its inconsistency with some basic tenets of traditional conservatism. One of the most important developments in conservative thought is renewed attention to social obligation.[148] In *Beyond Entitlement: The Social Obligations of Citizenship*, Lawrence Mead describes the main problem of the welfare state as its permissiveness and calls for the poor to work for their benefits in order to satisfy their social obligation.[149] Mead's argument uses the economic theory of contemporary policy analysis,[150] but, at the core it rests squarely on more traditional normative discourse of reciprocal obligations that forms such an important part of entitlement rights. Like the obligation behind proposals such as "workfare,"[151] the state has a duty to respect

143. *See* Frank Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash. U. L. Q. 659.

144. 416 U.S. 134 (1974).

145. *Id.* at 137-39.

146. *Id.* at 152.

147. *See* Massey, *supra*, note 139, at 551.

148. *See generally* Lawrence M. Mead, Beyond Entitlement: The Social Obligations of Citizenship (1986).

149. *Id.* at 69-90.

150. *Id.* Mead uses cost-benefit calculations, economic metaphors and statistical models in his analysis.

151. These proposals require willingness to train and be placed in a job to qualify for welfare benefits. For a general discussion of these proposals, see Mead, *supra* note 148.

promises made to the poor in the same fashion that government has accepted obligations to the wealthy.

The Status Quo

The "bitter and the sweet" as a response to entitlement claims has led to apprehension that raising statutory entitlements to the level of compensable property would bind legislators and policy makers to the status quo. David Grais, in an influential article on entitlements, states, "[i]f statutory entitlements and rights are equated . . . [,] statutes that create entitlements to the continuation of the benefit also create rights to the continuation of a benefit, thereby making the benefit irrevocable."[152] There is some truth in what he says, but the fear that full property status for statutory entitlements would chain legislators to the status quo is a caricature of constitutional property protection and the right to compensation. Under the constitutional right, compensation is simply a spreading of the cost of interfering with a property right, not an absolute prohibition on expropriation. The ways the cost can be met are varied and they reflect the extent to which a property interest is acknowledged.[153] Although the historical evolution of public rights has been toward greater protection,[154] the present composition of the federal bench obscures that progress.

In the case of the tenured professor faced with job-threatening retrenchment policies, the full property right to continued employment would define the parameters for administrative choice, but it would not eliminate choice altogether. Where that right is secure, for example under a contract of statutory entitlement, tight budgets might inevitably force cuts in other areas, such as maintenance and plant operation and such cuts would, of course, diminish the value of continued employment (since few people like working in a building without heat or light). This would in turn affect the cost of compensation.

Pressure comparable to that proposed for entitlement as a function of the compensation calculus was evident in *Boston Firefighters Union, Local No. 718 v. NAACP*,[155] decided by the Supreme Court in 1983. In that case, minority firefighters sought protection from layoffs under strict seniority, a guarantee won by

152. David Grais, *Statutory Entitlement and the Concept of Property*, 86 Yale L. J. 695, 709 (1977).

153. *See, e.g.*, the compensation calculus in Phillip Nichols, The Law of Eminent Domain §§ 8.1-8.10 (Julius L. Sackman, 3d ed. 1985).

154. *See* Anthony J. Waters, *Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 Harv. L. Rev. 1111 (1985).

155. 461 U.S. 477 (1983).

the union from the state. The NAACP brought suit in district court which ordered a modification in the seniority system to prohibit the reduction of the number of minorities in the fire department. The United States Court of Appeals, considering the conflict between the statutorily established seniority system and the court order as a case of two competing rights, held in favor of the minority firefighters.[156] Subsequent to the decision, however, Massachusetts came up with enough money to stop the layoffs, and the Supreme Court declared the case moot.[157] Policy was thus made around the entitlement.[158]

Though it is reasonable to fear vested interests[159] whenever they threaten democratic processes, rights define the nature of democracy and settled expectations are a basis for allegiance in a political system. The Constitution does not prevent the government from taking property; it protects against arbitrary "takings" and provides for just compensation.[160] Because discrimination and minority rights are treated under another rubric,[161] the issue of compensation did not arise, but perhaps the seniority interests of white firefighters and teachers should have been compensated in the interests of distributing the costs and minimizing resistance to social change.

Rather than tying the hands of policy makers to the status quo, compensation would simply require that entitlement policy be made with deference to legitimate expectations. Policy must accommodate rights in a constitutional democracy. Those with power have long enjoyed respect for their expectations. The prominence of civil rights now pushes courts to recognize new protected interests in housing even where there is no statutory grant.[162] The expectations of tenants or welfare recipients are already becoming a factor in policy formation. When property takes the form of support payments or promises of benefits, the compensation issue

156. NAACP v. Boston Firefighters Union, Local 718, 679 F.2d 965 (1st Cir. 1982).

157. 461 U.S. 477, 479 (1983).

158. In subsequent cases, minorities have been more successful in establishing affirmative action rights at the local level than in the Supreme Court, and in each of these cases, conservatives have overturned policy on reverse discrimination grounds. *See generally*, Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Wygant v. Jackson Bd. of Educ., 106 S.Ct 1842 (1986).

159. McCann, *infra* note 163, at 146-47.

160. *See* Bickel, *supra* note 14, at 26-27.

161. *See supra* notes 152-54 and accompanying text.

162. *See, e.g.*, Devines v. Maier, 665 F.2d 138 (7th Cir. 1981) (the 7th Circuit held that the fifth amendment entitled tenants to compensation for being displaced from their homes when inspectors determined that the apartments were in violation of the city's housing code).

arises from legitimate expectations. In some programs such as student financial aid, grants are contingent on future allocations and the property claim is diminished. Compensation, however, would at least become a consideration when policy shifts came up against the settled expectations of entitlement holders.

In judicial interpretation of the Constitution there have been two levels of property protection, one for the wealthy and one for the poor. Outside the Supreme Court, commentary includes caution about relying on "legal contrivances" to produce social change.[163] There is legitimate concern that the real gains from a revival of property rights will be for the wealthy and not the newly entitled.[164] But, the articulation of conceptions of new rights and claims for economic justice have a vital legacy as the work of Charles Reich and Staughton Lyad attest.[165] Given that property rights delineate fundamental guarantees, this article has discussed the bias that exists and explored the implications of eliminating this injustice. While the traditional property right has never been an absolute barrier to government regulation, the property right in new entitlements should not be powerless in the face of policy shifts. Since the same government that assures the old also guarantees the "new property," just compensation is necessary for entitlements to be treated as property. The right to such compensation for rich and poor alike is the only property right consistent with the Constitution.

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163. *See* Michael W. McCann, *Resurrection and Reform: Perspectives on Property in the American Constitutional Tradition*, 13 Pol. & Soc'y 143 (1984).

164. *See* William Van Alstyne, *Cracks in the 'New Property': Adjudicative Due Process in the Administrative State*, 62 Cornell L. Rev. 445 (1977).

165. *See* Reich, *supra* note 10, at 772-74; *see* Staughton Lynd, *Communal Rights*, 62 Tex. L. Rev. 1417 (1984); *See also* Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 Stan. L. Rev. 509 (1984).