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Book Review: Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy. by Jennifer Nedelsky.

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the Constitution and the Judiciary Act of 1789. Marshall was simply "there," as Holmes put it, when those cases which turned on the meaning of the Constitution presented themselves. When Marshall said, as he frequently did in his opinions, that he had no choice but to interpret the Constitution, perhaps we ought to pay attention. In any case, it was not Marshall alone who did the interpreting, since by his own admission, the deliberations of the Court were collective. Reasoning exclusively from appellate decisions, without benefit of private correspondence of any sort (even John Marshall's), is sure to miss the point.

Placing Marshall and the Court in the larger context of historical change, which is the gravamen of my argument, permits us to see that judicial review, as it unfolds from *Marbury* to *McCulloch v. Maryland* and beyond, was not born as a Platonic idea in the mind of the Chief Justice; nor did the transformation of judicial review during his tenure take place unbeknownst to contemporaries. For all of his prescient insight, he was, like other statesmen of the founding period, forced to learn on the job. His view of judicial review changed in response to a wide range of historical changes of a fundamental nature: the rise of a national market, the appearance of sectional nationalism after the War of 1812, and particularly the emergence of a states' rights constitutionalism that challenged Marshall and the Court at every turn. The powerful anti-court movement of the 1820s—the granddaddy of all subsequent such movements—makes it clear that the changes in the status of the Court which were taking place under Marshall's astute leadership were well known.

PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY. By Jennifer Nedelsky.[1] Chicago: University of Chicago Press. 1990. Pp. xiii, 343. $29.95.

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Jennifer Nedelsky's long-awaited discussion of Federalist theories of property is a major contribution to the literature on the founders' political theory and its relation to contemporary constitutional

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law. Taking a somewhat skeptical stance toward the so-called republican revival, Nedelsky demonstrates that Federalists no less than Anti-Federalists understood the role of civic virtue in a constitutional order predicated on private property. In terms suggestive of Charles Lindblom on corporations and democracy, though, she concludes that Madison ultimately failed to reconcile the political divisions inevitable in a private property regime with the demands of a democratic constitutional regime.

Nedelsky's analysis is neo-Beardian. It is Beardian in insisting on private property's primacy at the founding. Madison's statement in *Federalist 10*, that "the protection of different and unequal faculties of acquiring property" is "the first object of government," plays a central part in Nedelsky's analysis. In a Beardian vein, Nedelsky argues that the constitutional structure was designed to guarantee that a property-less majority could not tyrannize the propertied minority. Nedelsky's analysis is neo-Beardian, though, because unlike Beard she argues that the founders' concern for democratic tyranny arose from their commitment to political theory, not from their self-interest narrowly defined.

Nedelsky begins by offering a relatively standard account of Madison's political thought. Committed both to the republican principle of majority rule and to a private property regime that inevitably produced inequality and the passion for redistribution, Madison designed the Constitution's structures to hamper the resentful, unpropertied majority's efforts to exploit the propertied minority. Nedelsky argues that Madison came to understand that property regimes were themselves the result of political choices, and that structural arrangements could not provide adequate support for private property. Judicial review, for Nedelsky, completes the Madisonian framework. The courts, outside politics, define the boundaries of the private property regime.

The republican revival of recent years has stressed Anti-Federalist challenges to Madison's analysis. One of Nedelsky's most important contributions is the demonstration that Federalists too saw difficulties in Madison's approach. A chapter on Gouverneur Morris presents a challenge to Madison that was both democratic and aristocratic. Like Madison, Morris believed that private property was central to the regime being created. Unlike Madison, Morris believed that, just as the unpropertied could threaten the liberties of the propertied, so the latter could threaten the liberties of the unpropertied. In particular, they could influence the political process, using their wealth to assure that even the unpropertied would vote

for representatives primarily responsive to the interests of the propertied.

Morris proposed a more extreme alternative than Madison's system of structural limits on government. For Madison, the contention among factions in an extended republic protected private property. Morris argued that the protection of the propertied and unpropertied from each other had to be embedded in the constitutional structure as well. He suggested that the Senate be the branch where the propertied would be represented, the House the branch for the unpropertied. In that way, Morris argued, each class would be able to protect itself against the other's incursions.

Morris's plan was of course rejected. But, according to Nedelsky, the Madisonian constitutional framework did not adequately deal with Morris's concerns. Here Nedelsky joins scholars like Joyce Appleby, who are skeptical about the importance of the civic republican tradition to the founding generation. More precisely, Appleby argues that the founders were committed to a private property regime whose dynamic was unappreciated by those influenced by the civic republican tradition. With the possible exception of a segment of the Southern slave-holding class, the founders rejected an economic system in which the landed gentry played a central part, in favor of a commercial republic in which private property had transformative effects. Madison understood that private property in a commercial republic would always lead to actual inequality because of inequality in the capacity to acquire property. Yet, unlike Morris, he did not think it important to structure the government to deal with the political consequences of actual inequality.

Indeed, Nedelsky argues, Madison rejected another challenge from within the Federalist camp that emphasized those political consequences. A chapter on James Wilson presents the more completely democratic Federalist alternative to Madison. Madison's system, Nedelsky argues, would induce the unpropertied to abstain from political action, because politics could not give them what they most wanted. To Wilson, that undermined the democratic foundations of the republic. Nedelsky suggests that Wilson gave protection of property somewhat less priority than Madison. Her primary argument, though, is that Wilson agreed with Madison that laws confiscating private property were unjust, but believed that the evil could be averted better by encouraging rather than discouraging democratic participation. By taking active part in government, Wilson argued, citizens—including the unpropertied—would become more enlightened and would understand that confiscation was both unjust and against their long-term self-interest.

Nedelsky agrees with both Morris and Wilson in their critiques of Madison. The Madisonian framework, she argues, cannot restrain economic power's influence on politics and fails to encourage active citizen participation in politics. At the same time, though, she forthrightly rejects Morris's solution and somewhat more ambivalently rejects Wilson's. Morris wanted to preserve the founders' democratic commitments by squarely allocating democratic interests to the House. But Nedelsky argues Morris gave no reason to think that such a regime could effectively govern. On the other side, Wilson failed to appreciate the inevitable divisions between the propertied and unpropertied, optimistically assuming that these divisions could be overcome by a sense of common purpose and, perhaps, long-term self-interest on both sides. Nedelsky does praise Wilson for his greater understanding of the importance of democratic participation as an expression of the citizenry's social capacities.

Yet, if neither Morris nor Wilson provided an adequate alternative to the Madisonian framework, still that framework itself was problematic. Madison understood, in some unformed way, that private property itself resulted from political choices, but his political theory rested on the unexamined proposition that property—which he generally took as a primitive, undefined term—was pre-political. The courts, and judicial review in particular, might protect this pre-political property, but only if they themselves were outside politics. Nedelsky relies on George Haskins and Herbert Johnson's analysis of the Marshall Court to show that Marshall's lasting accomplishment was the creation of a theory of adjudication that sharply separated law and politics, and thereby completed the Madisonian framework.

For a century and a half, the Supreme Court, as Nedelsky argues, upheld many incursions on private property under the heading of the police power. These regulations expressed the democratic side of the Madisonian constitutional order, and, as Federalist theorists feared, they did indeed undermine the property foundations of the regime. Starting with Oliver Wendell Holmes in the late nineteenth century, legal theorists began to notice that it was exceedingly difficult to reconcile what the Court had approved with the idea that the definition of property was somehow pre-political. When the Court itself noticed the difficulty, the *Lochner* era began. The political problems the Court created for itself during that period joined the jurisprudential debates to destroy forever, among legal theorists, the coherence of the Madisonian framework, at least insofar as it aimed at protecting private property.

Bringing her analysis to contemporary debates, Nedelsky asks whether something can still be made of the private property foundations of the Madisonian system. In an acute analysis, she treats property as a central symbol of the permanent tension between individual liberty and power, on the one side, and collective liberty and security, on the other. Yet, she argues, the symbol necessarily distorts the reality because, at least in the Madisonian vision, inequality in property holdings is inherent in the idea of private property itself. The distortion appears, Nedelsky says, in recent Supreme Court decisions extending the reach of the contracts and takings clauses and limiting the ability of majorities to regulate campaign finance.

Further, Nedelsky argues, we have begun to experience a gap between the rhetoric and the reality of the sanctity of property. Takings jurisprudence may have been revitalized by *Nollan v. California Coastal Commission*,[3] but the state's regulatory reach is so extensive that private property has lost much of its power to symbolize a domain into which the majority may not intrude. And, as the "bundle of sticks" theory of property begins to penetrate public awareness, the symbolism weakens even more.

In one of her most interesting excursions, Nedelsky examines recent efforts to mobilize the rhetoric of property on behalf of the poor. Her targets are Charles Reich's idea of the "new property" in welfare state entitlements, and some versions of the republican revival. Nedelsky argues, persuasively in my view, that this strategy, while understandable, was unlikely to succeed. As she puts it, the positivism of *Board of Regents v. Roth*[4] flowed almost inevitably from the idea of the "new property" itself. The rhetoric of property could not be disentangled, she suggests, from the idea of inequality with which it was associated in the Madisonian tradition. When the rhetoric of property was turned to redistributive ends, it generated a doctrinal limit—*Roth*'s positivism—to capture the idea of inequality.

Further, Nedelsky argues, even if proponents of "new property" ideas had succeeded in separating the idea of property from the idea of inequality, as they surely wished, the results would have been disappointing. For, precisely because property was associated with inequality, the rhetoric of property would carry less force once it was separated from inequality: Its mythic quality, as Nedelsky puts it, rests importantly on its association with inequality.

In her conclusion Nedelsky briefly sketches an alternative

3. 483 U.S. 825 (1987).
4. 408 U.S. 564 (1972).

political theory of a constitution. Throughout the book she argues that private property serves as an expression of the tension between individual and collective self-rule. Private property provides a domain within which each of us can choose how to live while simultaneously allowing us to operate independently in the public sphere (if we want to). Yet, because private property is not pre-political, its precise contours depend on collective decisions about how extensive that domain ought to be. Nedelsky suggests, in a sketchy discussion, that we might "reshape constitutionalism" by focusing directly on human autonomy, making interdependence "the central fact of political life" so that "patterns of relationship . . . develop and sustain both an enriching collective life and the scope for genuine individual autonomy." She does not pretend that this sketch is a substitute for the Madisonian private property regime. She does insist, and I think properly, that political theorists need not accept private property as the sole expression of the tension between individual and collective self-rule.

Nedelsky's book is a provocative contribution to political and constitutional theory. Her readings of Madison, Morris, and Wilson are persuasive. Even if they do not sweep the field clear, anyone who addresses the property foundations of the constitutional order or takes part in the discussion of the republican revival will have to address Nedelsky's arguments.

DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING. By Samuel R. Gross[1] and Robert Mauro.[2] Boston: Northeastern University Press. 1989. Pp. xvi, 268. $32.50.

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The problems of arbitrariness and discrimination in the imposition of the death penalty have been the focus of a large body of litigation. Not unrelated to this constitutional contest, there has emerged a substantial body of published research on racial discrimination in the use of capital punishment. *Death and Discrimination:*

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