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Rick J. Hecker

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COMMENT

ON THE SUBJECT OF PROPERTY AND SOCIAL SECURITY: A TRADITIONAL ANALYSIS[†]

Rick J. Hecker^{††}

“Man can live and satisfy his wants only by ceaseless labor; by the ceaseless application of his faculties to natural resources. This process is the origin of property.”¹

I. INTRODUCTION

Beginning in Genesis, the first book of the Bible, after mankind was given common dominion over the entire world,² private property developed through the exertion of an individual’s time or talents on an object.³ William Blackstone, John Locke, Frederick Bastiat, and many others share the same conviction on the origins of property.⁴ Through the exertion of energy, an individual can gain dominion over the object of his efforts and thereby gain a defensible right in the object. The common law has long accepted the concept of dominion as the basis of a defensible right in an

† A special thanks to my Managing Editor, Daniel J. Schmid, for the title. His assurances that nothing titled “On the Subject of” would ever be dull led to the selection of this title.

†† Symposium Editor, LIBERTY UNIVERSITY LAW REVIEW, Volume 7. J.D. Candidate, Liberty University School of Law (2013); B.A., History, Hillsdale College (2010). I would like to thank my wife, Catherine R. Hecker, for her help editing and developing this Comment and especially for her love, support, and encouragement throughout the writing of this Comment. Further, I would like to thank my parents, John P. Jr. and Janine L. Hecker, for their support of my endeavors. Additionally, I would like to thank the LIBERTY UNIVERSITY LAW REVIEW for all the time and effort spent in editing this Comment and providing valuable suggestions.

1. FREDERIC BASTIAT, THE LAW 10 (Dean Russell trans., Found. for Econ. Liberty, Inc. 1950) (1850). “But it is also true that a man may live and satisfy his wants by seizing and consuming the products of the labor of others. This process is the origins of plunder.” *Id.*

2. *Genesis* 1:26 (King James) (all subsequent citations to Scripture are from the same version).

3. *See infra* Part II.A.

4. *See infra* Part II.A.

object.⁵ In principle, the defense of property is equivalent to the defense of individual industry and to the rewards that flow therefrom.⁶

Under a traditional theory of property, a laborer has the right to reap the rewards of his investments.⁷ For example, when an individual agrees to invest capital in a new business, the law accords that individual a right to receive the benefits that flow from that investment.⁸ Equally, an individual could share in the losses of that investment if it were to fail. Likewise, if a laborer were to place his earnings into an individual retirement account or a company-organized pension plan, then the law would accord him any accrued benefits consistent with the agreement.⁹ These examples, however, stand in stark contrast to the benefits paid out in Social Security. Most

5. *See* *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (discussing the principles of dominion and possession).

6. Andrew Carnegie saw the institution of property as the key of civilization precisely because it protected an individual's industry.

Objections to the foundations upon which society is based are not in order, because the condition of the race is better with these than it has been with any other which has been tried. Of the effect of any new substitutes proposed we cannot be sure. The Socialist or Anarchist who seeks to overturn present conditions is to be regarded as attacking the foundation upon which civilization itself rests, for civilization took its start from the day when the capable, industrious workman said to his incompetent and lazy fellow, "If thou dost not sow, thou shalt not reap," and thus ended primitive Communism by separating the drones from the bees. One who studies this subject will soon be brought face to face with the conclusion that upon the sacredness of property civilization itself depends—the right of the laborer to his hundred dollars in the savings-bank, and equally the legal right of the millionaire to his millions.

ANDREW CARNEGIE, *THE GOSPEL OF WEALTH* 9–10 (Applewood Books 1998) (1889).

7. *Galatians* 6:7 ("Be not deceived; God is not mocked: for whatsoever a man sows, this he will also reap.").

8. This is a fundamental concept of contract law—a principle upon which many suits have been brought. *See, e.g.,* *Capitol Specialty Ins. v. Indus. Elecs., LLC*, 407 F. App'x 47, 52 (6th Cir. 2011) (claiming that breach of contract did not exclude insurance coverage under plaintiff's policy); *Resco, Inc. v. Founders Title Grp., Inc.*, 751 F. Supp. 1442, 1445–46 (D. Haw. 1990) (claiming breach of option contract); *Floyd v. Country Squire Mobile Homes, Inc.*, 336 S.E.2d 502 (S.C. Ct. App. 1985) (claiming breach of contract); *Smith v. Harriman Util. Bd.*, 26 S.W.3d 879, 881 (Tenn. Ct. App. 2000) (claiming owed benefits under agreement).

9. This concept, too, is a fundamental principle of contract law, one about which numerous statutes have been written. *See, e.g.,* 26 U.S.C. § 408 (2012) (defining individual retirement accounts); LA. REV. STAT. ANN. § 9:2449 (2011) (providing for the payment of Individual Retirement Accounts upon death); P.R. LAWS ANN. tit. 13, § 8569 (2010) (providing rules for governing individual retirement accounts).

cannot agree on how the law ought to treat benefit payments.¹⁰ Even the Supreme Court of the United States seems unable to consistently classify Social Security benefits.¹¹

The ambiguity began with the creation of a welfare program infused with a hint of personal investment. Social Security was enacted by Congress in 1935.¹² Congress's goal was to alleviate the uncertainty that the elderly experienced with the loss of their retirement investments in the Great Depression of the 1930s.¹³ While functioning like welfare, the program was designed to appear more like an individual retirement account, thus reducing the embarrassment individuals might feel in receiving federal assistance during their old age.¹⁴ This ploy worked well—even Congress began to refer to Social Security as an earned benefit, distinct from welfare benefits like food stamps.¹⁵ Naturally, Social Security benefits appeared to be a dividend paid upon an investment.¹⁶ Social Security, however, actually consists of a designated tax, which provides for a specific welfare program.¹⁷

10. There is a multiplicity of law review articles contending for differing levels of welfare recipient rights. *See, e.g.*, Ruth Ben-Israel, *Social Security in the Year 2000: Potentialities and Problems*, 16 *COMP. LAB. L.J.* 139, 142 (1995) (referring to social security as a socioeconomic human right); William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 *MD. L. REV.* 1, 1 (1985) (addressing two separate eras of welfare entitlement jurisprudence); John McGuire, *The Public Debt Clause and the Social Security Trust Funds: Enforcement Mechanism or Historical Peculiarity*, 7 *LOY. J. PUB. INT. L.* 203, 216 (2006) (contending that the courts have not fully explored the possibility of contractual rights in Social Security benefits).

11. *See infra* Part II.C.2.

12. CHARLES MCKINLEY & ROBERT W. FRASE, *LAUNCHING SOCIAL SECURITY* 3 (1970).

13. *See id.* at 7–10.

14. LARRY W. DEWITT ET AL., *SOCIAL SECURITY: A DOCUMENTARY HISTORY* 55 (2008) (stating that the withholdings helped create a “self-respecting method through which workers make their own provision for old age”).

15. MCKINLEY & FRASE, *supra* note 12, at 308 & n.1 (noting that Congress changed the Social Security Act's language from “old age benefits” to “federal old age and survivor's insurance” in 1939). Thus, Congress was denoting that they believed Social Security to be more of an annuity or whole life insurance plan. *See* 3A *HORNER PROBATE PRAC. & ESTATES* § 66.1 (Michael P. McElroy, 2011) (defining annuity as “a fixed sum, payable periodically, subject to such limitations as the grantor may impose. . . . The determining characteristic of an annuity is that the annuitant has an interest only in the payments and not in the principle fund from which the payments are made.”); *see also* Steve Kurylo, *Choosing the Most Appropriate Insurance Policy and Company*, 23 *EST. PLAN.* 366, 367 (1996) (defining whole life insurance).

16. MCKINLEY & FRASE, *supra* note 12, at 308 & n.1.

17. WALLACE C. PETERSON, *THE SOCIAL SECURITY PRIMER* 54 (1999).

This Comment seeks to address the ambiguity that has developed in the law regarding Social Security benefit payments. Section II of this Comment addresses the nature of property to provide a background from which to analyze Social Security benefits. Section III examines how the Supreme Court has handled Social Security benefits and then offers a traditional analysis by which to classify them. Section IV of this Comment contends that in abandoning traditional notions of property, the Court has created confusion in the legislature, which in part impacts its ability to deal with the current budget deficit.

II. BACKGROUND

A. *Origins of Property*

William Blackstone stated, "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property."¹⁸ Few, however, can articulate the origins of their property rights.¹⁹ In considering the origins of property, one might remember *The Sound of Music* and take Maria's advice: "Let's start at the very beginning, a very good place to start."²⁰

1. John Locke

Genesis, the first book of Moses, contains an accurate description of the origins of property and was the starting place for both John Locke and

The truly fundamental way in which Social Security differs from private pensions is in being an income transfer system, organized and administered by the federal government. What the government does is tax one segment of the population and quite literally *transfer* the money collected to another segment of the population. This is the bedrock essence of Social Security. The segment of the population being taxed is persons at work, and the segment of the population receiving this money includes persons over 65, disabled, and survivors of workers. . . . Further, and unlike private pension systems, the transfer income (i.e., benefits) paid to the system's beneficiaries *are not* determined by what a worker has paid into the system in taxes over his or her working life, but by a government formula—called the "benefit formula"—which is based on the worker's lifetime earnings.

Id.

18. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

19. *Id.*

20. THE SOUND OF MUSIC (20th Century Fox Film Corp. 1965).

William Blackstone.²¹ In Genesis, man was given “dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.”²² This verse establishes man’s common dominion over the things of the world.²³ Locke contends that in the beginning man possessed only those rights that were inalienable to his person.²⁴ By investment of those inalienable rights in the form of labor, man could gain property.²⁵ Fruits could be claimed through gathering, and land could be claimed through improvement.²⁶ Property could be accumulated as needed or abandoned as its utility became extinguished.²⁷ Further, currency augmented property accumulation by allowing the free trade of low-utility items to a buyer who would pay in gold or silver, which could be accumulated and saved.²⁸

2. William Blackstone

Blackstone gave a nearly identical account of the formation of property rights, but nevertheless admitted that there is some disagreement among natural law theorists regarding the manner by which property rights vest.²⁹ For Blackstone, the important distinction was that the thing possessed becomes the property of the possessor upon possession.³⁰ Blackstone understood this newly-created right of property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the

21. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 303–04 (Peter Laslett ed., 2d ed. 2005) (1690); see also 2 BLACKSTONE, *supra* note 18, at *2–3.

22. Genesis 1:26.

23. LOCKE, *supra* note 21, at 304.

24. *Id.*

25. *Id.* at 304–06.

26. *Id.* at 306–09. Scripture further supports this principle when Abraham confronts Abimelech about the well Abraham had dug and which Abimelech had “violently taken away.” Genesis 21:25–32.

27. LOCKE, *supra* note 21, at 317.

28. *Id.* at 318–20.

29. 2 BLACKSTONE, *supra* note 18, at *8. Modern theorists on the origins of property law have adopted a wide variety of rationales for the existence of property rights. Some of these theories will be covered later in this section. See generally PROPERTY: MAINSTREAM AND CRITICAL POSITIONS (C.B. Macpherson ed., 1999) (1978) (containing a collection of varying views on property rights and origins).

30. 2 BLACKSTONE, *supra* note 18, at *8–9.

universe.”³¹ While some may scoff at this assertion given today’s complexity of social relationships,³² even Blackstone admitted that this dominion is tempered by “the law of the land.”³³ Regardless of this critique, under this theory, a working thesis contends that property is the use of labor to possess a thing, tangible or intangible, and labor establishes an alienable right in the thing possessed.

This concept of possession is taught to first-year law students through examining the classic case of *Pierson v. Post*.³⁴ In that case, Justice Tompkins explored a question of when the pursuit of a wild fox establishes possession sufficient to create a property right and thereby excludes all others from possession.³⁵ Post was in the midst of pursuing a fox when Pierson intervened and killed the fox, in spite of hearing the bark of the pursuing hounds.³⁶ Upon these simple facts, the court determined that Post had not deprived the fox of its natural liberty and therefore had not established possession, despite being in pursuit.³⁷ This case demonstrates that possession or occupancy is an important element of property law.³⁸

3. Relational Property

Disregarding the well-articulated descriptions of the origins of property given by John Locke and William Blackstone, there has been a plethora of further speculations on the origins of property.³⁹ For example, some authors have suggested that property is best described as a relationship between persons and the object.⁴⁰ These arguments stem from Roman jurisprudence and feudal influences on modern property law.⁴¹ This argument claims that “[w]hatever technical definition of property we may prefer, we must

31. *Id.* at *2.

32. C. REINOLD NOYES, *THE INSTITUTION OF PROPERTY* 297 (1936).

33. 1 BLACKSTONE, *supra* note 18, at *138.

34. *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

35. *Id.* at 177.

36. *Id.* at 175.

37. *Id.* at 179–80.

38. JAMES L. WINOKUR, R. WILSON FREYERMUTH & JEROME M. ORGAN, *PROPERTY AND LAWYERING* 67 (2002). Coinciding with the concept of “possession” is the concept of “first-in-time,” which distinguishes between theft and lawful possession. *Id.* at 121; *see also* *Armory v. Delamirie*, (1795) 93 Eng. Rep. 664 (K.B.); 1 Str. 505.

39. *See generally* *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS*, *supra* note 29.

40. *See* NOYES, *supra* note 32, at 356–57; *see also* Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L. Q.* 8, 11–12 (1927).

41. NOYES, *supra* note 32, at 285.

recognize that a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things."⁴² Thus, by protecting the property right of the landlord, the law gives a form of sovereignty to the landlord over the renter.⁴³ Indeed, even the clothes one wears are subject to the "lines decreed by their manufacturers."⁴⁴ Therefore, because property is sovereignty, "it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy."⁴⁵ In essence, relational property allows for government restraint of private property's power for the perceived common good of the people.⁴⁶

4. Pre-1935 American Property Law

The differences between Blackstone's view of property and his critics' views have caused some confusion for courts. Some courts have defined property as "any object of value that a person may lawfully acquire and hold, or any valuable interest therein or thereto,"⁴⁷ which fits closely to Blackstone's understanding. Others have adopted a more relational view of property:

The term property may be defined to be the interest which can be acquired in external objects or things. The things themselves are not, in a true sense, property, but they constitute its foundation and material, and the idea of property springs out of the connection, or control, or interest which, according to law, may be acquired in them, or over them.⁴⁸

Still others have mixed the two ideas by stating that property "means not only the thing owned, but also every right which accompanies ownership and is its incident."⁴⁹

Prior to 1935, certain limited interests were regularly considered to be property.⁵⁰ For example, in *Anaconda Copper Mining Co. v. Ravalli*

42. Cohen, *supra* note 40, at 12.

43. *Id.* at 13.

44. *Id.*

45. *Id.* at 14.

46. See PROPERTY: MAINSTREAM AND CRITICAL POSITIONS, *supra* note 29, at 153.

47. *State v. Frusha*, 91 So. 430, 431 (La. 1922).

48. *Griffith v. Charlotte, Columbia & Augusta R.R. Co.*, 23 S.C. 25, 38 (1885).

49. *Gulf, Colo. & Santa Fe Ry. Co. v. Fuller*, 63 Tex. 467, 469 (1885).

50. NOYES, *supra* note 32, at 378 (noting "[t]he extent to which American courts have gone in expanding the concept of property to include practically all rights, however

County,⁵¹ the court treated “the minerals and the right to mine the same; also a right of way over the land” as property for the purposes of taxation.⁵² Courts further held that “the right to fish is a property right and not a mere privilege.”⁵³ Yet, American courts were unwilling to include driver licenses as property. “[A] license to operate a motor vehicle is a permit to do that which would otherwise be unlawful. Although the privilege may be valuable, it is not property in any legal sense or constitutional sense.”⁵⁴ Likewise, even a business license could be revoked despite a seemingly arbitrary revocation.⁵⁵ Additionally, the revocation of a license was not a deprivation of property. In *Commonwealth v. Kingsley*,⁵⁶ the court stated, “A licensee takes his license subject to such conditions as the legislature sees fit to impose . . . Such a license is not a contract, and a revocation of it does not deprive the defendant of any property, immunity or privilege . . .”⁵⁷ Some Courts would not even consider a corporate franchise property of the franchisee.⁵⁸

The Supreme Court in *Lynch v. United States*⁵⁹ stated that government compensation was not a right of any kind.⁶⁰ “Pensions, compensation

attenuated, which immediately or ultimately concern relations with respect to specific material objects can well be demonstrated”).

51. *Anaconda Copper Mining v. Ravalli Cnty.*, 158 P. 682 (Mont. 1916).

52. *Id.* at 683.

53. *Leong Mow v. Bd. of Comm’rs for Prot. of Birds, Game, & Fish*, 185 F. 223 (C.C.E.D. La. 1911); *see also McCready v. Virginia*, 94 U.S. 391, 395 (1876).

54. *La Plante v. State Bd. of Pub. Rds.*, 131 A. 641, 642–43 (R.I. 1926).

A license being “neither a contract nor a right of property within the legal and constitutional meaning of those terms,” is no more than “a temporary permit to do that which would otherwise be unlawful, hence, the authority, which granted a license always retains the power to revoke it, either for due cause of forfeiture, or upon a change of policy and legislation” in regard to the subject. And such revocation cannot be pronounced unconstitutional, either as an impairment of contract obligations, or as unlawfully divesting persons of their property rights.

Id. (citing CHARLES J. BABBITT, *THE LAW APPLIED TO MOTOR VEHICLES* § 115 (1911)).

55. *Grand Rapids v. Braudy*, 64 N.W. 29, 32 (Mich. 1895) (“While the exercise of any arbitrary power may seem harsh, still we are of the opinion that [it] is not so unreasonable as to require the courts to declare it void.”).

56. *Commonwealth v. Kinsley*, 133 Mass. 578 (1882).

57. *Id.* at 579; *cf.* 42 U.S.C. § 1304 (2012) (reserving the right of Congress to alter, amend, or repeal any provision of the Social Security Act).

58. *State ex rel. Schwartz v. Ferris*, 41 N.E. 579, 581 (Ohio 1895).

59. *Lynch v. United States*, 292 U.S. 571 (1934).

allowances, and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time at the discretion of Congress.”⁶¹ The Court was not treading on new ground with this statement. In fact, the Court’s statement was based upon the holdings of *United States v. Teller*,⁶² *Frisbie v. United States*,⁶³ and *United States v. Cook*.⁶⁴ All of these cases were decided by the Supreme Court and had similar holdings.⁶⁵ This was the state of property law prior to Franklin D. Roosevelt’s New Deal.⁶⁶

B. Constitutional Property

The issue addressed by this Comment not only deals with how property has traditionally been understood but further addresses how the Supreme Court has handled property under the protections afforded by the Constitution. Therefore, it is necessary to examine how the Supreme Court has interpreted property in the context of the Constitution. The Fifth Amendment to the United States Constitution states, “No person 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.”⁶⁷ This language suggests a limitation placed on the federal government, while the Fourteenth Amendment, with similar language, places the limitation on state governments.⁶⁸ Therefore, before claimants

60. *Id.* at 577.

61. *Id.*

62. *United States v. Teller*, 107 U.S. 64, 68 (1883) (“No pensioner has a vested legal right to his pension.”).

63. *Frisbie v. United States*, 157 U.S. 160, 166 (1895) (“Pensions are the bounties of the government, which congress has the right to give, withhold, distribute, or recall at its discretion.”).

64. *United States v. Cook*, 257 U.S. 523, 527 (1922) (“Congress, in shaping the form of its bounty, may impose conditions and limitations on its acquisition and enjoyment . . .”).

65. *See supra* notes 62–64.

66. NOYES, *supra* note 32, at 350–412 (addressing the state of the law in 1936).

67. U.S. CONST. amend. V. A nearly identical provision can also be found in the Fourteenth Amendment, which incorporated this language against the states. *See* U.S. CONST. amend. XIV.

68. While the Fourteenth Amendment does not include a provision requiring just compensation for the taking of private property, the Supreme Court has held that the takings clause was also incorporated against the states by the Fourteenth Amendment. *See Chicago, B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226, 238 (1897). In this case, the City of Chicago

can challenge government action, they must demonstrate an adversely affected property right. In *Board of Regents of State Colleges v. Roth*,⁶⁹ the Supreme Court required that “procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.”⁷⁰ In that case, David Roth was hired under a one-year contract as a non-tenure professor for Wisconsin State University-Oshkosh.⁷¹ When Roth’s contract expired, the University decided not to renew the contract.⁷² Wisconsin State University-Oshkosh did not provide Roth with a reason for the non-renewal nor did it give Roth an opportunity to contest the non-renewal.⁷³ Accordingly, Roth brought suit claiming a violation of his due process rights.⁷⁴ The Court ruled in favor of the Wisconsin State University-Oshkosh by finding that Roth had neither a property nor a liberty interest in his possible renewal, and therefore due process protections were inapplicable.⁷⁵

The *Roth* Court took the view that property rights “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”⁷⁶ Building upon this rule in *Phillips v. Washington Legal Foundation*,⁷⁷ the Court understood this phrase to point them to the common law.⁷⁸ The Court continued to trace the incorporation of the English common law by

condemned the railroad’s property and used the property to expand the roadway while giving the railroad a mere dollar. *Id.* at 232. The Supreme Court has relied on natural law concepts to find that the Fourteenth Amendment incorporated the takings clause against the states and their political subdivisions. CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 455 (3d ed. 2009).

69. 408 U.S. 564 (1972).

70. *Id.* at 569.

71. *Id.* at 566.

72. *Id.*

73. *Id.* at 568.

74. *Id.* at 568–69.

75. *Id.* at 579.

76. *Id.* at 577.

77. *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

78. *Id.* at 165 (beginning the analysis by stating, “The rule . . . has been established under English common law since at least the mid-1700s.”). One legal scholar noted that even the terms used by the Court gave extra weight to those sources that “had a long ‘historical pedigree.’” Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 897 (2000) (citing *Phillips*, 524 U.S. at 165–68).

the states.⁷⁹ In this case, the Court used the common law as the avenue through which the meaning of constitutional property should be defined.⁸⁰

The clearest definition of constitutional property comes from *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.⁸¹ In that case, the Court dealt with the Trademark Remedy Clarification Act⁸² (“TRCA”) and the Lanham Act.⁸³ Because Congress enacted TRCA to “prevent state deprivations” of property rights “without due process,”⁸⁴ the Court needed to examine the nature of constitutional property.⁸⁵ The Court found that “[t]he hallmark of a protected property interest is the right to exclude others. That is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’”⁸⁶ The Court held that the petitioner’s claim was flawed because the purported property interest lacked the hallmark of protected property—the right to exclude others.⁸⁷ “[T]he bottom line is that the Court has now endorsed, unequivocally and in a majority opinion, a federal definition of constitutional property.”⁸⁸ This is the current state of constitutional property. One scholar, however, notes that the Court’s ruling in *College Savings Bank* raises some perplexing questions about its future application.⁸⁹

79. *Phillips*, 524 U.S. at 165.

80. Merrill, *supra* note 78, at 898. The word choice in *Phillips* “intimates that perhaps long-established common law rules are central to the identification of ‘true’ property interests” *Id.*

81. *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999).

82. Trademark Remedy Clarification Act, Pub. L. No. 102–542, 106 Stat. 3567 (1992). Aside from changing a few clerical errors of the Lanham Act, the Trademark Remedy Clarification Act mainly abrogates the sovereign immunity of the states in lawsuits brought under the Lanham Act. *Coll. Sav. Bank*, 527 U.S. at 668–69.

83. Lanham Act, 15 U.S.C. §§ 1051–1141n (2012). “The Lanham Act confers standing on ‘any person who believes that he or she is or is likely to be damaged’ by misrepresentations in commercial advertising or promotion.” *Healthport Corp. v. Tanita Corp. of Am.*, 563 F. Supp. 2d 1169, 1177 (2008) (quoting 15 U.S.C. § 1125(a)(1) (2012)).

84. *Coll. Sav. Bank*, 527 U.S. at 672.

85. *Id.*

86. *Id.* at 673 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

87. *Id.*

88. Merrill, *supra* note 78, at 911.

89. *Id.* at 912.

The Court’s disposition of the constitutional property issue in *College Savings Bank* raises a number of perplexing questions. As in *Eastern Enterprises*, Justice Scalia made no effort to reconcile the articulation of a federal definition of

C. *The Rise of Social Security*

In 1935, Congress enacted the Social Security Act (“Act”) “to provide for the general welfare by establishing a system of Federal old-age benefits”⁹⁰ These benefits primarily took the form of direct government welfare payments to eligible individuals.⁹¹ Created on the advice and recommendation of President Roosevelt’s Committee on Economic Security (“CES”),⁹² the Act appropriates funds to the states and the federal government, which use the funds to help needy individuals like the elderly, the disabled, and their dependents.⁹³ Furthermore, the Act established the Social Security Administration, which administers the Act.⁹⁴ On January 15, 1935, the CES issued a report outlining a compulsory system of contributory annuities.⁹⁵ The compulsory contributions were to be collected through a tax placed on both the employee and the employer.⁹⁶ The Act compelled employers to pay the entire tax—paying half the tax from their general funds and the other half by withholding a portion of their employees’ paychecks (“withholdings”).⁹⁷ The withholdings help create “a

constitutional property . . . that property rights are created and their dimensions defined by independent sources such as state law. We are left wondering whether the oversight was simply inadvertent, whether the Court has abandoned the older approach, or whether it envisions some reconciliation but has not troubled to tell us what it is.

Id. This skepticism is well taken considering that the Court previously stated that “[t]he hallmark of property . . . is an individual entitlement grounded in state law” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).

90. *Legislative History: Social Security Act of 1935*, SOCIAL SECURITY ONLINE, <http://www.socialsecurity.gov/history/35act.html> (last visited Feb. 2, 2013).

91. ALLEN W. SMITH, *THE LOOTING OF SOCIAL SECURITY: HOW THE GOVERNMENT IS DRAINING AMERICA’S RETIREMENT ACCOUNT* 31 (2004).

92. DEWITT ET AL., *supra* note 14, at 50 (providing a copy of Executive Order No. 6757, which created the Committee of Economic Security and tasked it with the examination of individual economic security).

93. Social Security Act, 42 U.S.C. § 301 (2012).

94. *Id.* § 901.

95. See COMMITTEE ON ECONOMIC SECURITY, *REPORT OF THE COMMITTEE ON ECONOMIC SECURITY* (1935), which says, “It is only through a compulsory, contributory system of old-age annuities that the burden upon future generations of the support of the aged can be lightened.” *Id.* at 29.

96. Specifically, “The compulsory contributions are to be collected through a tax on pay rolls and wages, to be divided equally between the employers and employees.” *Id.*

97. 42 U.S.C. § 1002 (Supp. II 1936) (providing for the deduction of the tax from an individual’s wages).

self-respecting method through which workers make their own provision for old age.”⁹⁸ A statement from President Roosevelt, however, indicates that he had less noble intentions.⁹⁹

The Supreme Court quickly certified the constitutionality of the Act in two landmark decisions.¹⁰⁰ The first decision, written by Justice Cardozo, upheld the constitutionality of the tax upon employers.¹⁰¹ In the second decision, the Supreme Court found constitutional the withholdings taken from an employee’s paycheck.¹⁰² These decisions solidified the constitutionality of the Act, and by 1940, individuals began to receive benefits.¹⁰³ Ida Fuller, the first recipient of Social Security benefits, paid into the system for five years and then proceeded to collect benefits for the next thirty-five years.¹⁰⁴

1. Financial Problems of Social Security

Fast-forwarding to the 1970s, Social Security faced its first serious crisis—a likely shortfall of revenue to support beneficiaries over the next seventy-five years.¹⁰⁵ Specifically, Social Security’s “trust fund reserves fell from 125 percent to 75 percent of annual payout.”¹⁰⁶ Faced with this looming crisis, Congress worked to save the program and to augment its deficiencies.¹⁰⁷ Ultimately, this was to no avail as current figures indicate a forty-six billion dollar deficit and project exhaustion of reserves by 2036.¹⁰⁸

98. REPORT OF THE COMMITTEE ON ECONOMIC SECURITY, *supra* note 95, at 33.

99. “We put those payroll contributions there so as to give the contributors a legal, moral, and political right to collect their pensions With those taxes in there, no damn politician can ever scrap my social security program.” *Social Security: A Primer*, CONG. BUDGET OFFICE 14 n.4 (2001), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/32xx/doc3213/entirereport.pdf>.

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

101. *Charles C. Steward Mach. Co.*, 301 U.S. at 577–98.

102. See *Helvering*, 301 U.S. at 639–47.

103. Matthew H. Hawes, *So No Damn Politician Can Ever Scrap It: The Constitutional Protection of Social Security Benefits*, 65 U. PITT. L. REV. 865, 879 (2004).

104. *Id.* at 881.

105. MARTHA DERTHICK, POLICY MAKING FOR SOCIAL SECURITY 381 (1979).

106. DEWITT ET AL., *supra* note 14, at 285.

107. Hawes, *supra* note 103, at 883. Specifically, Congress attempted to correct the problems by creating a new formula for benefit calculation—one that would model the most successful pension plans at that time. See NANCY J. ALTMAN, THE BATTLE FOR SOCIAL SECURITY: FROM FDR’S VISION TO BUSH’S GAMBLE 219–23 (2005). Further, Congress increased the maximum taxable wage base and raised the payroll tax. *Id.* Interestingly, Congress was

2. Benefits Classification Problems of Social Security

These 1970s deficits raised the question about an individual's potential rights in his Social Security benefits. Indeed, Congress proclaimed, "Social Security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect."¹⁰⁹ The individual contributions, coupled with this type of language, made Social Security seem almost akin to an individual retirement account or pension plan.

These funds were collected as taxes for use in a welfare program. Justice Cardozo confirmed that the contributions are simply a tax.¹¹⁰ In both of the cases that tested the constitutionality of the mandated contributions, Justice Cardozo reasoned that Congress was merely exercising its power to tax.¹¹¹ The Court said, "The tax, which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost, or an excise upon the relation of employment."¹¹² Despite Congress speaking in terms of "contributions," the Act was written in terms of taxation.¹¹³ Therefore, claiming a property interest in Social Security would appear as illogical as claiming a property interest in the Pentagon merely because one dutifully pays his taxes.

aware that these actions would be insufficient to cure the Social Security deficit but adopted these changes regardless. *Id.*

108. *Actuarial Publications: A Summary of the 2011 Annual Social Security and Medicare Trust Fund Reports*, SOCIAL SECURITY ONLINE, 1–2, <http://www.socialsecurity.gov/OACT/TRSUM/tr11summary.pdf> (last visited Feb. 2, 2012).

109. *Flemming v. Nestor*, 363 U.S. 603, 623 (1960) (Black, J., dissenting) (quoting 102 CONG. REC. 15110 (1956)).

110. *Helvering v. Davis*, 301 U.S. 619, 635 (1937) (consistently referring to the contributions as a tax).

111. *Id.*; *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 578 (1937).

112. *Id.*

113. *Compare* REPORT OF THE COMMITTEE ON ECONOMIC SECURITY, *supra* note 95, at 29 ("In order to reduce the pension costs and also to more adequately provide for the needs of those not yet old but who will become old in time, we recommend a contributory annuity system . . ."), *with Helvering*, 301 U.S. at 635 ("[The Social Security Act] lays two different types of tax, an 'income tax on employees,' and 'an excise tax on employers.'").

a. *Flemming v. Nestor*

Regardless of the dictates of logic, the question came before the Court. The Supreme Court in *Flemming v. Nestor*,¹¹⁴ the first landmark case on the issue, held that the recipient had an interest in the continued receipt of benefits.¹¹⁵ In its holding, however, the Court stated that Social Security benefits cannot be considered “accrued property rights.”¹¹⁶

But each worker’s benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation. . . .

It is hardly profitable to engage in conceptualizations regarding ‘earned rights’ and ‘gratuities.’¹¹⁷

Having stated that Social Security benefits are neither an accrued property right nor a gratuity, the Court concluded that there was, nonetheless, some protectable interest that a beneficiary could possess.¹¹⁸ This interest was sufficient to afford the protection of the Due Process Clause, but “a noncontractual benefit under a social welfare program” was insufficient to stop Congress’s alteration of benefits.¹¹⁹ *Flemming* confirmed the idea that one’s Social Security taxes afford him some form of interest in future receipt of those benefits.¹²⁰ The Court, however, left unclear what type of interest vested—contract, property, or liberty.

b. *Goldberg v. Kelly*

The Court in *Goldberg v. Kelly*¹²¹ expanded the interest that one could have in his welfare benefits.¹²² The Court held that welfare benefits were the

114. 363 U.S. 603 (1960).

115. *Id.* at 611.

116. *Id.* at 608; see also Elmer F. Wollenberg, *Vested Rights in Social-Security Benefits*, 37 OR. L. REV. 299, 358 (1958) (concluding that Social Security benefits could not be considered anything but gratuities). The Supreme Court specifically overruled the district court’s contrary finding below. *Flemming*, 363 U.S. at 608.

117. *Flemming*, 363 U.S. at 609–10.

118. *Id.*

119. *Id.* at 611.

120. *Id.*

121. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

122. *Id.* at 261–62.

entitlement of those eligible to receive them¹²³ and noted 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.”¹²⁴ In so holding, the Court adopted the rationale of Charles A. Reich expressed in his influential work *The New Property*, which contends that property includes anything upon which a man relies for his daily needs.¹²⁵ The Court also held that the extent of procedural due process—and arguably the extent of the right—is determined by balancing the government’s interest against the potential for grievous loss by the recipient.¹²⁶ In performing this balancing test, the Court stated that a welfare recipient’s interest is at its greatest when he has no other form of provision.¹²⁷ This interest is augmented, the Court argued, by the government’s interest in providing an uninterrupted flow of welfare benefits.¹²⁸ Therefore, the Court concluded that procedural due process requires that a welfare recipient receive a pre-termination hearing.¹²⁹

123. *Id.*

124. *Id.* at 262 n.8.

125. *Id.* The Court continued to quote Charles Reich:

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

Id. (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L.J.* 1245, 1255 (1965)).

126. *Id.* at 262–63.

127. *Id.* at 264.

128. *Id.* at 264–65. The Court cited to the Constitution, stating that welfare and Social Security are a means to promote the general welfare, and therefore, the government’s interest ought to be consistent with the continued and uninterrupted dispensing of welfare money.
Id.

129. *Id.* at 266.

With dismay, Justice Black dissented: “The Court . . . relies upon the Fourteenth Amendment and in effect says that failure of the government to pay a promised charitable instalment [sic] to an individual deprives that individual of his own property, in violation of the Due Process Clause of the Fourteenth Amendment.”¹³⁰ Apparently, eligibility to receive benefits creates a property interest in a new kind of property.

c. *Atkins v. Parker*

In *Atkins v. Parker*,¹³¹ the Court clarified the questions that were raised by *Goldberg*. The Court held that “[a] welfare recipient is not deprived of due process when the legislature adjusts benefit levels. . . . [T]he legislative determination provides all the process that is due.”¹³² The Court, however, took a firm stance that entitlements, such as Social Security, are indeed a form of property.¹³³ Therefore, despite an individual having a continued interest in the receipt of welfare benefits, Congress has the power to increase, decrease, terminate, or define the duration and scope of the entitlement.¹³⁴ This gives rise to the issue addressed in this Comment. It is inconsistent to claim that one has a property interest in his welfare benefits while simultaneously claiming that Congress possesses the unfettered right to extinguish that interest at any moment. Further, the Supreme Court has used inaccurate terminology, wanting to avoid the harsh reality that Social Security benefits are merely a gratuity.

III. PROBLEM

With the rapidly increasing federal debt¹³⁵ and the federal government’s credit downgrade,¹³⁶ Congress has been forced to look closely at its spending

130. *Id.* at 275 (Black, J., dissenting).

131. 472 U.S. 115 (1985).

132. *Id.* at 129–30 (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432–33 (1982)).

133. *Id.* at 128.

134. *Id.* at 129.

135. *Historical Debt Outstanding – Annual 2000 - 2010*, TREASURY DIRECT (Oct. 1, 2010), http://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt_histo5.htm. The Bureau of Public Debt reports the current public debt amount as of August 2012 to be 16 trillion dollars. *Monthly Statements of the Public Debt of the United States*, TREASURY DIRECT (Aug. 31, 2012), <http://www.treasurydirect.gov/govt/reports/pd/mspd/2012/opds082012.pdf>.

136. See Menzie D. Chinn & Jeffrey A. Frieden, Op-Ed., *The Downgrading of a Debtor Nation*, N.Y. TIMES, Aug. 9, 2011, at A23; see also *A National Debt of \$14 Trillion? Try \$211 Trillion*, NPR

habits.¹³⁷ As an article in the *New York Times* stated, “We lost the first decade of the 21st century by squandering our wealth and borrowing as if there was no tomorrow. We risk losing this decade to an incomplete recovery and economic stagnation.”¹³⁸ In the federal budget, no program exceeds the cost of Social Security to the federal government.¹³⁹ Balancing the national budget seems impossible without curbing some of the spending on Social Security.¹⁴⁰ To do this, Congress must have clarity on the ramifications of cutting the Social Security budget. There exists a myth that Social Security is identical to a trust fund run by the federal government.¹⁴¹ This myth has caused confusion

(Aug. 6, 2011), <http://www.npr.org/2011/08/06/139027615/a-national-debt-of-14-trillion-try-211-trillion> (discussing the 2011 credit downgrade from AAA to AA-plus); Egan-Jones downgrades US debt rating to AA- from AA, *Citing Fed's Plans to Stimulate Economy*, THE WASHINGTON POST (Sept. 14, 2012), http://www.washingtonpost.com/business/egan-jones-downgrades-us-debt-rating-to-aa--from-aa-citing-feds-plans-to-stimulate-economy/2012/09/14/7b3131e4-feab-11e1-98c6-ec0a0a93f8eb_story.html.

137. See Robert Pear, *Obama Sees Need to Add \$1.2 Trillion to Debt Cap*, N.Y. TIMES, Dec. 28, 2011, at A15. “Representative Tom Reed, a Republican from upstate New York . . . said, ‘Dealing with this national debt is one of the primary reasons why I ran for Congress—to stop the endless borrowing of Washington, D.C., on the backs of our children and our grandchildren.’” *Id.*

138. Chinn & Frieden, *supra* note 136.

139. SCOTT BITTLE & JEAN JOHNSON, *WHERE DOES THE MONEY GO? YOUR GUIDED TOUR TO THE FEDERAL BUDGET CRISIS* 82–87 (2008). “[F]or all [the federal government’s] complexity, for all its reach, the fact remains that if you gauge it by the federal budget, the main function of the world’s greatest superpower is . . . writing checks to retired people.” *Id.* at 83. “It’s no wonder this is the biggest federal program. Nearly 49 million Americans were getting Social Security benefits in 2006. And working Americans who aren’t getting Social Security now are paying taxes to support those who are.” *Id.* at 86.

140. *A National Debt of \$14 Trillion? Try \$211 Trillion*, *supra* note 136.

We’ve got 78 million baby boomers who are poised to collect, in about 15 to 20 years, about \$40,000 per person. Multiply 78 million by \$40,000—you’re talking about more than \$3 trillion a year just to give to a portion of the population . . . That’s an enormous bill that’s overhanging our heads, and Congress isn’t focused on it . . . What you have to do is either immediately and permanently raise taxes by about two-thirds, or immediately and permanently cut every dollar of spending by 40 percent forever.

Id. (quoting Professor Laurence J. Kotlikoff).

141. See BITTLE & JOHNSON, *supra* note 139, at 86–87. Social Security is a “pay-as-you-go” program. People in the work force now pay taxes to cover the check your grandma gets every month. . . .

There’s only one problem with the Social Security trust fund. It mainly exists on paper. Rather than let the surplus Social Security money sit

about the power that Congress may exercise over Social Security benefit levels.¹⁴² The confusion has been introduced by the Court's treatment of Social Security benefits as property for purposes of due process.¹⁴³ This leaves Congress with the false impression that the Constitution protects Social Security recipients from the reduction or severance of benefits.¹⁴⁴ Consequently, even if Congress considered the unpopular idea of reducing or cutting Social Security benefits, courts' ambiguous interpretations would inhibit Congress's ability to effectively deal with the pressing deficit spending. Simply said, courts have left the impression that Congress may be obligated to continue paying benefits. By classifying Social Security benefits as property, courts have implied that serious constitutional limitations may be placed upon the legislature when dealing with Social Security benefits. Therefore, to return legislative freedom to Congress, it is necessary to consider whether Social Security benefits should be considered a property interest for constitutional purposes.

A. *Traditional Approach*

Under traditional views, property is the right of possession that one gains over the object of his labor.¹⁴⁵ This can be contrasted to a gift, which one neither labors for nor can expect as a return on services rendered. A gift becomes the property of the intended recipient upon acceptance of delivery.¹⁴⁶ Upon acceptance of delivery by the intended recipient, a

in the bank, the government has been borrowing it for day-to-day operations.

Id.

142. *Id.* at 85.

143. *See supra* Part II.C.2.

144. In support of this assertion are multiple inquiries made to the Congressional Research Service on the matter. The following is a brief sampling of those requests. *See generally* KATHLEEN S. SWENDIMAN & THOMAS J. NICOLA, CONG. RESEARCH SERV., RL 32822, SOCIAL SECURITY REFORM: LEGAL ANALYSIS OF SOCIAL SECURITY BENEFIT ENTITLEMENT ISSUES (2010) (addressing select legal issues regarding entitlement to Social Security benefits as Congress considers possible changes to the program); DAWN NUSCHLER, CONG. RESEARCH SERV., RL 33544, SOCIAL SECURITY REFORM: CURRENT ISSUES AND LEGISLATION (2010) (addressing Social Security reform ideas proposed by the National Commission on Fiscal Responsibility and Reform); KATHLEEN ROMIG, CONG. RESEARCH SERV., RL 33514, SOCIAL SECURITY: WHAT WOULD HAPPEN IF THE TRUST FUNDS RAN OUT? (2008) (addressing what would happen if the Social Security trust funds became insolvent in 2041). This concern appears to remain, regardless of the holding in *Atkins*. *See supra* Part II.C.2.c.

145. *See* LOCKE, *supra* note 21, at 317; *see also* 2 BLACKSTONE, *supra* note 18, at 8.

146. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.1 (2003).

property interest vests.¹⁴⁷ Upon vesting, the law protects the interest of the recipient.¹⁴⁸ Of these legal protections, the most pertinent to this Comment are found in the Fourteenth Amendment, which provides for just compensation upon the government's dispossession of an individual's property and for due process of law before the government deprives an individual of a property right.¹⁴⁹

As demonstrated by *Pierson v. Post*, the traditional view of property requires one to exercise dominion and control over an object.¹⁵⁰ For example, in 1853, the Ohio Supreme Court articulated the concept this way:

Our right to the free use and enjoyment of things which are in common, such as air, light, [and water] is valuable; and our right to the free use of the public highways, and to many of the privileges and advantages derived from the government, may be valuable, and may be maintained by legal process. Yet none of these things come within the denomination of property. Those things which constitute the subject matter of private property, are such as the owner may exercise exclusive dominion over, in the use, enjoyment, and disposal of them, without any control or diminution, save only by the laws of the land. It is a fundamental principle, that, 'property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them either by exchanging them for other things, or by giving them away to any other person, without any valuable consideration in return, or even of throwing them away, which is usually called relinquishing them.'

It is said that capability of alienation or disposal either by sale, devise or abandonment, is an essential incident to property.¹⁵¹

Social Security benefits do not possess the characteristics of traditional property. They are not freely transferable. A recipient does not exercise dominion over the benefits; rather, the recipient depends on government

147. *Jackson Cnty. v. DNR*, 717 N.W.2d 713, 724 n.10 (Wis. 2006).

148. *See Hooping v. Wood*, 526 N.E.2d 1205, 1207 (Ind. Ct. App. 1988) (detailing the requirements for an *inter vivos* gift).

149. *See U.S. CONST.* amend. XIV, § 1; *see also id.* at amend. V.

150. *Pierson v. Post*, 3 Cai. 175, 178 (N.Y. Sup. Ct. 1805).

151. *Exch. Bank of Columbus v. Hines*, 3 Ohio St. 1, 8 (1853) (citations omitted).

relinquishment of control over the benefits. Therefore, Social Security benefits traditionally could not fit under the umbrella of property.¹⁵²

B. Relational Property Alteration

The relational view of property, however, offers a bridge by which the concept of property becomes less concerned about dominion over an object and more concerned about the balancing of power and wealth.¹⁵³ The relational property view thereby allows courts to make rulings in which they consider how property might affect the balance of power.¹⁵⁴ Through this understanding, the courts left their traditional, judicial method of looking backwards in time to make rulings based on static facts.¹⁵⁵ Instead, the courts can now look forward to the prudential concerns and the balancing of power.¹⁵⁶ Therefore, the relational property view opens the door for prudential concerns to influence judicial decisions.

C. Supreme Court's Understanding

In *Goldberg v. Kelly*, the Supreme Court used prudential reasoning to reach its conclusion and thereby departed from a traditional legal analysis

152. *Lynch v. United States*, 292 U.S. 571, 577 (1934).

153. *Cohen*, *supra* note 42, at 14.

154. The Court took this idea to the extreme in *Goldberg v. Kelly*, 397 U.S. 254 (1970), when it voiced its sympathy for the views articulated by Charles Reich in his article *New Property*. See discussion *infra* Part III.D.

155. Jeffrey C. Tuomala, *Marbury v. Madison and the Foundation of Law*, 4 LIBERTY U. L. REV. 297, 325–34 (2010).

An analysis of the distinction between judicial and legislative powers is often focused on differences in two elements—one is the element of time, and the other the element of applicability. The distinction based on the element of time is described in an oft-quoted passage from Justice Holmes:

A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.

Id. at 328 (citing *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908)).

156. The action of legislating, which includes the adoption of a constitution, is forward-looking or prospective in nature. The focus in the legislative process is not upon determining what happened at some particular time in the past in some discrete situation. The focus is on formulating rules best designed to achieve some lawful object of government.

Id. at 329.

of property rights.¹⁵⁷ By departing from a traditional legal analysis, the Court was able to suggest that Social Security benefits might be properly considered property.¹⁵⁸ The problem arises from the term “property” itself. When the notions of possession and the mere expectation of future possession are confused,¹⁵⁹ property becomes a less definite concept. Furthermore, property interests, when rightly understood, should not be subject to the whim of the legislature. The Court has attempted to classify a gratuity as a property interest and thereby created confusion in the law.¹⁶⁰ While this development complements an entitlement mentality, it causes confusion in the law by creating a quasi-property concept. Some authors have referred to this property interest as the “New Property.”¹⁶¹

157. *Goldberg*, 397 U.S. at 264.

158. *See supra* Part II.C.2.b.

159. This is the very premise of Charles Reich’s article, *The New Property*. For Reich, property is the protection of those sources from which we derive our daily sustenance. Therefore, just like a doctor relies on his ability to practice medicine, so does the welfare recipient rely upon his eligibility to receive Social Security. What makes this view most problematic is that, rather than rewarding laborers by protecting the fruits of their labor, it instead protects an individual’s stagnation. Rather than incentivizing a system of forward movement, Reich’s system removes many of the incentives to productivity. The saying “less is more,” may not be far from the truth under the *New Property* view.

160. The Dutch jurist Hugo Grotius once commented on similar shifts in so-called justice.

The delusion is as old as it is detestable with which many men, especially those who by their wealth and power exercise the greatest influence, persuade themselves . . . that justice and injustice are distinguished the one from the other not by their own nature, but in some fashion merely by the opinion and the custom of mankind. Those men therefore think that both the laws and the semblance of equity were devised for the sole purpose of repressing the dissensions and rebellions of those persons born in a subordinate position, affirming meanwhile that they themselves, being placed in a high position, ought to dispense all justice in accordance with their own good pleasure, and that their pleasure ought to be bounded only by their own view of what is expedient.

HUGO GROTIUS, *THE FREEDOM OF THE SEAS* 1 (James Brown Scott ed., Ralph Van Deman Magoffin trans., 1916). *But see* William J. Brennan, Jr., *Reason, Passion and “the Progress of the Law,”* 10 *CARDOZO L. REV.* 3 (1988).

I want to suggest . . . [that *Goldberg*] can be seen 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.

Id. at 19–20.

161. Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

D. *New Property*

Charles Reich begins his article, *The New Property*, with this foundational supposition: "Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function."¹⁶² Furthermore, because many individuals rely on these government provisions in place of their savings, their wealth can be said to reside in the government's largess.¹⁶³ This largess "is helping to create a new society."¹⁶⁴ This new society is experiencing a change in its forms of wealth, just as land and private property once signified an individual's wealth.¹⁶⁵ Because Reich understands property to be a relationship between an individual and his source of wealth, Reich characterizes property to include an individual's relationship to his government benefits.¹⁶⁶

This Comment seeks to clarify the misconception that Social Security benefit payments may be classified as property rights. While this fact may not be intuitive to all, it remains true that the traditional view of the protection of private property stems from the protection of labor. Hence, the common law protected those who exercised dominion over an object because of the assumption that one who had dominion had exerted labor to achieve that dominion.¹⁶⁷ Social Security benefits, on the other hand, are more properly classified as gratuities.¹⁶⁸ These gratuities flow from the generosity of the American government and of the American people. They are not the property of the recipient but rather the property of the benevolent giver. Despite the myth sold to the American public, Social Security is not a pension plan. It is a welfare program created by a previous Congress that future Congresses are not bound to continue. Therein lies the

162. *Id.* This statement seems highly contradictory to the preamble of the Constitution. Redistribution of wealth does not establish justice, tranquility, or defense. Neither does it "promote the general Welfare" (which is promoted by the establishment of justice, tranquility, and defense) or "secure the Blessings of Liberty." U.S. CONST. pmb1.

163. Reich, *supra* note 161, at 733. Reich contends that the forms of government-created wealth include welfare benefits, jobs, occupational licenses, franchises, contracts, subsidies, public resources and services. *Id.*

164. *Id.*

165. *Id.* at 738.

166. *Id.* at 739.

167. *See supra* Part II.A.

168. *See supra* Part II.C.

problem: the courts have further perpetuated this myth by treating Social Security benefits as property for purposes of due process.

IV. PROBLEM

A. *Property and Propriety*

Private property, it has been said, is propriety and an ethical institution.¹⁶⁹ “Private property has been defended on grounds of justice, freedom, progress, peace and happiness.”¹⁷⁰ Indeed, private property is so central to the American spirit that there can be little surprise that the Fifth and Fourteenth Amendments both provide broad protections from the deprivation of private property by the government.¹⁷¹ Property, however, can be a difficult idea to define. The common law relied upon the concept of possession to define property.¹⁷²

Possession accurately embodied the rationale behind the protection of private property and provided a simple standard for the law. To first acquire property, presumably one had to exert some form of labor to gain possession over an object and thereby gain a defensible right in the object. Specifically, Blackstone understood this right to be “that sole despotic dominion which one man claims and exercises over the external things of the world”¹⁷³ to the exclusion of another man. To describe property in any other way is to distort the reality that the term property stems from the Latin *proprius*, meaning “one’s own.”¹⁷⁴

While there is some utility in considering how possession impacts one individual’s relationship to another individual, that relationship is purely secondary to the owner’s relationship to the object. When person X claims ownership in his home, the primary idea communicated is that the home is his possession. Given such possession, it is also true that person Y does not possess the home. But to fully appreciate this corollary, one must first understand the primary assertion, i.e., that the home belongs to X. If our primary focus is on Y, it is impossible to deduce who has actual ownership of the home.

169. GOTTFRIED DIETZE, IN DEFENSE OF PROPERTY 9 (1963).

170. *Id.*

171. U.S. CONST. amends. V & XIV.

172. *See supra* Part II.A.2.

173. 2 BLACKSTONE, *supra* note 18, at *2.

174. WEBSTER’S II NEW COLLEGE DICTIONARY 907 (3d ed. 2005).

Despite the strange nature of thinking of ownership in reverse, that is precisely what the relational view of property does. It makes a subtle mockery of disciplined thinking by making primary assumptions secondary and secondary corollaries primary. Under the relational property view, ownership requires the courts to balance individuals' interests in an object.¹⁷⁵ For example, in *Pierson v. Post*,¹⁷⁶ the court used the traditional notions of possession to determine ownership of the fox.¹⁷⁷ If the court had taken a relational property approach, it would have had to weigh the competing interests of Pierson and Post. Post's interest would include the effort he exerted in the hunt, the accolades of having killed the fox, and possibly a future financial interest in the sale of the pelt. Pierson's interest would be characterized by his efforts exerted in actually killing the fox and by his current control of the fox's carcass. The court would proceed to give values to the differing interests and ownership that would be granted to the individual with the greatest cumulative interest in the object. Unlike the actual case, the determinative factor would not be possession. This relational approach cheapens the rule of law because a balancing test is inherently subjective.

B. Innovative Deviations

The deviation from a traditional analysis served to open the minds of legal thinkers to new and innovative ways of viewing property. The most critical of these new views can be found in Charles Reich's article *The New Property*.¹⁷⁸ Reich's article calls for a definition of property that encompasses many forms of wealth.¹⁷⁹ Reich argues that the government has become an instrument for the redistribution of wealth.¹⁸⁰ The government, through taxes and regulations, limits some people while granting others certain privileges.¹⁸¹ For example, through the imposition of regulations and the collection of taxes, the doctor is permitted to practice medicine, the lawyer

175. See *supra* Part II.A.3.

176. *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

177. *Id.* at 177.

178. Reich, *supra* note 163.

179. *Id.* at 733.

180. *Id.* at 733–38.

181. *Id.*

is allowed to practice law, and the poor are entitled to collect their food stamps.¹⁸²

Consequently, there seems to be an injustice in telling an individual, who depends entirely upon the government, that he has no defensible right in the continued receipt of daily sustenance. Yet, under the law, that is the answer that the courts must give. *The New Property*, however, offers a path that gives defensible rights to the individual purely on the basis of his degree of dependence.¹⁸³ From this point, the connection between the relational property view and *The New Property* can be clearly seen. Both views involve a balancing of the interests between two parties. According to the *The New Property*, the most relevant concern is the individual's degree of dependency, while under the relational property view the most relevant concern is the balancing of power.

C. *The Court's Take*

All of this discussion of property would be irrelevant if it were not for the protections afforded by the Constitution. The Constitution protects private citizens from the dispossession of property by the government in both the Fifth and the Fourteenth Amendments.¹⁸⁴ Consequently, the Supreme Court's definition of property is of utmost importance to any claim of property rights in an individual's Social Security benefits.

Most recently, the Supreme Court has declared in *College Savings Bank*¹⁸⁵ that the "hallmark of a protected property interest is the right to exclude others."¹⁸⁶ Nevertheless, there certainly are strong grounds to question whether this actually is an accurate understanding of property in the constitutional sense.¹⁸⁷ This is because previously, in *Logan v. Zimmerman Brush Co.*,¹⁸⁸ the Court stated that the "hallmark of property . . . is an individual entitlement grounded in state law."¹⁸⁹ In *Goldberg v. Kelly*,¹⁹⁰ the Court hinted at the adoption of Charles Reich's *The New Property* by stating

182. *Id.*

183. See Brennan, *supra* note 160, at 22.

184. U.S. CONST. amends. V & XIV.

185. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999).

186. *Id.* at 673 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

187. See Merrill, *supra* note 78, at 912.

188. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).

189. *Id.*

190. *Goldberg v. Kelly*, 397 U.S. 254, 261–62 (1970).

that it “may be [more] realistic to regard welfare entitlements as more like ‘property’ [T]he existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property.”¹⁹¹

While the *College Savings Bank* definition certainly has the earmarks of a more traditional definition of property, the *Goldberg* case was dealing with welfare benefits, and *College Savings Bank* did not address government gratuities.¹⁹² Therefore, there is reasonable uncertainty as to what the Supreme Court might do if faced with a scenario more akin to that presented in *Goldberg*.

D. *The Enigma*

To properly analyze the issue, a deeper discussion of the characteristics of Social Security is warranted. What makes Social Security such an enigma in the law is the way in which it combines traditional investment aspects with government mandates. A simple passage taken from a January 15, 1935, CES report demonstrates the mixture of investment terms with the government mandates that Congress envisioned.

It is only through a *compulsory, contributory* system of *old-age annuities* that the burden upon future generations of the support of the aged can be lightened. With an increasing number and even more rapidly increasing percentage of the aged, the cost of supporting old persons will be a heavy load on future generations regardless of any legislation that may be enacted. . . . In order to reduce the *pension* costs and also to more adequately provide for the needs of those not yet old but who will become old in time, we recommend a *contributory annuity* system *on a compulsory basis*, to be conducted by the federal government.¹⁹³

Congress further indicated that the contributions were to be collected through a tax placed on payrolls and wages.¹⁹⁴ Therefore, despite speaking in terms of annuities, the program was structured like a welfare program. The only difference between a normal welfare program and Social Security

191. *Id.* at 262 n.8.

192. *Compare Goldberg*, 397 U.S. at 254 (adopting a broad definition of property), *with Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 666 (1999) (adopting a traditional notation of property).

193. DEWITT ET AL., *supra* note 14, at 53 (emphasis added).

194. *Id.*

is the demarcation of a special income tax going specifically to Social Security.

There are a plethora of reasons why Social Security had to be structured in this manner, the most important being the limitations that the Constitution places on the federal government. The Constitution does not authorize the government to require compulsory contributions to an investment program; however, it does provide for the power to tax.¹⁹⁵ Therefore, to even contemplate this program, Congress was limited to tax power.¹⁹⁶ Unlike a normal investment plan, Congress was under no contractual obligation to continue the payment of benefits.¹⁹⁷ While many might agree that there is an ethical duty upon the government to provide benefits to those who contributed to the system, there cannot be a legal duty unless a beneficiary can show a property interest in the continued receipt of his Social Security benefits.

If a Social Security beneficiary has a property interest in the continued receipt of his benefits, then the Constitution affords him some level of due process before his benefits can be terminated, reduced, or altered. Consequently, the Supreme Court has taken some strong steps to find a property interest in Social Security benefits, an interest that protects individual recipients but continues to allow Congress the freedom to perform its legislative role.¹⁹⁸ To do this, however, the Court has butchered the traditional concept of property by forcing it into a forward-looking balancing test—one that weighs the interests of the government against those of the individual recipients.

195. U.S. CONST. amend. XVI (“Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).

196. Such legislative entrenchment cannot be done. *See* United States v. Winstar, 518 U.S. 839, 872 (1996).

Blackstone stated the centuries-old concept that one legislature may not bind the legislative authority of its successors:

“Acts of parliament derogatory from the power of subsequent parliaments bind not Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it’s [*sic*] ordinances could bind the present parliament.”

Id. (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *90 (1765)).

197. *See supra* Part II.A.4.

198. *See* Brennan, *supra* note 160, at 19–22.

When dealing specifically with entitlements, like Social Security, the Court addressed the property rights issue in the 1960 case *Flemming v. Nestor*.¹⁹⁹ There the Court developed a quasi-property interest, which it stated was not a true property interest.²⁰⁰ The Court stated instead that the quasi-property interest was a “non-contractual benefit” sufficient to invoke due process yet insufficient to hinder Congress’s ability to statutorily alter the program.²⁰¹ Thus, the Court struck a balance between the protection of individual recipients’ interests and the government’s interest—while only slightly altering traditional notions of property.

In *Goldberg v. Kelly*, however, the Court went further. In *Goldberg*, the Court completely disregarded *Nestor*’s refusal to extend the label of property interests to entitlements.²⁰² Instead, the Court concluded that it may be more useful to consider a recipient’s interest as a property interest, given the realities of today’s government largess.²⁰³ Once again, this allowed the Court to extend the protections of the Due Process Clause of the Fourteenth Amendment but at the expense of a completely redefined conception of property. Interestingly, the Court’s stance overstated the strength of the property interest that the Court was actually permitting a beneficiary to have.

In *Atkins v. Parker*, the Court affirmed, in spite of *Goldberg*’s strong language, that Congress still had the authority to alter or amend entitlement programs.²⁰⁴ But despite the holding of *Atkins*, the Court has never retracted its opinion in *Goldberg*, which obscures the law as to the definition of property rights. This imprecision has been noticed by members of Congress, who have requested multiple briefs from the Congressional Research Service dealing with the problem.²⁰⁵

Given the impending budgetary crisis, large programs like Social Security may have to be altered, amended, or even terminated. The courts, not helping the situation, have introduced uncertainty into the legislative process by forcing Congress to look closely at the minutiae of the Court’s decisions to determine whether Social Security benefits may even be

199. *Flemming v. Nestor*, 363 U.S. 603 (1960).

200. *Id.* at 611.

201. *Id.* at 608–11.

202. *Goldberg v. Kelly*, 397 U.S. 254, 261–62 (1970).

203. *Id.* at 262 n.8.

204. *Atkins v. Parker*, 472 U.S. 115, 129–30 (1985).

205. See *supra* note 144 and the authorities cited therein. This concern appears to remain, regardless of the holding in *Atkins*.

decreased constitutionally. Property, as a concept that was once readily understandable, has been recast as any interest the Court deems worthy of protection from Congress. This uncertainty handicaps our legislative body in its ability to deal effectively with the budgetary problems it faces.

Considering how unpopular it would be to reduce Social Security benefits,²⁰⁶ any congressman who would propose such a plan would need to expend large amounts of political capital to ensure the plan's passage. It is doubtful that any congressman would even begin to suggest such a plan when he believes his efforts might be ruled unconstitutional by the courts. Therefore, because the courts have drastically expanded the definition of property, they have inadvertently hammered a nail into the coffin of America's financial future. Yet, the situation is not without hope because the solution is simple in nature.

E. The Simple Solution

The solution lies in abrogating the greatly expanded view of property. A return to the traditional view of property may seem archaic and unworkable in this modern system of dynamic regulations and interests. Nevertheless, only through clear definitions based on concrete principles can the law even begin to address these modern complexities. The current definition inhibits the creation of solutions to the problems facing Social Security because legislatures are forced to venture guesses at what whimsical definitions the Court might draw.

The operation of a welfare state is a new experiment for our Nation. For this reason, among others, I feel that new experiments in carrying out a welfare program should not be frozen into our constitutional structure. They should be left, as are other legislative determinations, to the Congress and the legislatures that the people elect to make our laws.²⁰⁷

It has been said that bad facts make bad law. Twisting the definition of property to protect the American public from a raw deal is not justice. Neither can it be considered the role of the courts. By distorting the proper understanding of property, the courts have perverted justice and have endorsed a myth in avoidance of a harsh reality—a reality in which American workers hold no property rights in Social Security benefits. A

206. The unpopular nature of this idea stems largely from the fact that many Americans depend upon Social Security for at least a supplement to their retirement. See *Research, Statistics & Policy Analysis*, SOCIAL SECURITY ONLINE, <http://www.ssa.gov/policy/index.html> (last visited Mar. 11, 2012) (providing current statistics on Social Security beneficiaries).

207. *Goldberg*, 397 U.S. at 279 (Black, J., dissenting).

court's job is not to provide charity but to ensure justice. Let the executive branch administrate and the legislative branch govern, but let the courts deal in justice by perfectly applying the law—not to satisfy their own inward passions but rather to satisfy the law.

V. CONCLUSION

This Comment has identified a fundamental change in our society's understanding of property rights. The change was not brought about by an informed legislative process but was the result of judicial compassion. Such compassion has been made the arbiter of property rights. The problems created are detrimental to the legislative process and concepts of self-governance. The purpose of this Comment is to call for a narrower definition of property, a definition this author believes is necessary to address the complexities of modern life. In the same way that scientific progression often occurs through increased precision, so too do precise legal definitions allow for new, advanced, and efficient legal structures to develop.