# *Flemming v. Nestor:* Anticommunism, the Welfare State, and the Making of "New Property"

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Ephram (Fedya) Nestor, a Bulgarian-born immigrant to the United States, was "an unusual person," according to his second wife Barbara. She met him in 1933 when he was selling vegetables from his car and remembers not really liking him. "He stayed too long," he "talked too much," and worst of all to this devoted radical, he "passionately espoused the cause of Communism [but] he didn't know too much about it." Interviewed when she was ninety, sharp-witted Barbara Nestor still recalled how Fedya embarrassed her at a Marxist study group with his "foolish" statements and obvious lack of knowledge about Marx or communism. His family agreed he was "not much of a Communist" when he joined the local party in 1936 and could not be trusted with the simplest duties.[1] Nonetheless, the federal

1. Barbara Nestor, interview by Sherna Berger Gluck, December 27, 1974, interview 06c segment 6 segkey: a1602, "Women's History: Reformers and Radicals," The Virtual Oral/Aural History Archive, California State University, Long Beach, Calif., http://www.csulb.edu/voaha (16 January 2006); Dorothy Healey and Maurice Isserman, *Dorothy Healey Remembers: A Life in the American Communist Party* (New York: Oxford University Press, 1990), 122.

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government deported Fedya in 1956 for his brief Communist Party (CP) membership.

Fedya would have been just another quiet casualty of Cold War anticommunist zeal had it not been for his wife's discovery of his accrued Social Security benefits the previous year. In 1955 Barbara Nestor signed Fedya's name to an Application for Old-Age Insurance Benefits and submitted a Wife's Insurance Benefits application for herself. She was pleasantly surprised at her award of $27.80 per month, since she believed Fedya could never hold a steady job. After Fedya was deported, however, an official from the Department of Health, Education, and Welfare (HEW) informed Barbara in the curt language of bureaucracy that "no additional payments [were] due under the social security law." She took Fedya's case all the way to the Supreme Court, with the assistance of the American Committee for the Protection of the Foreign Born, arguing that the federal government had deprived Fedya of a vested property interest without due process of law and subjected him to cruel and unusual punishment.[2] Ultimately the Court disagreed. In the matter of *Flemming v. Nestor* (1960) the justices split five to four in favor of the government, reversing a district court ruling.[3]

No one at the time perceived *Nestor* as one of the most significant decisions of the term. The debate among the justices was brief. The press paid little attention.[4] But in retrospect the case was important for several reasons. First, it revealed confusion among even the most learned Americans about the legacy of the New Deal and the character of their so-called "welfare state," a term that had only recently come into use. The program at issue in Fedya Nestor's case, federal Old-Age Insurance ("Social Security"), was foundational to American security by the mid-twentieth century yet

2. Case file for *Nestor v. Folsom,* Civ. A. No. 1154-58, National Archives, College Park, Md.

3. *Flemming v. Nestor,* 363 U.S. 603 (1960) *rev'g Nestor v. Folsom,* 169 F. Supp. 922 (1959).

4. As John Attarian, a historian of Social Security, summarizes, there were "[n]o big headlines, front-page stories, reprints of the full text of the opinion, or editorials. The mass-circulation news magazines such as *Time* and *Newsweek* did not mention the case. The decision and its shattering, momentous implications went undiscussed in the mainstream press. It was not like the aftermath of *Helvering v. Davis* [the 1937 case establishing the constitutionality of the Social Security program]." John Attarian, *Social Security: False Consciousness and Crisis* (New Brunswick, N.J.: Transaction Publishers, 2002), 221. I found minimal coverage in the *New York Times* and the *Los Angeles Times* but none in other major papers like the *Wall Street Journal* or the *Chicago Defender.* See "High Court Rejects Pension Plea by Man Deported as Former Red," *New York Times,* June 21, 1960; "Supreme Court Actions," *New York Times,* June 21, 1960; "Competition in Pacific Shipping OKd by Court," *Los Angeles Times,* June 21, 1960.

Americans fundamentally misunderstood it.[5] In support of the deported Nestor's claim, his attorneys parroted the language of politicians and government officials, describing Social Security in terms of "contributions," "premiums," and "earned rights" (as opposed to "charity" or "relief").[6] This language resonated with a district court judge and several Supreme Court justices. Yet Social Security was not insurance, the majority in *Nestor* made clear. "Earned" social insurance benefits were neither "property" nor contractual right.[7] This was a major pronouncement about the nature of America's welfare state, one that has never been overturned.[8]

Second, *Nestor* is important for exemplifying the important role that courts and legal disputes played in the development of the welfare state. Historically and institutionally oriented political scientists and sociologists,

5. Recent debates over the privatization of Social Security suggest that the program is still misunderstood. See, e.g., Deroy Murdock, "It's Not Your Money," *American Enterprise* 10 (1999): 76; Charles E. Rounds, Jr., "You Have No Legal Right to Social Security," *Consumers' Research Magazine* 80 (2000): 4; Robert Samuelsen, "Lots of Gain and No Pain!" *Newsweek* 145 (2005): 41 (discussing the pervasive belief that Social Security is an entitlement; citing *Nestor* as the myth-busting decision "you've never heard of").

6. President Franklin Delano Roosevelt famously claimed that this rhetoric would guarantee contributors "a legal, moral, and political right to collect their pensions." Quoted in William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal* (New York: Harper & Row, 1963), 133.

7. *Nestor* became an important precedent for the Social Security Administration (SSA), which today maintains the full text of the decision on its website. Social Security Administration, "Supreme Court Case: Flemming v. Nestor," http://www.ssa.gov/history/nestor.html (25 April 2006). *Nestor* is also a case that conservative judges cite whenever a person challenges a restricted or terminated social welfare benefit. For example in *Weinberger v. Salfi,* where Concetta Salfi challenged a provision of the Social Security Act that prohibited her from receiving widow's benefits because she had not been married to her wage-earner husband long enough, Justice Rehnquist used *Nestor* as "the standard for testing the validity of Congress' Social Security classification." To him this meant that a restriction passed muster unless it "manifests a patently arbitrary classification, utterly lacking in rational justification." 422 U.S. 749, 768 (1975). See also *Richardson v. Belcher,* 404 U.S. 78 (1971) (upholding a HEW decision to reduce Social Security benefits to beneficiaries also receiving state workmen's compensation).

8. It has, however, been called into question by subsequent Supreme Court characterizations of other government benefits. As attorney Matthew Hawes writes, "Logic dictates that any property interests recognized by the Court for welfare recipients should be more ephemeral than those 'bought' through contribution as in Social Security. Yet, just ten years after refusing to recognize any protectable rights for Social Security recipients, the Supreme Court first found constitutional protections for welfare beneficiaries in *Goldberg v. Kelly.*" Hawes calls *Nestor* "outdated case law." Matthew H. Hawes, "So No Damn Politician Can Ever Scrap It: The Constitutional Protection of Social Security Benefits," *University of Pittsburgh Law Review* 65 (Summer 2004): 898, 907; *Goldberg v. Kelly,* 397 U.S. 254 (1969). See also *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (holding that continued receipt of Social Security disability benefits is a "statutorily created 'property' interest protected by the Fifth Amendment").

who have done the bulk of the work on the development of the American welfare state, have overlooked this point. While attentive to lawmakers and statutes, their accounts of the welfare state have generally failed to consider litigation as a creator of policy capable of shaping and constraining future policy; they have not brought their insights about "path dependence" and "policy feedback" to bear on administrative and judicial decisions.[9] Historians have also overlooked this point, perhaps because of the enduring belief that while Franklin Delano Roosevelt lost his court-packing battle, he won the war, securing a New Deal Court that would no longer pass judgment on the wisdom of social and economic legislation. Cases like *Nestor* suggest that the courts after 1937 continued to influence social and economic policies, even if they now refrained from invalidating legislation wholesale. After all, the civil liberties, due process, and racial discrimination controversies that flooded into the courts throughout the next decades were often entangled with social welfare policies; litigants asked courts not only to vindicate their individual liberties, but to pass judgment on what the state owed them and what it could ask of them in return.[10]

Cases raising these questions about the welfare state became more frequent as domestic anticommunist fervor increased—a third point that *Nestor* illustrates—because during this Red Scare, political repression often occurred through revocation of government-funded privileges and entitlements. McCarthyism[11] punished thousands of targets not, for the most part, through

9. For an excellent review of the literature on law and the American state and a discussion of how scholars could examine law and courts more fruitfully, see John D. Skrentny, "Law and the American State," *Annual Review of Sociology* 32 (2006); see also Reuel Schiller, "'Saint George and the Dragon': Courts and the Development of the Administrative State in Twentieth-Century America," *Journal of Policy History* 17 (2005): 114–17 (noting that most of the literature on the American welfare state "ignores courts and the role the judiciary has played" and describing some of the ways that courts may have affected social welfare bureaucracies in the 1970s).

10. As Risa Goluboff has illustrated in the civil rights context, the 1940s and 1950s were not "a relatively uneventful interlude" between the New Deal and the drama of "the Sixties" but "a signal period of ferment, in which the boundaries of the bureaucratic state, the form of individual rights, and the relationships between them were still unclear." Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge, Mass.: Harvard University Press, 2007), 5.

11. Historians have long recognized "McCarthyism" as a problematic term. To borrow the words of M. J. Heale, "[Joseph R. McCarthy] did not inspire the anticommunist cause, to which he came very late. He contributed no new ideas, fashioned no legislation, commanded no coherent organization; he only briefly chaired a Senate committee, and that a minor one, and his tactics did lasting harm to his own mission." M. J. Heale, *American Anticommunism: Combating the Enemy Within, 1830–1970* (Baltimore: Johns Hopkins University Press, 1990), 150. The term "McCarthyism" is also "invariably pejorative," suggesting at best "an unfortunate overreaction to a genuine danger" and at worst "a conscious campaign to wipe out dissent." Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (Boston: Little,

death or imprisonment, but by removing security and dashing expectations—by taking away a job, revoking a license to work, or rescinding a promised old-age pension. Those who wanted to root out subversives took advantage of the dramatic growth of the state and its direct or indirect control over Americans' social welfare. For example, as the federal government deported Fedya Nestor and revoked his Social Security benefits, other political radicals lost public housing, unemployment insurance, government-regulated licenses, and public-sector jobs.[12] *Nestor* shows how the breadth of the American welfare state and its hooks into American lives offered a new technology for policing, monitoring, and coercing American citizens.[13]

Finally, *Nestor* not only highlighted a problem in post-war American life, it helped trigger a creative solution. At a time when it seemed that a communist presence was certain and national morals were in peril, when communities struggled with dramatic social and demographic changes, many people wanted the government to impose order and reinforce tradi-

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Brown, 1998), xii. Furthermore, "McCarthyism" denotes an aberrant period rather than one grounded in beliefs many Americans share today: that some ideologies are simply outside the sphere of "politics," that the nation's protections do not extend to its enemies, and that civil liberties must yield in times of war. Yet there are also good reasons for accepting the term. Heale notes that "before the eyes of the country and indeed of the world it was McCarthy who became the personification of American anticommunism, and for a time press and politicians, bureaucrats and businessmen, Congress and White House treated him as a power in the land." Heale, *American Anticommunism,* 150. Historians have also adopted the term as their own, using it to refer to the efforts of "a broad coalition of politicians, bureaucrats, and other anticommunist activists" during the late 1940s and 1950s to "eliminate the alleged threat of domestic Communism" by "hound[ing]" a generation of radicals, their associates, and their institutions. Schrecker, *Many Are the Crimes,* xii. I use the term in this broader context and with a wariness of the crusade-like imagery it invokes.

12. See, e.g., *Blackman v. Chicago Housing Authority,* 122 N.E.2d 522 (Ill. 1954) (eviction of tenants who would not sign loyalty oaths); *Ault v. Unemployment Compensation Board of Review,* 157 A.2d 375 (Pa. 1960) (denial of unemployment compensation for failing to answer questions about CP affiliation); *Barsky v. Board of Regents,* 347 U.S. 442 (1954) (suspension of a surgeon's medical license after he was convicted of contempt of Congress); *Homer v. Richmond,* 292 F.2d 719 (D.C. Cir. 1961) (denial of a radiotelegraph operator's license to an applicant who refused to answer questions about membership in subversive organizations); *Garner v Board of Public Works,* 341 U.S. 716 (1951) (termination and withholding of salaries from employees who failed to comply with municipal loyalty and security procedures); *Lerner v. Casey,* 357 U.S. 468 (1958) (dismissal of a transit worker for being of "doubtful trust" and refusing to answer questions about CP membership); *Faxon v. School Committee of Boston,* 120 N.E.2d 772 (Mass. 1954) (firing of a public school teacher for declining to answer questions about communist activities before a subcommittee of the U.S. Senate).

13. For a discussion of the connection between Cold War political persecution and the administrative state, see Daniel Levin, "The Communist Party Cases and the Origins of the Due Process Revolution" (paper presented at the annual meeting of the Southwestern Political Science Association, New Orleans, La., March 26–29, 1997).

tional values. But what tactics were appropriate? How should the government wield its growing power as welfare guarantor? And what mechanisms existed to prevent government agencies and administrators from abusing their discretion? The *Nestor* case and related controversies led Yale law professor Charles Reich to articulate a legal theory that spoke in conservative terms yet promised to protect the subsidies, benefits, and opportunities that the government provided. Reich's famous 1964 article "The New Property"—in which he called *Nestor* "the most important of all judicial decisions concerning government largess"—likened the "valuables dispensed by the government" to the private property of the Founders. Reich urged courts to provide these new forms of wealth the same protections as the old in order to maintain an independent citizenry.[14] Eventually courts agreed, deciding in the late sixties and early seventies that the Constitution protected welfare payments, public housing, and other nontraditional forms of property from being taken without rigorous administrative procedures.[15] The Court has since stepped back from the redistributive implications of these decisions, but not from the acknowledgment that the state creates valuable interests on which many Americans depend.

In sum, *Flemming v. Nestor* is in one sense the story of a single deportee, a colorful, self-proclaimed "Tolstoyan" who lost his Social Security benefits in an unfortunate but not exceptional manner. But in another sense it is much bigger: it captures a complicated moment in American history, when Americans grappled with political repression, a growing expectation of government largess, and the intersection of the two. The case also had real consequences. It not only clarified one aspect of an "open-textured"

14. Charles A. Reich, "The New Property," *Yale Law Journal* 73 (1964): 733–87, 768. The article had dramatic implications: it suggested that economic rights—for even the nation's least "deserving"—should be on par with the freedoms in the Bill of Rights. But "The New Property" was not a radical text. Although Reich associated with various "leftwing" individuals and causes throughout his career, he wrote "The New Property" when he was part of a cohort at Yale Law School that was "relentlessly ambitious," "politically timid," and averse to activism. Laura Kalman, *Yale Law School and the Sixties: Revolt and Reverberations* (Chapel Hill: University of North Carolina Press, 2005), 50. As Reich himself describes the article, "I sought to restore the original meaning and function of property as a safeguard of democracy; in this sense 'The New Property' is profoundly conservative in the true sense of the word." Charles Reich, e-mail message to author, October 19, 2006.

15. In the most significant case, *Goldberg v. Kelly*, Justice Brennan's majority opinion adopted "The New Property" as its analytical framework and held that entitlements to welfare benefits merited the same procedural protections as rights to traditional forms of property. 397 U.S. 254 (1970). Other decisions suggesting a "new property" jurisprudence include *King v. Smith,* 392 U.S. 309 (1968) (striking down an Alabama welfare regulation disqualifying otherwise eligible children from receiving aid if their mother "cohabits with a man") and *Shapiro v. Thompson,* 394 U.S. 618 (1969) (overturning a state law denying welfare assistance to persons who have not resided within the state for one year).

welfare state, making law for millions of Americans, it contributed to a jurisprudence that attempted to reconcile the Constitution's promises with the optimism, anxiety, and insecurity of post-war American life.

## Fedya and Barbara Nestor: Dilettante and Crusader

Fedya Nestor's encounter with the American legal system truly began with his second wife, Barbara Nestor (née Herman), and her children from her first marriage, who were far more engaged with politics than he. Barbara arrived in the United States from Hungary in 1888, at age four, and found socialism by age sixteen. She was a member of the Socialist Party in Denver until the Bolshevik Revolution of 1919 when she became a charter member of the Communist Labor Party in Denver,[16] and she remained an active grassroots organizer until her death in 1979.[17] She also passed her radical politics onto her children: her feisty daughter Dorothy went on to become the twenty-year chair of the CP in the Los Angeles area.[18]

Ironically the U.S. government deported not Barbara but her bumbling second husband Fedya, a childish dreamer who dabbled in communism but truly loved the "perpetual motion machine" he was building in the backyard.[19] Fedya came from Bulgaria in 1913 when he was twenty-three. Not wanting to fight in the Balkan Wars, Fedya fled to Switzerland where a doctor friend enabled his immigration to the United States. Barbara met him during the Great Depression when he was selling vegetables door-to-door in Los Angeles.[20] Although Barbara claimed she "didn't like him

16. Nestor, interview, October 11, 1974, interview 01a segment 5 segkey: a1485; Healey and Isserman, *Dorothy Healey Remembers,* 17–24.

17. According to her grandson Richard Healey, Barbara "never went out of the house without some kind of little shopping bag, something to carry literature, because you never knew who you were going to bump into, you never knew when you were going to make a convert." Healey and Isserman, *Dorothy Healey Remembers,* 122.

18. Barbara took care to educate her children about the great battles between labor and capital, and she frequently took them to demonstrations and meetings of leftist organizations. Barbara remembered Dorothy yelling at scabs during a labor strike at age six and distributing radical literature throughout her childhood. Nestor, interview, October 11, 1974, interview 01b segment 5 segkey: a1493; Nestor, interview, December 20, 1974, interview 05a segment 5 segkey: a1566.

19. Dorothy remembered Fedya as "a sweet, amiable man, without much sense." Barbara described him as a self-declared poet, an amateur inventor, and "a crackpot in many ways." Healey and Isserman, *Dorothy Healey Remembers,* 122; Nestor, interview, December 27, 1974, interview 06c segment 6 segkey: a1602.

20. According to Barbara, "Nestor" was the name of Fedya's doctor friend; Fedya appropriated it after using the friend's passport to enter the U.S. Nestor, interview, December 27, 1974, interview 06c segment 6 segkey: a1602.

very much" and found his admiration "nauseating," he won her over with his good looks, spirited teasing, and love for her children. By 1933 Fedya was living with her and by 1936 they were married.[21]

Nineteen thirty-six was also the year in which Fedya joined the Communist Party. Fedya had a great love for the Soviet Union, but politically he was not very involved.[22] Although Barbara remembered Fedya joining picket lines and helping her shelter an accused murderer sent by the local CP branch, she was adamant that "[t]he most [Fedya] could do—and he didn't do that well—was to help distribute The People's World."[23] Furthermore Fedya had little understanding of the Party's ideology. "He thought he was a Communist," mused Barbara, but "he really didn't know much about Marxism." He had been a "Tolstoyan" in Bulgaria and "a very weird kind of socialist."[24] Barbara, who at age sixteen considered Marx's manifesto her "bible,"[25] distinctly remembered taking the impish Fedya to her local John Reed club for Marxist intellectuals and being "so embarrassed" by his ignorance.[26] Barbara's daughter Dorothy agreed: "He was basically a dreamer," she said, whose politics were an incoherent mixture of anarchism and De Leon-style socialism.[27]

Dorothy, dubbed "the Little Dictator" by the local press for her leadership style, fiery temperament, and diminutive stature, was the real "subversive"

21. Nestor, interview, December 27, 1974, interview 06c segment 7 segkey: a1603.

22. Barbara said Fedya used to make her go to the theater where they showed all the Soviet films (prompting her to declare "Look, I'm not going to go see Swan Lake again!"), but he never made political speeches and "wasn't that important" in the local party. Nestor, interview, June 11, 1975, interview 10b segment 6 segkey: a1680.

23. Once when Fedya was distributing the publication he told an unemployed black female acquaintance that he knew of a maid job for her, a remark she interpreted as chauvinistic and racist. Party officials planned to sanction Fedya but stopped when Dorothy, then a high-ranking Party figure, told them not to pursue the "fool." Nestor, interview, December 27, 1974, interview 06c segment 7.

24. Nestor, interview, December 27, 1974, interview 06c segment 6 segkey: a1603.

25. Nestor, interview, October 11, 1974, interview 01b segment 2 segkey: a1490.

26. "Who is Marx to tell me that I had to be a wage slave until you had a developed economy?" Barbara remembered Fedya demanding. "Who is Marx to tell the peasants in Germany that they couldn't win because they didn't have a developed economy?" When Dorothy finally asked, "Fedya, what did you ever read of Marx?" he admitted "not very much." Nestor, interview, December 27, 1974, interview 06c segment 6 segkey: a1602. Barbara also insisted that Fedya was not "independent in his thinking" about the Party, instead following her and her daughter. "He wouldn't read things himself unless [Dorothy] told him to." Nestor, interview, December 27, 1974, interview 06d segment 4 segkey: a1608.

27. Healey and Isserman, *Dorothy Healey Remembers,* 122. On these two strains of leftist thought, see Paul Buhle, *Marxism in the United States: Remapping the History of the American Left* (London: Verso, 1987).

in the family.[28] She joined the Young Communists League at age fourteen, mobilized farm and cannery workers throughout the 1930s, and worked as lead organizer for the Los Angeles County Communist Party in the 1940s. She was also the frequent object of FBI surveillance[29] and one of the eleven California Communist Party leaders famously arrested in 1951 for conspiring to bring about the violent overthrow of the U.S. Government. (The Supreme Court overturned her conviction under the Smith Act in the renowned case *Yates v. United States.*)[30] When federal immigration authorities commenced deportation proceedings against Fedya, the family assumed it was to get at Dorothy.[31] No one predicted how important his case would become.

28. "Communism in L.A.—How It Works," *Los Angeles Mirror,* August 21, 1950, quoted in Healey and Isserman, *Dorothy Healey Remembers,* 133.

29. Agents reported on her as early as 1945, and from 1946 until at least December, 1949, the FBI continuously tapped her phone. Dorothy recalled that "[b]y 1951 the FBI was following my every move" and that every day she woke up to find "three carloads of FBI men" sitting in front of her house, which followed her as she drove her son to school and ran her errands. Government inquisitors at both the state and federal level also demanded her testimony. Healey and Isserman, *Dorothy Healey Remembers,* 114–18; "Contempt Laid to Five in U.S. Red Inquiry," *Los Angeles Times,* June 15, 1949.

30. 354 U.S. 298 (1957) (holding that the statute of limitations barred the Smith Act convictions of Healey and others; convictions for conspiring to advocate the violent overthrow of the government could stand, but only where it was clear that evidence supported the advocacy charge apart from the organizing charge). *Yates,* which left the Smith Act a "helpless cripple," was the most important of the major cases that the Court decided on the last day of the 1956–57 term, a day known as "Red Monday" for the Court's refusal to sustain prosecutions of communists. Michal R. Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (Westport, Conn.: Greenwood Press, 1977), 268; Morton J. Horwitz, *The Warren Court and the Pursuit of Justice* (New York: Hill and Wang, 1998), 59.

31. "They would never have deported him except they were getting back at Dorothy," Barbara stated. Nestor, interview, December 27, 1974, interview 06d segment 3 segkey: a1606. This observation highlights the role of gender in Cold War political culture and practice, as well as how federal officials may have used the gendered nature of the welfare state for their punitive purposes. As Linda Gordon and others have discussed, the American welfare state developed in a fundamentally gendered way, privileging traditionally male occupations and rewarding male heads of families. Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare, 1890–1935* (New York: Freedom Press, 1994). By deporting Fedya, the family member with the most honorable and legitimate claims on the American welfare state, federal officials covertly punished Barbara and Dorothy. On women's growing reliance on Social Security in the Cold War era, see "Millions of Elderly Women Depend on Social Security Benefits," *America's Women: Report of the President's Commission on the Status of Women, 1963* (Washington, D.C.: U.S. Government Printing Office, 1963), p. 13, reprinted online in Kathryn Sklar and Thomas Dublin, eds., Women and Social Movements in the United States, 1600–2000, vol. 9 (2005), http://www.alexanderstreet6.com/wasm/index.html (22 January 2007).

Fedya's legal history begins in 1953. A new law allowed federal authorities to deport aliens who were or had been members of the CP,[32] and they easily found three "stool pigeons" to testify about Fedya's CP membership. The informants' motives were suspect and their recollections inconsistent, but the judge overlooked all objections. The evidence constituted "reasonable, substantial and probative evidence of Communist Party membership," he found, which Fedya's silence (his attorney advised him not to testify) "further corroborat[ed]."[33] Meanwhile, as Fedya's deportation case was on appeal, Barbara applied for Social Security benefits on the couple's behalf. To her surprise HEW issued Fedya an award of $55.60 per month.[34] By July 1956, however ("right after Khrushchev's speech," Barbara remembered), the Immigration and Naturalization Service (INS) had sent her white-haired husband on his way to Sofia, Bulgaria.[35] (His appeal was unsuccessful and some evidence suggests he actually wanted to go.)[36] HEW then terminated Fedya's benefits, citing an obscure provision of the 1954 amendments to the Social Security Act.[37]

32. Immigration and Nationality Act, 8 U.S.C. 1251 § 241(a)(6)(i).

33. In re: Daniel Nestor or Ephraim or Prodan Nestoroff, File E-069450—Los Angeles, November 9, 1954, Case file for *Nestor v. Folsom,* National Archives, College Park, Md. As Fedya's attorney would soon find out (he was appealing an almost identical case on behalf of a Mexican American worker named Jose Angel Ocon), neither the deportation law nor its application raised concerns for the Court of Appeals. *Ocon v. Del Guercio,* 237 F.2d 177 (9th Cir. 1956).

34. Total wages of $10,936.95 between 1936 and 1955 entitled Fedya Nestor to $55.60 and his wife to $27.80. Department of Health, Education, and Welfare, Determination of Award, March 7, 1956, Case file for *Nestor v. Folsom,* National Archives, College Park, Md. This surprised Barbara because Fedya "never supported [her]" and "never earned very much." She claims he contributed five dollars a week to the family income when he was working. Nestor, interview, December 27, 1974, interview 06d segment 2 segkey: a1605.

35. Notice of Deportation for Daniel Nestor, alias Ephraim Nestor, Prodan Nesteroff, Case file for *Nestor v. Folsom,* National Archives, College Park, Md.; Nestor, interview, October 11, 1974, interview 01b segment 8 segkey: a1496 (the reference is to Khrushchev's famous "secret speech" from the twentieth Congress in which he denounced Stalin and, in the eyes of many observers, further discredited the CP).

36. According to Barbara, Fedya considered it a "feather in his cap" that the government would pay for his $600 trip to Bulgaria and "[h]e was really very anxious to see what was going on in Bulgaria now under socialist rule." Dorothy recalled that Fedya wanted to market his "perpetual motion machine" to the Bulgarian government. Barbara also insisted that Fedya's deportation was his fault: the socialist regime in Bulgaria normally would not accept deportees, but Fedya surreptitiously got a friend in the Bulgarian government to grant him the visa he needed. Nestor, interview, June 11, 1975, interview 10b segment 6 segkey: a1680; Healey and Isserman, *Dorothy Healey Remembers,* 122.

37. George R. Krets to Barbara Nestor, November 15, 1956, Case file for *Nestor v. Folsom,* National Archives, College Park, Md.; Social Security Act of 1954, 68 Stat. 1084 § 202(n), as amended 42 U.S.C.A. § 402(n).

Historians of the welfare state often characterize the 1954 amendments as a triumph for the Social Security program because they extended coverage to previously uncovered sectors of the labor market and liberalized eligibility requirements. A program that legislators once restricted mainly to white, urban workers opened up, giving more Americans security and creating an even bigger constituency for the popular program.[38] But the amendment that applied to Fedya was illiberal and ungenerous, a reminder of a political climate that historians of the welfare state often forget. Section 402(n) allowed for the termination of old-age, survivor, and disability insurance benefits to an alien deported for participation in, inter alia, "subversive" activities.[39] The amendment was likely part of the flurry of legislation aimed at suspected Soviet spy and State Department official Alger Hiss.[40] In 1954, when Hiss was serving a prison sentence for perjury, legislators discovered he was due to receive a government pension of $700 a year, a development that left at least one representative "shocked—aghast—enraged—boiling mad."[41] Section 402(n) aimed to prevent people like Hiss from reaping the rewards of the country they betrayed. This amendment prompted little discussion in Congress, but it mattered to Barbara Nestor. Her U.S. residency ensured the safety of her monthly Social Security check, but she believed HEW unfairly terminated her husband's.[42] Accordingly, when her contestation of the agency's decision failed, the Los Angeles Committee for Protection of the Foreign Born found attorneys to file a complaint for her in federal court.[43]

38. See, e.g., Edward D. Berkowitz, *America's Welfare State: From Roosevelt to Reagan* (Baltimore: The Johns Hopkins University Press, 1991); Daniel Beland, *Social Security: History and Politics from the New Deal to the Privatization Debate* (Lawrence: University Press of Kansas, 2005).

39. 42 U.S.C.A. § 402(n).

40. Hiss's guilt of espionage was never proven in court, but recent research in archives from the former Soviet Union suggests that he was a Soviet spy. See Michael E. Parrish, "Soviet Espionage and the Cold War," *Diplomatic History* 25 (Winter 2001): 114 (reviewing eight recent works on Soviet espionage and American communism during the Cold War and concluding that Alger Hiss was a Soviet agent from the mid-1930s until at least 1945); G. Edward White, *Alger Hiss's Looking-Glass Wars: The Covert Life of a Soviet Spy* (Oxford: Oxford University Press, 2004) (starting from the premise of Hiss's guilt).

41. The legislator who introduced Section 402(n) was Katharine St. George, a Republican congresswoman from New York. That same year St. George sponsored bills revoking the mailing privileges of senders of subversive propaganda, rescinding Hiss's government pension, and denying pension benefits to all government employees convicted of a felony. Social Security Act of 1954, 83rd Cong., 2nd sess., Congressional Record 100 (January 25, 1954), quoted in *Nestor v. Folsom,* 169 F. Supp. 922, 927 (D.C. Cir. 1959); "Bill Would Deny Mail Aid to Reds," *New York Times,* May 8, 1954; "Administration for Hiss Pension; House Sponsors of Ban 'Enraged,'" *New York Times,* June 23, 1954.

42. Case file for *Nestor v. Folsom,* National Archives, College Park, Md.

43. Barbara requested a hearing with HEW on Fedya's behalf on February 26, 1957. A

## A Life Becomes Law

"[T]he sordid controversies of the litigants," Benjamin Cardozo once said, "are the stuff out of which great and shining truths will ultimately be shaped." Cardozo was describing the way in which a system of case law develops: cases become precedents that judges must follow, and thus principles rather than "chance and favor" dictate the outcome of controversies.[44] But Cardozo's quote also describes how, when litigants bring their complicated, contradictory stories to court, the law and its functionaries impose order. Lawyers and judges shape the facts into a narrative that makes sense to them, pruning off the bits that straggle. Perhaps Barbara Nestor thought that litigating the Social Security issue would affect her husband's deportation case, perhaps she wanted to make a point to the administrators that jilted her family, perhaps she simply wanted access to Fedya's benefits, but in initiating a formal legal complaint she gave the story to others to tell. Along the way the legal system lost sight of the Nestors as individuals and instead connected their story to a larger debate about the relationship between liberty and security in a Cold War welfare state.

Barbara Nestor did not have much contact with the attorneys that the Committee for the Protection of the Foreign Born found for her. She remembered them simply as "able."[45] Able indeed—and deeply embedded in the legal history of American anticommunism. The lawyers who took the Nestors' case were partners Joseph Forer and David Rein, both Jewish, Ivy League law school graduates, and members of the left-wing National Lawyers Guild.[46] At a time when most lawyers were unwilling to associate with the politically unpopular targets of anticommunist politics and rigorously policed their own ranks,[47] Forer and Rein repre-

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HEW referee heard the case in Glendale, Califonia, on December 30, 1957, and Fedya lost. HEW denied Barbara's request for a review of the decision. Case file for *Nestor v. Folsom,* National Archives, College Park, Md.

44. Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 35.

45. Nestor, interview, June 11, 1975, interview 10c segment 1 segkey: a1681.

46. The two lawyers once worked for the government but they left in 1946—just in time, they said. They believed that the Cold War brought a "wave" of government repression "such as this country has never seen before." Intending to become "prosperous corporation lawyers" they instead became, as they liked to joke, "unprosperous civil liberties lawyers." Folder 14, Series II, The Forer and Rein Research Collection, 1941–2000, Historical Society of Washington, D.C.

47. According to Schrecker, the FBI eagerly provided information to the ABA and local bar associations about left-wing lawyers' groups and lawyers to facilitate internal anticommunist purges. Meanwhile, any attorney who relied on the Fifth Amendment risked disbarment for

sented hundreds of alleged subversives and communists.[48] Between 1948 and 1964 the United States Supreme Court granted certiorari to at least eighteen of Forer and Rein's cases,[49] and the partners were involved in such famous proceedings as *American Committee for Protection of Foreign Born v. Subversive Activities Control Board,*[50] *Rowoldt v. Perfetto,*[51]

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poor "moral character." Not all members of the bar joined in anticommunist persecution, but "[t]he bar's timidity made it almost impossible for Communists and alleged Communists to obtain counsel—especially if they did not want to be represented by someone who was already tainted [by having defended a communist]." Schrecker, *Many Are the Crimes,* 301–5; Belknap, *Cold War Political Justice,* 219–31. Bar associations at all levels also imposed loyalty oaths and refused admission to applicants with the slightest leftist leanings. See, e.g., *Schware v. Board of Examiners,* 353 U.S. 232 (1957) (reviewing a 1954 decision by the New Mexico State Board of Bar Examiners to deny Rudolph Schware's application to take the bar exam because of his past CP membership, prior arrest record, and use of aliases); *Konigsberg v. State Bar,* 353 U.S. 252 (1957) (reviewing the California State Bar's refusal to grant certification to Raphael Konigsberg for his refusal to answer questions about his political associations). In 1950 the ABA House of Delegates adopted a resolution urging that all attorneys be required to file affidavits declaring whether they were or had been members of the CP. In 1951 the House of Delegates voted unanimously to urge lawyers' groups to expel all communists and advocates of Marxism-Leninism from legal practice. In 1953 the same body called for lawyers' groups to examine any attorneys who invoked the Fifth Amendment for "fitness to continue to practice." Belknap, *Cold War Political Justice,* 220. As late as 1957 the ABA took a strong anticommunist stance. For example after the *Yates* decision (eviscerating the Smith Act), the House of Delegates favored a legislative reversal of the Court. Ibid., 254.

48. "Between them, and sometimes with other lawyers, they handled every important McCarran Act case as the government tried to deny passports, make the Communist party register, and so on." David Riley, "The Antiestablishment Lawyers," *The Washingtonian* 6.2 (November 1970): 54.

49. The partners took on other cases in their individual capacities. Joseph Forer represented Herbert Aptheker and other alleged subversives in their effort to overturn the part of the Subversive Activities Control Act that made it a felony for a member of a communist organization to apply for or use a passport (the Supreme Court agreed). *Aptheker v. Secretary of State,* 378 U.S. 500 (1964). Forer also represented the defendant in *Watts v. United States,* 394 U.S. 705 (1969) (seeking to overturn Watts's conviction for threatening the life of the president after the anti-war protester declared, "if they ever make me carry a rifle the first man I want in my sights is LBJ"). David Rein represented one of the resident aliens who challenged the Alien Registration Act of 1940 in the famous immigration case *Harisiades v. Shaugnessy,* 342 U.S. 580 (1952) (holding that the government could validly deport nonresident aliens for past membership in the Communist Party). Later Rein represented the W. E. B. DuBois Club of America in its effort to declare communist-front registration provisions of the Internal Security Act unconstitutional. *W. E. B. DuBois Clubs of America v. Clark,* 389 U.S. 309 (1968). By 1970, each partner had argued about twenty cases in the Supreme Court. Riley, "The Antiestablishment Lawyers," 54.

50. 380 U.S. 503 (1965) (vacating an appellate court judgment that the American Committee for Protection of Foreign Born register as a communist front under the Subversive Activities Control Act of 1950).

51. 355 U.S. 115 (1957) (holding that an alien's one-year membership in the CP and his work in a communist book store were too insubstantial to support an order of deportation).

*Gold v. United States,*[52] and the civil rights case *District of Columbia v. John R. Thompson Co.*[53]

In fact the pair's very first civil liberties case was "a whopper," to use Forer's words: the case of Soviet spy Gerhardt Eisler, a German intellectual who worked for the Comintern while living in the United States in the 1930s.[54] From late 1946 when his case broke to 1949 when he escaped to East Germany, Eisler faced prosecutions for deportation, perjury, and contempt of Congress, each of which the public watched with fascination and horror. Eisler by then was homeless, penniless, and lacking any CP authority, but to the public he was "the quintessential embodiment of the specter of international Communism" and "the personification of the foreign elements that allegedly controlled the American Communist Party."[55] Although Fedya Nestor was not nearly as important as Eisler, one of the most vilified characters of the early Cold War, the fact that the two shared attorneys suggests the role that everyone expected Nestor to play in the ensuing legal drama.

On May 5, 1958, Forer and Rein filed a complaint on Fedya Nestor's behalf in the United States District Court for the District of Columbia, arguing that the government acted unconstitutionally in revoking Nestor's Social Security benefits. For one thing, they said, the deprivation was a penalty inflicted without a judicial trial. For another, it was an ex post facto punishment. In addition they called the government's decision irrational (and thus a violation of due process)—it had nothing to do with the purposes of the Social Security program. Last, they invoked the First Amendment: the government was punishing Nestor for past membership in the Communist Party, which constituted protected speech.[56] For Forer and Rein this was a classic Cold War civil liberties case, one more battle for the rights of an unpopular minority.

Nestor won, but not for the reasons anyone expected. The case went to

52. 352 U.S. 985 (1957) (holding that a defendant convicted of filing a false Taft-Harley affidavit—false because it denied that he supported the CP—was entitled to a declaration of a mistrial because the jury had intruded into his privacy).

53. 346 U.S. 100 (1953) (holding that the District of Columbia could prosecute Thompson Company for refusing to serve African Americans under a nineteenth-century Act that criminalized race-based discrimination).

54. Folder 14, Series II, The Forer and Rein Research Collection, 1941–2000, Historical Society of Washington, D.C. In an interview with historian Ellen Schrecker, Joseph Forer claimed that taking on Eisler as a client "immediately" cost him and his partner "half of our business." Schrecker, *Many Are the Crimes,* 304.

55. Schrecker, *Many Are the Crimes,* 122–25.

56. Memorandum in Support of Plaintiff's Motion for Summary Judgment, *Nestor v. Folsom,* 169 F. Supp. 922 (D.C. Cir. 1958) (Civil Action No. 1154-58); Brief for Appellee, *Flemming v. Nestor,* 363 U.S. 603 (1959) (No. 54).

Judge Edward Allen Tamm, a protégé of J. Edgar Hoover's from the Federal Bureau of Investigation.[57] Tamm was so tied to Hoover, in fact, that when President Truman nominated him to the federal bench in 1948 the local bar association objected. Out of desperation some critics even questioned his law degree.[58] Tamm survived and in some ways was everything his opponents feared: a predictable conservative on the bench who continued to correspond with Hoover about everything from the socialist leanings of Hoover's judicial enemies to the need for FBI-trained court administrators to "knock some sense into the heads of freaks" on the federal bench.[59] Yet in the case of the Bulgarian ex-communist, Fedya Nestor, Tamm wrote a lengthy decision in Nestor's favor.

What Tamm cared about was not one man's civil liberties, but the sanctity of Social Security for the American people. He believed the politicians and administrators who described Social Security as an insurance program; he believed that workers, through their contributions to the program, earned their Social Security benefits. In legal terms, the program seemed to deserve the protections of contract or property. Tamm accepted that Congressional appropriations were not binding promises: Congress needed the ability to deal with inevitable political and economic fluctuations. But the ability to absolutely deprive a person of pension-like benefits after they had accrued—must that also follow? "This Court," Tamm answered, "does not believe so."[60]

If the law of contract did not protect Social Security Benefits, the law of property should, Tamm reasoned. Some case law directly contradicted that logic,[61] but a few cases at least suggested "that the nature of such benefits

57. Tamm joined the FBI in 1930; four years later he became assistant director. From 1940 to 1948 he worked as Hoover's personal assistant. "Judge Edward Tamm, Ex-F.B.I. Official, 79," *New York Times,* September 24, 1985.

58. "Truman Names 11 Rebuffed by GOP," *New York Times,* June 23, 1948; Editorial, "Balanced Accounts," *New York Times,* September 27, 1985.

59. Quoted in Alexander Charns, *Cloak and Gavel: FBI Wiretaps, Bugs, Informers, and the Supreme Court* (Urbana: University of Illinois Press, 1992), 124, 136 n 24. Charns also implicates Tamm in Hoover's early efforts to spy on the judiciary. Ibid., 17–31. On the other hand, some evidence suggests that Tamm's allegiance to Hoover had waned by the time Tamm reached the court. According to H. Graham Morison, who dealt with both men in his capacity as executive assistant to the attorney general, Hoover was ready to give Tamm the "axe" in 1948 for insubordination. H. Graham Morison, interviewed by Jerry N. Hess, August 1, 1972, Harry S. Truman Library, Independence, Missouri, http://www.trumanlibrary.org/oralhist/morison1.htm (10 January 2007).

60. *Nestor v. Folsom,* 169 F. Supp. 922, 934 (D.C. Cir. 1959).

61. See, e.g., *Helvering v. Davis,* 301 U.S. 672 (1937) (giving Congress wide latitude in decisions about how to spend for the general welfare); *Norman v. Baltimore & Ohio Railroad Co.,* 294 U.S. 240, 307–8 (1935) ("Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but, when

make [sic] them property rights."[62] Furthermore, Tamm had statements from the secretary of HEW himself stating that the act of working in covered employment established "rights to benefits." Once the right had been earned, an individual's actions were not supposed to modify or restrict it.[63] Tamm knew that the HEW secretary had no authority to bind the courts, but it mattered to him that that the head of HEW thought of—and marketed—Social Security this way. Conveniently ignoring Nestor's heritage and politics, Tamm concluded that the government deprived him of his Social Security benefits, his property, without due process of law.[64]

HEW appealed the case directly to the Supreme Court. Judge Tamm's decision not only looked like judicial intrusion into legislative territory (a separation of powers problem), it threatened to expand that sacred category of rights and obligations that the government protects as "property."[65] The phrase "property rights" may not be used lightly in American jurisprudence. As Richard Adelstein notes, "property stands at the center of the relationship between the individual and the state"; "whom the state recognizes as having the authority to control the disposition of objects and ideas"

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contracts deal with a subject-matter which lies within the control of the Congress, they have a congenital infirmity"); *Mullowney v. Folsom,* 156 F. Supp. 34, 36 (D.C.N.Y 1957) (holding, in a case where a claimant's Social Security payments were adversely affected by legislation passed after he became entitled to benefits, that "Payments made as a result of Congressional appropriation have not been thus far construed as contractual in nature"). Tamm, however, was a judge who did not fear reversal when he felt strongly enough. "When one is convinced that his dissent is predicated upon lawful grounds then there's no hesitancy in continuing to dissent," Tamm once told an interviewer, "and while the fact that a majority of the court may take the opposite side is sometimes frightening, it nevertheless is no reason for altering or changing one's position." Edward Tamm, interview by Alice O'Donnell, November 12, 1983, Federal Judicial Center, Washington, D.C.

62. *Nestor v. Folsom,* 169 F. Supp. 922, 934 (D.C. Cir. 1959).

63. Ibid., 925 n 3 (citing a 1956 letter from the secretary of Health, Education, and Welfare to the Senate Finance Committee in which the secretary characterized the Social Security program as establishing "rights to benefits," earned through work, that "the individual's actions do not modify or restrict" and that Congress was not entirely free to amend).

64. Ibid., 934. The due process clause of the Fifth Amendment provides that the federal government may not deprive any person of "life, liberty, or property, without due process of law." The Fourteenth Amendment places the same restriction on state and local governments. U.S. Const. Amends. V, XIV.

65. Warren J. Samuels offers a useful definition of "property rights" in contemporary American legal thought: they are "interests given legal protection as property"; as such they enable their holders "to participate in economic decision making." Warren J. Samuels, "An Introduction to Essays on the Fundamental Interrelationships between Government and Property," in *The Fundamental Interrelationships between Government and Property,* ed. Nicholas Mercuro and Warren J. Samuels (Stamford, Conn.: JAI Press, 1999), 1–23, 3.

determines a society's institutions, customs, and hierarchies.[66] In the U.S. property may be especially important. Some legal historians go so far as to describe it as the basis of American civil society[67] and "the guardian of every other right."[68] And all agree that in constitutional law property has a special place. It alone stands as the equal of liberty and life in the Constitution—something not to be taken, at least not without expensive, time-consuming procedures.[69] It also had a special place in Cold War political rhetoric: as a symbol of a free market and a free society, private property differentiated Americans from their enemies. In sum, the boundaries of property mattered.

Some scholars have suggested that Fedya Nestor's disloyalty was more important to the Court than the property issue and that the case's outcome was simply "Court rationalization of the persecution of a communist who had been deported in 1956 but who had the audacity to demand his social security money."[70] The several dissenters in the case alleged the same. Had the Court merely wanted to rationalize Nestor's persecution, however, there were ways to do so that would not have simultaneously affected the interests of millions of American workers and their families. For example, the Court might have acknowledged a theoretical property interest in Social

66. Richard Adelstein, "The Origins of Property and the Powers of Government," in Mercuro and Samuels, *The Fundamental Interrelationships between Government and Property,* 25–35, 25.

67. As David Abraham puts it, "American law started from and remains strongly wedded to the right of property." American national identity centers on the idea of liberty, but that liberty is "formal, negative, expressed in contract, and dependent on possession of property." Whereas other countries may tie rights to principles like citizenship, Americans tie everything from speech to reproductive freedom to the notion of property. "The law, it seems, only listens to talk it can understand. More than anything, it understands property." David Abraham, "Liberty without Equality: The Property-Rights Connection in a 'Negative Citizenship' Regime," *Law and Social Inquiry* 21 (1996): 1–64.

68. James Ely, for example, argues that from the colonial era to the present, property rights and other personal rights have been closely connected, even as their place in constitutional law has changed. James W. Ely, Jr., *The Guardian of Every Other Right* (New York: Oxford University Press, 1992).

69. U.S. Const. Amend. V. Beyond the due process clause and the "takings clause" of the Fifth Amendment, property finds protection in the First Amendment (protecting a person's use of property in her expressive activities), the Third Amendment (restricting the government's authority to quarter soldiers in private homes), the Fourth Amendment (barring unreasonable searches and seizures of a person's home, papers, and effects), the Eighth Amendment (prohibiting excessive fines), and the Fourteenth Amendment (supporting some egalitarian claims to the resources people need to survive). C. Edwin Baker, "Disaggregating the Concept of Property in Constitutional Law," in Mercuro and Samuels, *The Fundamental Interrelationships between Government and Property,* 47–62, 49.

70. Abraham, "Liberty without Equality," 24 n 79.

Security benefits, but held that Nestor's right had not "vested" at the time Congress changed the law regarding communist deportees. There are other reasons as well to question the "Court rationalization" theory. While the sparse notes in the files of Justices Black and Douglas, both dissenters in the case, shed little light on the issue, Howard Lesnick, a clerk to Justice Harlan during the 1959–60 term, recalls that members of the Court were most concerned about Judge Tamm's unorthodox use of the term "property" and the apparent judicial intrusion on the legislative function.[71] This seems right. In 1960, when the justices heard *Flemming v. Nestor,*[72] anticommunist sentiments were not gone—indeed, the politics of anticommunism were thriving—but the climate of fear associated with Senator McCarthy had lifted. And although most of the justices had taken a conservative stance on loyalty and security issues during the early Cold War period,[73] by 1956 the Court had welcomed one of its most liberal members ever (William

71. "Case File: No. 54 Oct. term, 1959 *Flemming v. Nestor,*" Box 341, Papers of Hugo L. Black, Library of Congress, Washington, D.C.; "Folder No. 54—*Flemming v. Nestor,*" Box 1223, Papers of William O. Douglas, Library of Congress, Washington, D.C.; Howard Lesnick, conversation with author, January 6, 2007.

72. In 1960 Earl Warren was chief justice but most legal scholars argue that the "Warren Court" had not yet begun. (They cite the starting date as 1962, when the conservative Charles Whittaker retired and the most articulate proponent of judicial restraint, Felix Frankfurter, resigned, replaced by Byron White and Arthur Goldberg.) The main divide on the Court in 1960 was between those like Justice Harlan, who believed that the Court could rationalize Congress's actions for just about anything, thereby keeping laws in harmony with the Constitution, and people like Justice Black, who believed that devising benign, rational justifications for Congress's actions was wrong when Congress never had such justifications in mind. Mark Tushnet, "The Warren Court as History: An Interpretation," in *The Warren Court in Historical and Political Perspective,* ed. Mark Tushnet (Charlottesville: University Press of Virginia, 1993), 1–36.

73. "For most of the brethren, it was simple fact that the Communist 'menace' had to be curtailed, and, during the first half of the 1950s, the Supreme Court majority of Vinson, Jackson, Frankfurter, Clark, Minton, Burton, and Reed managed to find for the governmental interest in subverting freedom of speech, press, and/or association." Howard Ball and Phillip J. Cooper, *Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution* (New York: Oxford University Press, 1992), 147. The most "notorious example" of the Court giving in to repressive anticommunism, according to Morton Horwitz, was *Dennis v. United States,* 341 U.S. 494 (1951), in which the Court upheld eleven Smith Act convictions and eviscerated constitutional protections on free speech. Horwitz, *The Warren Court,* 57–59. Some decisions from this period are arguably better explained by certain justices' predisposition to judicial restraint in cases implicating national security, but the most important point is that between 1950 and 1956 the Court as a collective "gave free rein to executive, legislative, and popular determination to destroy the domestic arm of the international Communist movement" by "accepting a generic 'proof' of Communism's seditions nature" whereas after that period it was less willing. William M. Wiececk, "The Legal Foundations of Domestic Anticommunism: The Background of *Dennis v. United States,*" *The Supreme Court Review* (2001): 375–434, 434.

J. Brennan).[74] The 1956–1957 term became famous for limiting political persecution.[75] Thus, a case that once fit with classic McCarthy-era controversies was by 1960 about guarding the boundaries of property, preventing leftist lawyers from carving out new rights, and respecting Congress as it grappled with the complexities of running a welfare state.[76]

The decision in *Flemming v. Nestor* was five to four in favor of HEW (Flemming), with Justice John Marshall Harlan writing for the majority. He began with an explanation of Social Security's design. "Payments under the [Social Security] Act are based upon the wage earner's record of earnings in employment"; "[t]he program is financed through a payroll tax levied on employees in covered employment." But, he continued, "eligibility for benefits, and the amount of such benefits, do not in any true sense depend on contribution to the program through the payment of taxes." Each contributor's payroll taxes go into the Treasury as "internal-revenue collections" and from there into the program's "Trust Fund." Nothing akin to individual bank accounts exists. In other words Social Security was not like commercial insurance, where one's benefits were entirely dependent on contractual premium payments, nor could the "noncontractual interest" of a covered employee be analogized to that of the holder of an annuity. The annuity holder has a firm entitlement; the covered employee something less.[77]

74. Brennan's confirmation is further evidence that McCarthyism was waning. Senator McCarthy pursued Brennan with his usual tactics during Brennan's confirmation hearings, but only McCarthy himself voted against confirmation.

75. Usually the Court avoided deciding cases on constitutional grounds (perhaps because of backlash over *Brown*), but by 1956 it was frequently overturning persecutions of alleged subversives on technical or procedural grounds. See, e.g., *Schware,* 353 U.S. 232 (1957) (holding that the New Mexico board of bar examiners denied Schware the right to practice law without due process when it found his past membership in the Communist Party and his use of aliases to raise "substantial doubts" about his moral character); *Speiser v. Randall,* 357 U.S. 513 (1958) (holding that California had used unconstitutional procedures to enforce a law making "nonadvocacy of overthrow of government by unlawful means" a condition precedent to a tax exemption); *Vitarelli v. Seaton,* 359 U.S. 535 (1959) (holding that the procedures that the secretary of the interior followed in dismissing a government employee fell short of the requirements of due process). For a discussion of "the avoidance canon" of the early Warren Court, see Philip P. Frickey, "Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court," *California Law Review* 93 (March 2005): 397–464.

76. Horwitz notes that between 1959 and 1962 the Court "seemed to flee from its earlier anti-McCarthy initiatives," but he rejects the idea that the Court acted out of fear of communist subversion or antipathy towards political radicals. Horwitz attributes the apparent retrenchment to the Jenner-Butler Bill, an anti-Court measure that Congress considered after the Court overrode Congressional committees and decrees on "Red Monday." Horwitz, *The Warren Court,* 64–65. See also Walter F. Murphy, *Congress and the Court* (Chicago: The University of Chicago Press, 1962); C. Herman Pritchett, *Congress Versus the Supreme Court, 1957–1960* (Minneapolis: University of Minnesota Press, 1961).

77. *Flemming v. Nestor,* 363 U.S. 603, 608–10 (1960) (emphasis added).

Justice Harlan next discussed why it would be wrong to characterize a person's accrued Social Security benefits as a "property right," a title that other Cold War cases had forced into ambiguity. (For example, in *Greene v. McElroy,* a case involving revocation of a government contractor's employee's security clearance, a majority of the Court agreed that the "liberty" and "property" concepts of the Fifth Amendment encompassed "the right to hold specific private employment and to follow a chosen profession free from unreasonable government interference").[78] Congress designed Social Security, Harlan explained, "to function into the indefinite future," enduring inevitable fluctuations in economic and social conditions. To fulfill this goal Congress needed "flexibility and boldness in adjustment," including the ability to narrow or even repeal provisions that promised certain benefits. If the Court were to agree with Judge Tamm that accrued Social Security benefits were "property," a host of procedural protections would apply and Congress would lose its flexibility. The Constitution also prohibits the government from taking private property for public purposes without just compensation, meaning Congress might have to offer pay-outs to covered beneficiaries every time it lowered or restricted benefit levels, wreaking havoc on the national budget.[79]

Justice Harlan insisted that the Court's holding was fair. Nestor's benefits were not "property," but that did not mean the government could freely revoke them. In evaluating Congressional actions not involving a fundamental interest like liberty or property, the Court would still overturn laws that "manifest[ed] a patently arbitrary classification, utterly lacking in rational justification." Not surprisingly, however, Justice Harlan found "[s]uch is not the case here." When Congress terminated the benefits that accrued to people like Nestor, deported for Communist Party affiliation, Harlan reasoned, it might have been simply limiting benefits to people residing in the United States, perhaps because residents would be more likely than non-residents to invest their money in the U.S. economy. Then, having conjured a possible rational explanation, Harlan concluded that the Court "need go no further." The Act depriving Nestor of his benefits was constitutional; Nestor had received all the protection the law mandated.[80]

78. 360 U.S. 474, 492 (1959). See also *Schware,* 353 U.S. 232 (1957) (holding that the opportunity to qualify to practice law is protected by constitutional due process provisions); *Peters v. Hobby,* 349 U.S. 331, 352 (1955) (arguing that "the reputation of men and their right to work" must be safeguarded by rigorous procedures since these are "things more precious than property itself") (Douglas, J., concurring).

79. *Flemming v. Nestor,* 363 U.S. 603, 608–10 (1960).

80. Ibid. Justice Harlan devoted the rest of the decision to dismissing Nestor's Sixth Amendment claim (that deprivation of benefits punished people like Nestor in an unconstitutional manner). To strike down a Congressional enactment of this kind on Sixth Amendment

Justice Hugo Black vigorously disagreed.[81] Black and Harlan, though friends, came from different worlds and often found themselves on opposite sides of legal debates. Harlan was a Princeton graduate and Rhodes Scholar who seemed groomed for political greatness. His forbears included a governor, a congressman, and a Supreme Court justice (his namesake). Black, by contrast, came from an evangelical Baptist family in poor, isolated Clay County, Alabama. His training in law came not from Oxford or the "Eastern establishment," but from the University of Alabama and his years as a small-time practitioner, police court judge, and county prosecutor. With little money and no family connections, Black entered national politics (he won a Senate seat in 1926) by combining his brand of southern populism with a short-lived membership in the powerful Ku Klux Klan.[82]

Once in the Senate Hugo Black was a tenacious foe of corruption, an advocate for the common man (the consumer, the farmer, the factory worker), and a reliable supporter of New Deal legislation, including the Social Security Act of 1935.[83] In fact, his personal papers are filled with correspondence from constituents about the Act—how it worked; whether they or their family members could benefit. Sincere letter writers detailed their personal situations and asked for their senator's opinion.[84] Black likely told them the same thing that New Deal designers and administrators said: Social Security was insurance for the working man, earned by the individual and merely administered by the federal government.

Perhaps in answering he consulted one of the clippings he saved, from the *Tuscumbia Times*. "The Truth About Old Age Benefits" discussed a hypothetical man, Jim Brown, who was nearly sixty and had a job in a mill. When old age overtakes Jim, the article explained, "the postman will bring him a Government check, every month, covering the amount of old-age benefits to which he is entitled" based on his wage record. And Jim "will have only himself to thank for this provision for his old age"—

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grounds Nestor would need "unmistakable evidence of punitive intent," Harlan explained, and this evidence simply did not exist. Ibid., 619.

81. Ibid., 626. Justices Douglas, Brennan, and Warren also dissented. Douglas focused on the idea that the 1954 law under which the government terminated Nestor's benefits was a classic bill of attainder, "a legislative act which inflicts punishment without judicial trial." Ibid., 629 (Douglas, J., dissenting). Brennan's dissent, which Douglas and Warren joined, added that the 1954 Act violated the constitutional prohibition against ex post facto laws. Ibid., 634–40 (Brennan, J., dissenting).

82. Ball and Cooper, *Of Power and Right.*

83. President Franklin D. Roosevelt considered Black reliable enough to make him his first appointment to the Supreme Court in 1937, even though Black was not a White House insider.

84. "Senatorial File, Constituent Correspondence, Social Security 1936–1937," Box 133, Papers of Hugo L. Black, Library of Congress, Washington, D.C.

because he earned it.[85] Twenty-five years later the majority in *Flemming v. Nestor* wanted to take Jim's right away, Black believed. With "nice words" and slick reasoning the majority told contributors "that despite their own and their employers' payments the Government . . . is merely giving them something for nothing and can stop doing so when it pleases." This, Justice Black wrote in dissent, was "a complete misunderstanding of the purpose Congress and the country had in passing that law."[86]

To support his understanding of Congress's purpose Justice Black cited Senator Walter F. George (D-Georgia), chairman of the Finance Committee in 1935 and presumably a representative of "congressional intent." As Congress debated Social Security, Senator George emphasized the program's compatibility with "the American concept that free men want to earn their security and not ask for doles—that what is due as a matter of earned right is far better than a gratuity." In another passage Senator George stated: "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."[87]

The majority not only overlooked ignored legislative history, Black continued, it overlooked binding legal precedents. Consider the 1934 case *Lynch v. United States,* which involved beneficiaries of War Risk Insurance, a WWI-era federal program that Congress subsequently repealed. The beneficiaries claimed that the repeal deprived them of property without due process of law, and the Court agreed. "[W]ar risk policies, being contracts, are property and create vested rights"; taking such property without just compensation violated the Fifth Amendment.[88] Black complained that the *Nestor* majority conveniently "puts the Lynch case aside."[89]

Last, Black invoked the very real expectations that Social Security created. "People who pay premiums for insurance usually think they are paying for insurance," Justice Black wrote. They pay for security, not for the "flexibility and boldness" that the majority cited. Congress could deny coverage to new people or refuse to increase its obligations to existing beneficiaries, "[b]ut that is quite different from disappointing the just expectations of the contributors to the fund which the Government has compelled them and

85. "Senatorial File, Clipping File, Social Security," Box 111, ibid.

86. *Flemming v. Nestor,* 363 U.S. 603, 623 (1960) (Black, J., dissenting).

87. Ibid. Essentially, he was making the same argument as Judge Tamm. This agreement between Black, a famous protector of civil liberties, and Tamm, a man who once helped Hoover wiretap unsuspecting citizens, suggests the complicated cross-currents generated by the nexus of the Cold War and the welfare state.

88. *Lynch v. United States,* 272 U.S. 571, 577 (1934).

89. *Flemming v. Nestor,* 363 U.S. 603, 622 (1960) (Black, J., dissenting).

their employers to pay its Treasury."[90] Justice Black denigrated the standard of review that the majority applied to such a flagrant act of dispossession. It amounted to no review at all.[91]

## The End of Insurance and the Making of "New Property"

When the Supreme Court handed down its decision in *Flemming v. Nestor* the public appeared unconcerned. Although the Court had not framed its decision in terms of loyalty, journalists characterized the case as just another one involving a "Red," not applicable to loyal Americans[92] (a lacuna in coverage that at least one historian of Social Security finds shocking).[93] Some legal scholars took note, as they did with all cases handed down by the nation's highest court, but their tone was detached and academic; most did not recognize or sympathize with the decision's meaning for Social Security contributors.[94] The lone exception, it appears, was blind activist and professor Jacobus tenBroek, who in a speech to the San Diego Urban League characterized *Nestor* as part of an attack on the original meaning of Social Security and an example of the dangerous penetration of criminal law into social welfare programs.[95] TenBroek was right to emphasize

90. Ibid., 624.

91. Though Justice Douglas did not join Black's dissent, he shared many of Black's concerns. Douglas characterized a person's accrued social benefits as "part of his property benefits." He, too, cited Senator George's characterization of Social Security as "an earned right." Ibid., 630–31 (Douglas, J., dissenting).

92. The entry in the *New York Time's* Supreme Court round-up was as follows: "Upheld, 5 to 4, the constitutionality of a Congressional statute depriving certain deported aliens of Social Security benefits that they would otherwise have been entitled to." "Supreme Court Actions," *New York Times,* June 21, 1960. A more extensive piece noted the Court's rejection of the idea of "accrued property rights" in Social Security, but focused on Nestor's unique factual circumstances. "High Court Rejects Pension Plea by Man Deported as Former Red," *New York Times,* June 21, 1960.

93. See note 4 above.

94. Among full-length law review articles on the case, I found only one that focused on the Court's refusal to recognize accrued benefits as property rights: James P. Lewis, "The Property Interest in Social Security Benefits," *Maryland Law Review* 21 (1961): 331–44. The several other articles focused on different aspects. See, e.g., "Retroactivity and First Amendment Rights," *University of Pennsylvania Law Review* 110 (1961–1962): 394–435 and "Bill of Attainder and the Supreme Court in 1960—*Flemming v. Nestor,*" *Washington University Law Quarterly* (1961): 402–24.

95. Jacobus tenBroek, "Social Security: Today's Challenge in Public Welfare," *Vital Speeches of the Day* 27 (1961): 411–15. For greater discussion of tenBroek's role in shaping and critiquing the American welfare state, see Felicia Kornbluh, "A Disabled State: How Blind Activists Created Modern Social Welfare Policy" (paper presented at the annual meeting of the American Society for Legal History, Baltimore, Md., November 17, 2006).

*Nestor*'s importance. The case addressed one of the biggest unresolved questions of the American welfare state: the nature of its payouts.

This was indeed an open question. Politicians had their own ways of explaining the program to their constituents, while private insurers—the SSA's main competitors—frantically broadcast a different message.[96] And within the federal government (never a policymaking monolith to begin with), different individuals, agencies, and branches of government had distinct interpretations of this crucial piece of the welfare state. Officials in the Social Security Administration, for example, were disturbed by *Nestor.* The director of the Bureau of Old-Age and Survivors Insurance, Victor Christgau, called *Nestor*'s portrayal of Social Security "quite unfortunate" and criticized Justice Department lawyers for telling the Court that old-age, survivors, and disability insurance was something other than "insurance." The positions of HEW and the SSA were "quite to the contrary," he emphasized.[97] *Nestor* essentially forced that disagreement into the open and required the Court to resolve it.[98] Today, despite Christgau's grumblings, the SSA uses *Nestor* to show that benefits are "an earned right" only in

96. The National Association of Insurance Commissioners (NAIC) and the National Association of Life Underwriters (NALU) had long tried to convince the public that Social Security was no substitute for real insurance. In fact, the *Nestor* opinion perfectly reinforced a recent NALU resolution to oppose use of insurance terminology in the Social Security Act. Carlyle Dunaway, general counsel to the NALU, noted that "the decision [*Nestor*] could prove extremely helpful to NALU in its current campaign to persuade Congress to delete all insurance terminology from the Social Security Act and to insert in the Act a forthright declaration that the Social Security program is not, and is not to be represented as, an insurance program." Statement of Carlyle M. Dunaway, *National Association News* 55 (1960): 70, quoted in Lewis, "The Property Interest in Social Security Benefits," 343 n 63. See also Attarian, *Social Security,* 221 (describing the use that Ray Peterson, vice president and associate actuary of the Equitable Life Assurance Society, made of the decision and the government's briefs); Robert J. Myers, memorandum ("Further Thoughts on Quotations Relative to Nature of OASDI under Brief of Nestor Case"), January 12, 1960, box 2, Bureau of Old-Age and Survivors Insurance—Correspondence of Director Victor Christgau, 1954–1963, Social Security Administration Archives, National Archives, College Park, Md. (observing that the NALU had started using language from *Nestor* as "proof" that the program is not "insurance").

97. Victor Christgau to W. L. Mitchell, October 19, 1960, box 218, folder 011.11, Social Security Administration Archives, National Archives, College Park, Md. Christgau's memo made its way to HEW's general counsel, who sent back a terse response and dismissed the charge that Social Security had suffered. Parke M. Banta to W. L. Mitchell, December 5, 1960, box 216, folder 011.11, General Correspondence, 1960–1964, Records of the Office of the Commissioner—Commissioner's Correspondence, Social Security Administration Archives, National Archives, College Park, Md. This conversation may be part of a larger story about the internal politics of the New Deal agencies. Christgau's positions in the Agricultural Adjustment Administration and Works Progress Administration in the 1930s may have affected his stance on the nature of Social Security in 1960. I thank Dan Ernst for this suggestion.

98. Lower courts had come to similar conclusions about the nature of Social Security

the "moral and political sense," not the "legal, contractual sense"; Social Security is not a "handout" but neither is it "a matter of right." *Nestor* definitively settled the issue.[99]

If *Flemming v. Nestor* rejected one idea (that a person could have a traditional property- or contract-based right to Social Security benefits), it opened up space for another. *Nestor* attracted the attention of Yale professor Charles Reich, who made the case the centerpiece of his 1964 article "The New Property."[100] In this classic artifact of legal liberalism, Reich articulated a vision of individual liberty and government largess that aimed to push the welfare state under the protective umbrella of the Constitution and prevent McCarthy-style persecution from happening again.

Often historians and legal scholars do not associate "The New Property" with the issues of the 1950s because it had such a great impact in the late 1960s and 1970s, and because shortly after "The New Property" Reich started working on *The Greening of America,* his famous encomium to the consciousness of youth.[101] The article thus seems enmeshed in the social, political, and cultural upheaval of the sixties. It is also true that "The New Property" was not aimed at McCarthyism; if anything, it was aimed at establishing welfare rights. But as Robert Rabin astutely observed, "The New Property" is "firmly grounded in the political and cultural trauma of the

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(that Congress was free to change it without compensating affected beneficiaries) but "[t]he *Nestor* decision indicates that the pattern of recurrent amendments which have characterized the history of the Social Security Act since 1939 can withstand challenge in the highest court." Lewis, "The Property Interest in Social Security Benefits," 343.

99. Congress has changed eligibility rules "many times over the years," the SSA now explains. "The rules can be made more generous, or they can be made more restrictive. Benefits which are granted at one time can be withdrawn . . . ." Social Security Administration, "Supreme Court Case: Flemming v. Nestor," http://www.ssa.gov/history/nestor.html (25 April 2006). See also Attarian, *Social Security,* 219 ("So the highest court in the land had settled it: there is no accrued, vested property right to Social Security benefits. Social Security has no contract for benefits. And there is no sound analogy between Social Security and private insurance or annuities").

100. *Flemming v. Nestor* was not the only motivation for "The New Property." It was part of a series of cases in which authorities used control over privileges and benefits to punish non-conforming individuals. Furthermore, as Martha Davis and Felicia Kornbluh note, many of these cases came to Reich's attention only after Justine Wise Polier, a New York family court judge and the mother of a boyhood friend, asked Reich to look into the legality of "midnight raids" on welfare recipients. Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973* (New Haven: Yale University Press, 1993), 84; Felicia Kornbluh, *The Battle over Welfare Rights: Poverty and Politics in Modern America* (Philadelphia: University of Pennsylvania Press, 2007). Last, there is a more mundane explanation for the article and its timing: Reich was assigned to teach an introductory course on Property, a subject of which he knew "virtually nothing." When he read the Framers' discussions of property and government, he saw his contemporary concerns in a new light. Charles Reich, e-mail message to author, October 19, 2006.

101. Charles Reich, *The Greening of America* (New York: Random House, 1970).

Fifties."[102] More specifically, it is grounded in Reich's observations about how a powerful state, strengthened by its authority over New Deal social welfare programs, could enforce political and ideological conformity.

From the late-1940s to the mid-1950s, according to Ellen Schrecker, "Americans at every level of society genuinely believed that Communism endangered the nation." There were enough instances of supposed subversion, espionage, and sabotage to convince many people that communists were trying to undermine the American government and way of life.[103] People scrambled to protect the country, as well as their own reputations and institutions. The federal government implemented loyalty tests for employment, pursuant to executive order, but many private employers followed voluntarily. (Security-related industries adopted particularly stringent loyalty-security criteria, as did industries like law, education, communication, and entertainment).[104] State and local governments did their part by conditioning the use of public spaces and resources on loyalty, monitoring everything from fishing privileges to drivers' licenses. Meanwhile, after several decades of steady public sector growth in which many families grew dependent on government employment,[105] officials enthusiastically rooted out subversive employees, often with flimsy evidence and Kafkaesque procedures.[106]

102. Robert L. Rabin, "The Administrative State and Its Excesses: Reflections on 'The New Property,'" *University of San Francisco Law Review* 24 (1990): 275.

103. Schrecker, *Many Are the Crimes,* 154. See also Tom Engelhardt, *The End of Victory Culture: Cold War America and the Disillusioning of a Generation* (New York: Basic Books, 1995) (discussing Americans' preoccupation with the "enemy within" and the merging of "national security and insecurity" in American culture during the 1950s).

104. The best source on employment tests remains Ralph S. Brown, Jr., *Loyalty and Security: Employment Tests in the United States* (New Haven: Yale University Press, 1958). At the time of publication, Brown estimated that half of professional workers in the U.S. were "exposed to some kind of oath, inquiry, supervision, or surveillance" designed to test their loyalty. Surveying the total labor force (including public employees) Brown concluded that "at least one person out of five, as a condition of his current employment, has taken a test, or completed a loyalty statement, or achieved official security clearance, or survived some unidentified private scrutiny." Ibid., 176.

105. In 1950 governmental occupations included 13.3 percent of the nation's non-agricultural employees. This percentage steadily grew, reaching 15.4 percent by 1950 and 19.1 percent by 1975. Susan B. Carter et al., eds., *Historical Statistics of the United States, Millennial Edition Online* (Cambridge: Cambridge University Press, 2007), http://hsus.cambridge.org/HSUSWeb (16 January 2007).

106. Schrecker reports that by the end of the Truman administration there were 518 loyalty dismissals and 2,636 resignations. The figures from the Eisenhower administration, when 1,456 federal employees were fired, were not disaggregated. Schrecker estimates a low number of loyalty dismissals, but also notes evidence that "ten times as many people with security problems in their files resigned as were fired." Schrecker, *Many Are the Crimes,* 298. The government also flushed out employees that appeared vulnerable to coercion by the enemy, such as homosexuals. David K. Johnson, *The Lavender Scare: The Cold War*

Charles Reich, who during his years in Washington, D.C. sometimes went over to the Capitol "to watch Senator McCarthy and experience first-hand the atmosphere of fear and conformity which had taken over much of our government," had several connections to victims of anticommunist zeal.[107] One was Dr. Edward K. Barsky. An executive board member of the apparently suspicious Joint Anti-Fascist Refugee Committee, Barsky received a subpoena from the House Committee on Un-American Activities in April 1946. Barsky and seventeen fellow board members were cited for contempt when they refused to surrender the organization's records. Barsky paid a $500 fine and served a six-month sentence, but his ordeal was far from over. For his "crime" the State of New York suspended (and threatened to revoke) his license to practice medicine. Barsky sued, arguing that New York "deprive[d] him of property in his license and his established practice, without due process of law."[108] Barsky's case made it all the way to the Supreme Court, where Justice Black and his young law clerk, Reich, took great interest.

Reich had been thinking about the anticommunist manipulation of government-issued licenses, government jobs, and government services for several years. In 1951 Reich helped a fellow editor on the *Yale Law Journal* conceptualize a Note on passport denial, at the time a favorite State Department "weapon in the anti-communist crusade."[109] On a more personal level, Reich feared he would be denied membership to the New York bar in 1952 because of his past associations. One of Reich's mentors at Yale, Thomas Emerson, had earned the nickname "Tommy the Commie"[110] for his political work and Reich remembered "many rumors that the Com-

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*Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004).

107. Charles Reich, *The Sorcerer of Bolinas Reef* (New York: Random House, 1976), 5–6.

108. *Barsky,* 347 U.S. 442, 451 (1954).

109. "What the State Department was saying came down to this: you are free to exercise your constitutional rights, but we can deny you a passport for doing so; the Constitution only protects you from criminal punishment, not other kinds of sanctions and deprivations." Charles Reich, "The New Property after 25 Years," *University of San Francisco Law Review* 24 (1990): 232; Comment, "Passport Refusal for Political Reasons: Constitutional Issues and Judicial Review," *Yale Law Journal* 61 (1952): 171–203. See also Stanley Kutler, "Government by Discretion: The Queendom of Passports," in *The American Inquisition: Justice and Injustice in the Cold War* (New York: Hill and Wang, 1982).

110. Thomas I. Emerson was among the leading civil liberties scholars of his generation. He was also active in politics. He ran for governor on the Wallace Progressive Party ticket in 1948, and during the McCarthy era he belonged to the National Committee to Abolish the House Committee on Un-American Activities and the National Lawyers Guild. For a complete list of writings by and about Emerson, see "Writings of Thomas Irwin Emerson," *Yale Law Journal* 101 (1991): 327–30.

mittee [on Character and Fitness] would reject anyone thought to harbor left-wing tendencies."[111] Meanwhile, as a Supreme Court clerk, Reich daily "read briefs and listened to arguments involving people who had been persecuted, exiled, or destroyed by their own government."[112] Ultimately neither the government nor the bar association questioned Reich's loyalty, but he lived with the knowledge that an arbitrary official action could take something precious from him. This may explain why Reich spent so "many hours and days discussing and debating" Barsky's appeal in Justice Black's chambers, even though a clear majority of the Court found the state's action unobjectionable.[113] The case would come back to Reich in the early 1960s as he considered the holding in *Flemming v. Nestor.*

In 1960, when the Supreme Court issued its decision in *Nestor,* anticommunists seemed unaware of their victory. Meanwhile, both Fedya Nestor and his wife Barbara were far removed from the proceedings. Yet *Nestor* stood out, at least to Reich, because it epitomized what was particularly dangerous about this Red Scare. Anticommunists were not simply raiding union offices or jailing alleged radicals; they were throwing the full force of the welfare state behind their efforts.[114] They had gone beyond demanding loyalty oaths for high-security government jobs to demanding such oaths for almost all publicly administered goods, from professional licenses to

111. Reich, "The New Property after 25 Years," 234. Reich would have been vulnerable to this charge: he supported Henry Wallace for President in 1948 and was a friend of prominent leftists like I. F. Stone and Leonard Boudin. According to Reich, he did not support communism "in any form," but he opposed the Cold War, the Truman loyalty program, the anticommunist oath for labor leaders in the Taft-Hartley Act, "and all manner of procorporate anti-leftism." Charles Reich, e-mail message to author, October 19, 2006.

112. Reich, *The Sorcerer of Bolinas Reef,* 6.

113. Ibid., 234; *Barsky,* 347 U.S. 442 (1954) (upholding the statute and the procedures that the New York Board of Regents used to suspend Barsky's license). Justice Black, joined by Justice Douglas, dissented. Reich credits the following statement from their dissent to his own influence: "The right to practice [medicine] is . . . a very precious part of the liberty of an individual physician or surgeon. *It may mean more than any property.* Such a right is protected from arbitrary infringement by our Constitution, which forbids any state to deprive a person of liberty or property without due process of law." Ibid., 459 (Black, J., dissenting) (emphasis added); Reich, "The New Property after 25 Years," 235.

114. Here I use "welfare state" to refer to its most "visible" components, programs like Social Security, unemployment insurance, and Aid to Families with Dependent Children. Scholars now recognize that there are important, less visible pieces of the American welfare state such as the tax code and private employer pensions. See, e.g., Jacob Hacker, *The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States* (Cambridge, Eng.: Cambridge University Press, 2002); Christopher Howard, *The Hidden Welfare State: Tax Expenditures and Social Policy in the United States* (Princeton: Princeton University Press, 1997); Michael B. Katz, *The Price of Citizenship: Redefining the American Welfare State* (New York: Henry Holt, 2001); Jennifer Klein, *For All These Rights: Business, Labor, and the Shaping of America's Public-Private Welfare State* (Princeton: Princeton University Press, 2003).

housing.[115] And now they were imposing political conditions on a mandatory retirement savings program, a program grounded firmly in the language of entitlement (and thus supposedly above politics). Yes, the spirit of McCarthyism seemed to be flagging, and *Nestor*'s facts seemed too unique to stir fear in most Americans, but the case was an egregious example of a pattern of government conduct that had no discernible limit. The American welfare state had created expectations among its constituents—more and more every year, Reich observed—yet few protections existed to prevent legislators and administrators from exploiting these expectations should some future need to enforce loyalty or conformity arise.[116] Laws in the early 1960s that subjected welfare mothers to "midnight searches" (for men in their beds and men's clothing in their closets) were one worrisome indication of the government's latent power. The holding in *Flemming v. Nestor* was another.[117]

The term "welfare state" entered the American lexicon in the late 1940s, when opponents of Truman's "Fair Deal" attempted to portray the program as a corruptor of American individualism and a communist plot. The term was an epithet to some, while to others it had positive connotations. In general, the existence of a "welfare state" in America was far from accepted.[118] By the late 1950s, however, scholars had recognized that the

115. See note 12 above.

116. "By 1964, after the loyalty investigations of the 1950s, it was all too apparent that unprotected new forms of wealth afforded a ready device for using economic retaliation as an extra-constitutional means of punishment." Charles Reich, "Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor," *Chicago-Kent Law Review* 71 (1996): 820.

117. Charles Reich, "Midnight Welfare Searches and the Social Security Act," *Yale Law Journal* 72 (1963): 1347–60. Other arbitrary exercises of official power bothered Reich, too, like the series of cases involving bar admission. One of Reich's colleagues at Yale Law School, Clyde Summers, was denied bar membership for being a conscientious objector to World War II. Another well-known legal academic, George Anastaplo, spent over five years litigating the Illinois bar's refusal to admit him after he would not answer questions about CP affiliations. Charles Reich, e-mail message to author, October 19, 2006. See *In re Clyde Wilson Summers,* 323 U.S. 705 (1944); *In re Anastaplo,* 366 U.S. 82 (1961).

118. On the dangers of the "welfare state," see Sheldon Glueck, ed., *The Welfare State and the National Welfare: A Symposium on Some of the Threatening Tendencies of Our Times* (Cambridge, Mass.: Addison-Wesley Press, 1952) (including commentaries by Bernard Baruch, Harry F. Byrd, John Foster Dulles, Dwight D. Eisenhower, Herbert Hoover, and Roscoe Pound); Jules Abels, *The Welfare State: A Mortgage on America's Future* (New York: Duell, Sloan and Pearce, 1951); Marc Moreland, "The Welfare State: Embattled Concept," *Phylon* 11 (1950): 164–70 (attempting to explain why "the mere notion of the welfare state" had become "an anathema, an abomination" to the dominant political and business interests). On the promise of a "welfare state," see, e.g., William O. Douglas, "The Human Welfare State," *University of Pennsylvania Law Review* 97 (April 1949): 597–607. For an excellent collection of magazine articles and speeches discussing the existence, nature, strengths, and

United States had a "welfare state" system of social welfare provision (or, as one law professor put it, a "welfare state standard" regarding poverty).[119] They also realized that whether good or bad, this increasingly extensive and complex system challenged traditional American values, customs, and legal concepts.[120] Reich's "The New Property" married these concerns about the nature of the welfare state with the civil liberties questions raised by McCarthyism.

"The New Property" catalogued the many ways in which "the valuables dispensed by government" were "steadily taking the place of traditional forms of wealth" and leaving Americans more dependent, often invol-

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weaknesses of a "welfare state" in America, see Herbert J. Marx, Jr., ed., *The Welfare State* (New York: The H. W. Wilson Company, 1950). For a sampling of newspaper coverage, see, e.g., "Truman's 'Welfare State,'" *New York Times,* January 9, 1949 ("Mr. Truman's other policies represent—let us face this fact squarely—the growth of the 'welfare state' in America"); Henry Steele Commager, "Appraisal of the Welfare State," *New York Times,* May 15, 1949 (explaining the term "welfare state" and its differences from socialism); "Byrnes Hits Trend to 'Welfare State,'" *New York Times,* June 19, 1949 (quoting former Secretary of State James F. Byrnes attacking Truman's new programs for "point[ing] inevitably to a welfare state"); Lucy Freeman, "Dewey Lists Gains in State Welfare," *New York Times,* November 16, 1949 (quoting New York Governor Dewey on the "rising war of words over the phrase 'welfare state'").

119. Writing in 1962, Yale law professor Calvin Woodward described "widespread acceptance of the welfare state standard," the notion that "poverty is an 'economic' phenomenon that can, must, and should be abolished" and that "the state is the sole social institution capable of dealing with the economic forces which give rise to that phenomenon." Calvin Woodward, "Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State," *Yale Law Journal* 72 (1962–1963): 288. See also Harry W. Jones, "The Rule of Law and the Welfare State," *Columbia Law Review* 58 (February 1958): 143–56 (noting that America had developed what Europeans called a "welfare state," marked by a "vast increase in the range and detail of government regulation of privately owned economic enterprise," "the direct furnishing of services by government to individual members of the national community," and "increasing government ownership and operation of industries and businesses"); Jacobus tenBroek and Richard B. Wilson, "Public Assistance and Social Insurance—A Normative Evaluation," *U.C.L.A. Law Review* 1 (April 1954): 238 ("[t]aking it as settled that public welfare on the present scale of magnitude or a greater one is a fixed and permanent part of our national policy . . . ").

120. See, e.g., tenBroek and Wilson, "Public Assistance and Social Insurance," 239 (asking how the welfare state "fit[s] into our democratic system of government," as well as whether it is "in harmony with American political and constitutional ideals," "consistent with sound economic principles," and "compatible with existing knowledge of the nature of man"); Jones, "The Rule of Law and the Welfare State," 143 (asking "How, if at all, can the values associated with the rule of law be achieved in today's welfare state?"); Alanson W. Willcox, "Patterns of Social Legislation: Reflections on the Welfare State," *Journal of Public Law* 8 (1957): 8 (balancing the economic value of the welfare state against charges that it causes "a net loss of freedom, and damage to the American character"); Elmer F. Wollenberg, "Vested Rights in Social-Security Benefits," *Oregon Law Review* 37 (1957–1958): 300 (worrying that judges or legislators would "transplant" inappropriate property- and contract-based legal concepts to the government social insurance program).

untarily, on the government. Income and benefits, jobs and occupational licenses, public resources and services—our wealth is increasingly in the form of these intangible goods, Reich told his readers, yet these goods are ours only by the grace of the government.[121] And the government, according to Reich, had misused its power in the past. He needed only gesture to the case law of the 1950s: *Barsky v. Board of Regents,*[122] *Homer v. Richmond,*[123] *Borrow v. Federal Communications Commission*[124]—and, of course, *Nestor,* the decision from the end of the McCarthy era that Reich considered "the most important of all judicial decisions concerning government largess."[125] "The implications of *Flemming v. Nestor* are profound," wrote Reich:

> No form of government largess is more personal or individual than an old age pension. No form is more clearly earned by the recipient, who, together with his employer, contributes to the Social Security fund during the years of his employment. No form is more obviously a compulsory substitute for private property; the tax on wage earner and employer might readily have gone to higher pay and higher private savings instead. No form is more relied on, and more often thought of as property. No form is more vital to the independence and dignity of the individual.

The fact that the government could take this "property" away suggested a feudal order, Reich said, in which "[w]ealth is not 'owned,' or 'vested' in the holders" but rather "held conditionally" and subject to "the fulfillment of obligations imposed by the state."[126] This "new feudalism" should disturb all Americans, he argued, because it eroded the essence of American national character: individualism and independence.[127] The Social Security pension system, for example, ostensibly "assur[ed] old people a stable,

121. Reich, "The New Property," 768. See also Jones, "The Rule of Law and the Welfare State,"155 ("Now the welfare state brings its staggering volume of additional grist to the mills of justice: new rights in vast number and infinitely more widely dispersed among the citizenship than the old rights ever were. In the scale of legal valuation, these new and more widely asserted rights are . . . certainly as dear to their possessors as contract and property rights are to those who possess them").

122. 347 U.S. 442 (1954) (upholding New York's suspension of a surgeon's medical license after he was convicted of contempt of Congress).

123. 292 F.2d 719 (D.C. Cir. 1961) (upholding the Coast Guard's denial of an operator's license to an applicant who refused to answer questions about membership in subversive organizations).

124. 285 F.2d 666 (D.C. Cir. 1960) (holding that the Federal Communications Commission could legally refuse to renew a radio operator's license for refusing to answer questions about CP membership).

125. Reich, "The New Property," 768.

126. Ibid., 769.

127. "If the day comes when most private ownership is supplanted by government largess, how then will governmental power over individuals be contained? What will dependence do to the American character? . . . Without the security of the person which individual wealth provides and which largess fails to provide, what, indeed, will we become?" Ibid., 770–71.

dignified, and independent basis of retirement," consonant with American social values. Yet in *Nestor* "Congress and the Supreme Court jeopardized all these values to serve a public policy both trivial and vindictive—the punishment of a few persons for Communist Party membership now long past."[128] A "feudal philosophy of largess and tenure may well be characteristic of collective societies," like Nazi Germany or Soviet Russia, but it was not the American way.[129]

Reich proposed a deceptively simple solution. The institution of private property had long protected the individual against both the power of the state and the "ruthless pressures" of collective society, Reich argued, combining a Lockean understanding of property with his own dash of anticommunism.[130] In light of changing circumstances Americans needed to "create a new property" to perform this function. They needed a definition of property that encompassed diverse forms of government largess and endowed them with the procedural protections surrounding traditional forms of property, like hearings before fair tribunals, judicial review, and the opportunity to cross-examine evidence. As with traditional forms of property, "[t]he presumption should be that the professional man will keep his license, and the welfare recipient his pension," Reich explained. And "[i]f revocation is necessary, not by reason of the fault of the individual holder, but by reason of overriding demands of public policy, perhaps payment of just compensation would be appropriate," just as it would be if the government took a man's land.[131] This would ensure that all citizens had the necessary modicum of property to be independent, upright citizens, capable of participating in the polity.[132] In essence, it was a solution to

128. Ibid., 775.

129. The invocation of communism and fascism as two poles, equally distant from freedom and American values, illustrates how Reich deployed classic anticommunist liberal ideas and the anti-extremist language of the early sixties in the service of greater protections for the clients of the welfare state. On the shifting ideology of anticommunism, see Richard Gid Powers, *Not without Honor: The History of American Anticommunism* (New York: The Free Press, 1995).

130. Unlike Locke, however, Reich believed that "Property is not a natural right but a deliberate construction by society"; all property comes from the state. Reich, "The New Property," 771.

131. Ibid., 785–87.

132. "The New Property" articulates a variant of the idea that "[p]roperty protects all other rights, because property enables citizens to be independent and hence capable of self-government." It invokes an older republican tradition in which property, especially agricultural property, gives the citizen a "safe haven" that "enables him to form independent judgments and to debate and defend his views with courage and vigor in the political forum." Since the republican property owner is "dependent on no one," he is "fit to exercise the franchise and generally take part in the polity." Carol Rose, "Property as 'The Guardian of Every Other Right,'" in *Property Law on the Threshold of the 21st Century,* ed. G. E. van Maanen and A. van der Walt (Antwerp: MAKLU Uitgevers Antwerpen—Apeldoorn, 1996), 487–93, 488.

what Justice Douglas in 1949 called "the foremost problem of society": "to cultivate and preserve incentive and independence for the individual and security for the masses of the people."[133] It was also a brilliant sleight of hand. As Gregory Alexander explains, Reich's theory not only justified legal recognition of the individual property interest in entitlements like Nestor's Social Security benefits, which "are easily squared with the classical liberal theory of the legitimate means of acquiring property rights," but also the property interest in "the true welfare benefit."[134]

Reich's argument proved to be one of the most influential of the late twentieth century. On the twenty-fifth anniversary of "The New Property," the editors of the *University of San Francisco Law Review* found hundreds of journal pieces and at least fifty important cases that relied on "The New Property."[135] The most consequential was *Goldberg v. Kelly* (1970), the case in which, to use the words of one critic, Justice Brennan attempted to transform Reich's "academic and philosophical insights about the nature of property into the imperative language of constitutional law."[136] In *Goldberg,* the Supreme Court not only mandated an evidentiary hearing before the termination of welfare benefits (a hefty procedural protection), Brennan suggested that welfare entitlements may now be "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," Brennan explained, but this wealth needs property's traditional protections.[137]

Ironically, Justice Black vehemently dissented, signaling that his protégé had carried the notion of property too far, that the leftist deportee Fedya Nestor really was more deserving than the welfare recipient John Kelly. "It somewhat strains credulity," Black wrote, "to say that the government's promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment." He accused the majority of interpreting the Due Process Clause to "forbid [] any conduct that a majority of the Court believes 'unfair,' 'indecent,' or 'shocking to their consciences,'" an interpretation that could easily allow the clause to "swallow up all other parts of the Constitution." He also predicted that the effect of the decision would be just the opposite of what Reich intended: "that the government

133. Douglas, "The Human Welfare State," 597.

134. Gregory S. Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776–1970* (Chicago: University of Chicago Press, 1997), 371.

135. Reich, "The New Property after 25 Years," app., 242–71. In 1991, the *Yale Law Journal* found "The New Property" to be its most cited article to date. Fred R. Shapiro, "The Most-Cited Articles from *The Yale Law Journal*," *Yale Law Journal* 100 (1994): 1449–1515.

136. Epstein, "No New Property," 748.

137. *Kelly,* 397 U.S. 254 (1969).

will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility"; people in desperate need would be disserved.[138]

Black's gauge of bureaucratic behavior proved prescient, but in the short term *Goldberg* was a major victory for the diffuse "poor people's movement" of public housing tenants, welfare mothers, legal services lawyers, and civil rights activists. It raised their hopes of constitutionalizing a more just, humane social order and gave them a weapon to use in their ground-level battles for welfare rights.[139] *Goldberg* also appeared to catalyze a "due process explosion" in which the Court "carried the hearing requirement from one new area of government action to another."[140] The decision produced "considerable progeny in the Supreme Court and a much larger brood in the lower courts": under its framework, the Court mandated that hearings precede the suspension of driver's licenses, the repossession of chattels, the revocation of parole or probation, and even a student's ten-day suspension from school.[141] By 1975, Judge Friendly famously wondered "whether government can do anything to a citizen without affording him 'some kind of hearing.'"[142]

The answer, it turned out, was "yes." By the following year, the Supreme Court held in *Mathews v. Eldridge* that the federal government did not have to provide an evidentiary hearing before terminating a person's Social Security disability benefits. This decision also inaugurated a "balancing test" for due process cases, in which the Court weighed the so-called "private interest" against "the Government's interest," including the fiscal and administrative burdens that greater procedural protections would entail.[143] Although this approach continued to acknowledge the valuable interests that the welfare state created, it took the magic out of the word "property." Whether a government benefit was "property" or not became curiously irrelevant.

In the end, then, "The New Property" did not lead to a revolution in constitutional law, nor did it result in greater security for most clients of the nation's social welfare programs. Reich himself eventually acknowl-

138. Ibid., 271–79 (Black, J., dissenting).

139. Davis, *Brutal Need*; Annelise Orleck, *Storming Caesar's Palace: How Black Mothers Fought Their Own War on Poverty* (Boston: Beacon Press, 2005), 133–34.

140. Henry J. Friendly, "Some Kind of Hearing," *University of Pennsylvania Law Review* (1975): 1268.

141. Ibid., 1273–75 (citing *Bell v. Burson,* 402 U.S. 535 [1971]); *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Morrissey v. Brewer,* 408 U.S. 471 (1972); *Gagnon v. Scarpelli,* 411 U.S. 778 (1973); *Perry v. Sinderman,* 411 U.S. 593 (1972); *Board of Regents v. Roth,* 408 U.S. 564 (1974); *Goss v. Lopez,* 419 U.S. 565 (1975).

142. *Goss v. Lopez,* 419 U.S. 565 (1975), 1275.

143. 424 U.S. 319, 334–34.

edged that "the moderate, due process, cost-benefit approach" of "The New Property" "must surely be deemed a failure" because "it does not work."[144] Yet in at least one way it succeeded beyond Reich's expectations: drawing on cases like *Nestor,* "The New Property" called attention to the tensions inherent in a state that guaranteed both social security and domestic security; it vividly illustrated the connections between the nation's most progressive impulses and its darkest. These are observations that haunted other intellectuals of the post-war period and that haunt us still today.

## Conclusion

Fedya Nestor's stepdaughter, Dorothy Healey, was the last person in her family to see Fedya alive. In June 1961 Dorothy went with six other American communist leaders to Eastern Europe, where she found Fedya "a sadly disillusioned man." "He had set off with such eagerness," she remembered, but life in Bulgaria was not what he expected.[145] A high school sweetheart put him up for a time, but eventually threw him out. The Bulgarian government had no use for his perpetual motion machine or his political ideas. According to Barbara, Fedya wrote to her begging to return to the U.S., but she could do nothing for him.[146] His life seems to have ended in loneliness and disappointment.

Fedya Nestor's encounter with the legal system, at least, demands remembering. The case not only set a vital precedent for all contributors to the Social Security program, it captured a complex moment in American history. The nation was at once grappling with political and ideological threats, adjusting to the changes wrought by World War II, and puzzling out the meaning of its welfare state, all while attempting to preserve the integrity of sacred concepts like "liberty" and "property." Nestor's case also anticipates some of the major disputes and concerns of the 1960s. As the war on domestic communism transitioned to a war on poverty and a war in Vietnam, *Nestor's* questions about the nature of government largess, the scope of government responsibility, and the exercise of government power became even more pressing.

Most important, *Flemming v. Nestor* should prompt scholars to think

144. Charles Reich, "Beyond the New Property: An Ecological View of Due Process," *Brooklyn Law Review* 56 (Fall 1990): 733. Reich claims that, "judged by the experience of twenty years," the best way to realize his goal from "The New Property" would be to "give economic security the status of a constitutional right which must be honored ahead of the other goals of society." Ibid.

145. Healey and Isserman, *Dorothy Healey Remembers,* 182.

146. Nestor, interview, December 27, 1974, interview 06d segment 3 segkey: a1606.

about the history of social welfare policy in new ways and to reevaluate periods that appear quiescent.[147] The case and its trajectory highlight the crooked path by which the American welfare state has developed (a path that traveled through the courts), the toll the welfare state has taken on competing interests like civil liberties, and the unusual combination of "insiders" and "outsiders," the powerful and the powerless, that shaped its story. Often historians of the American welfare state turn to legislative debates, cabinet discussions, and boardroom meetings to understand the unique structure of American social welfare provision, overlooking the role of the courts and their diverse array of litigants. But as Susan Sterett has written in her work on public pension cases, the accessibility of the American court system ensured that "it was not only social workers and social insurance advocates and their legislative opponents who shaped policy," but also the range of Americans that took their complaints to court—people like railroad executives, "cranky taxpayers," and county commissioners. In this way, the law functioned "not only as a structure but as a site of contest": "[l]itigation in specific cases contested the meanings that common-law categories contained for public payments."[148] Cases like *Flemming v. Nestor* should urge historians to extend Sterett's analysis beyond public pensions to public support of all kinds, beyond the New Deal era to subsequent decades of welfare state development and retrenchment, and beyond "cranky taxpayers" to welfare mothers, disbarred lawyers, "subversive" government employees, and evicted public housing tenants. Through their seemingly personal disputes—which often occurred right under the noses of crucial policymakers, administrators, and activists—litigants negotiated the boundaries, meaning, and power of the American welfare state.

147. Many scholars characterize the years between the New Deal and the Great Society as a period of "benign neglect" in the history of welfare state development. It's time to reconsider that evaluation.

148. Susan Sterett, *Public Pensions: Gender and Civic Service in the States, 1850–1937* (Ithaca: Cornell University Press, 2003), 10.