

# Regulatory Property and the Jurisprudence of Quasi-Public Trust

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## Abstract

This article examines the changing meaning of property within the modern regulatory state. Government increasingly regulates in order to promote efficient competition within various fields of newly privatised industry. In many instances this intervention leaves the operator — the nominal ‘owner’ of a privatised resource or utility — with only a residue of the rights conventionally associated with ownership. In particular, requirements of inter-operability and the compulsory unbundling of network facilities have the effect of exposing the operator’s assets to compulsory hire by commercial competitors at non-market rates of revenue return. Where now does the ‘reality of proprietorship’ reside? Against this background the present article explores the tension between access and exclusion that lies at the heart of contemporary conceptualisations about property. It argues that state intervention has silently generated a novel species of property — a category of ‘regulatory property’ — which stands the traditional paradigm of private property on its head. An overriding control over specific kinds of vital resource or essential facility is confirmed as belonging to the public or citizenry, who, by force of consumer choice, can determine whether, how and by whom a resource may be exploited. The article goes on to demonstrate that this diffusion of entitlement among citizen-consumers has clear and direct antecedents in an older code of marketplace morality — an explicit common law doctrine of ‘quasi-public trust’ — that long ago emphasised the correlation of commercial privilege with social obligation. In the present context the engrafting of some form of fiduciary responsibility on major aggregations of economic power has not only redefined our understanding of the phenomenon of property, but also reinforced important perceptions of individual and corporate citizenship. This development comprises a significant contribution to the modern democratisation of property.

## I Introduction

Among the distinguished individuals who have bridged the traditions of legal scholarship alive in both Singapore and Sydney, one name is fairly prominent — that of the late Professor Alice Erh-Soon Tay. It is now some three decades since Alice Tay referred, with obvious distaste, to a mutation in our conceptualisations about property which, to her mind, was beginning to threaten the conventional adjudicative systems of the law. This evolution of the property paradigm, she said in an uneasy phrase, embodied ‘a bureaucratic-administrative, regulatory and even confiscatory resources-allocation concern, in which the state stands above property owners, as the representative of a general “socio-political” interest’.<sup>1</sup> She pointed to a number of regulatory fields where law is apt to morph into state-directed administration. For Tay and her collaborator Eugene Kamenka, the ‘bureaucratic-administrative’ model was a style of legal and social organisation most strongly replicated within the old Soviet Union. Law became ‘a form of social control, a way of achieving social effects rather than proclaiming a morality’.<sup>2</sup> The ‘bureaucratic-administrative’ scheme of things was unashamedly instrumental in its orientation. It was deliberately aimed at the efficient realisation of socially determined objectives through various regulatory regimes which simply *acted upon* citizens rather than engaging their sense of dignity, responsibility and individuality.<sup>3</sup>

Alice Tay’s antagonism towards the bureaucratic-administrative model of law overlapped with her resistance to another modish theme of the 1960s and 1970s. Various writers had begun to reiterate the ancient idea that the concept of property can accommodate notions of access to, as well as exclusion from, socially valued resources. Thus, for the Canadian political scientist Crawford

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<sup>1</sup> ‘Law, the citizen and the state’ in Eugene Kamenka, Robert Brown and Alice Erh-Soon Tay (eds), *Law and Society: The Crisis in Legal Ideals* (Edward Arnold, 1978) 13.

<sup>2</sup> “‘Transforming’ the law, “steering” society’ in Eugene Kamenka and Alice Erh-Soon Tay (eds), *Law and Social Control* (Edward Arnold, 1980) 115.

<sup>3</sup> ‘Social traditions, legal traditions’ in Kamenka and Tay (eds), above n 2, 19–20.

Macpherson, the idea of property was constantly being 'broadened ... to include ... a right to a kind of society or set of power relations which will enable the individual to live a fully human life'.<sup>4</sup> An access-related dimension within the proprietary paradigm lent itself easily to advocacy of the 'new property' supposedly inherent in claims to participate, under conditions of dignity and security, in the novel range of rights, advantages and opportunities offered by the post-war welfare state.<sup>5</sup> Indeed, the emerging interaction or tension between the inclusory and exclusory functions of property seemed (and still seems) to epitomise one of the most profound problems of modern social philosophy. For Tay and Kamenka, however, the intellectual shift at the core of the property notion marked a 'decline in respect for private property' and was symbolised by 'the demand for *access* as independent of ownership and as something that ought to be maintainable against it'.<sup>6</sup>

Alice Tay's identification of relevant drifts in property jurisprudence has been largely confirmed by the developments of the last 30 years,<sup>7</sup> but I want to suggest that the transformative movement that Tay deplored may ultimately have generated more beneficial social and economic dividends than she anticipated. Bureaucratic-administrative regimes of legal regulation have frequently conduced, not to the subjugation of the individual by the state, but to the empowerment of citizens in their dealings with the corporate monsters created by privatisation and the digital revolution. Equally, these same processes have ushered in a new world in which, like it or not, 'ownership is steadily being replaced by access'.<sup>8</sup> Recent years have witnessed a significant trend towards the 'democratisation of property', the product of which is not the classic Marxian reduction of economically pivotal goods to collective ownership, but rather the provision of various rights of lease or easement over desired facilities and services. Indeed, some claim that we have now entered an era in which the ideology of access has become 'a potent conceptual tool for rethinking our world view as well as our economic view'. On this basis, access has emerged as 'the single most powerful metaphor of the coming age'.<sup>9</sup> Markets 'give way to networks, sellers and buyers are replaced by suppliers and users, and virtually everything is accessed ... Ownership of physical capital ... becomes increasingly marginal to the economic process'.<sup>10</sup>

## II The *Telstra* case of 2007/2008

Just how far the jurisprudence of property has moved on since the 1970s can be measured by examining a problem which has troubled the modern communications industry in many jurisdictions across the world. Although the problem is thoroughly contemporary, it turns out to have ancient origins. Indeed the major thrust of the present article is the suggestion that the solution to this problem is largely to be found in the legal and political ideology underpinning those 'gateway' facilities which in bygone centuries controlled access to the marketplace.<sup>11</sup> This much older concern with the 'gateway of commerce'<sup>12</sup> was preoccupied with the question of entry barriers to travel, transportation, and other channels of movement and communication.

In 21<sup>st</sup> century Australia the problem is inevitably associated with the name of Telstra. To cut a long story short, Australia's nascent public switched telephone network (PSTN) was vested in the Commonwealth at Federation, whereupon at an historic cost of some \$4 billion the Postmaster-General undertook the exclusive task of erecting and maintaining telegraph lines and organising the transmission of telegraphic and telephonic communications. In 1991 federal legislation was enacted in order to create 'a regulatory environment for the supply of telecommunications services which

<sup>4</sup> CB Macpherson, 'Capitalism and the Changing Concept of Property' in Eugene Kamenka and RS Neale (eds), *Feudalism, Capitalism and Beyond* (Australian National University Press, 1975) 120.

<sup>5</sup> See Charles A Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733.

<sup>6</sup> 'Beyond Bourgeois Individualism: the Contemporary Crisis in Law and Legal Ideology' in Kamenka and Neale (eds), above n 4, 133.

<sup>7</sup> See generally Brendan Edgeworth, *Law, Modernity, Postmodernity: Legal Change in the Contracting State* (Ashgate, 2003).

<sup>8</sup> Jeremy Rifkin, *The Age of Access: How the Shift from Ownership to Access is Transforming Capitalism* (Penguin Books, 2000) 4. See also Eduardo M Peñalver, 'Property as Entrance' (2005) 91 *Virginia Law Review* 1889.

<sup>9</sup> Jeremy Rifkin, above n 8, 15. Thus, for example, the pre-eminent object of popular aspiration now comprises electronic connectivity to various kinds of commodified leisure experience.

<sup>10</sup> Ibid 5–6.

<sup>11</sup> For a reference to the concept of property as a 'gateway', see Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, 304–5.

<sup>12</sup> See *Munn v Illinois*, 94 US (4 Otto) 113, 132 (Waite CJ) (1877).

promotes competition and fair and efficient market conduct'.<sup>13</sup> Shortly thereafter, in 1992, the assets of the PSTN were vested in Telstra, then a Commonwealth-owned corporation, with Telstra undertaking responsibility for repayment of the balance of the \$4 billion debt owed to the Commonwealth. Between 1997 and 2006, as is well known, Telstra's shares were sold off to members of the public, but the physical infrastructure of the PSTN remained within the ownership of Telstra. This infrastructure includes, critically, the 'last mile' connection, that is the copper or aluminium wiring (or 'local loop') that runs between the premises of an end-user (that is, a telephone customer) and one or other of Telstra's local exchanges. In effect, the 'last mile' connection or 'local loop' constitutes a classic bottleneck facility, constricting physical access to the market of customers, while remaining prohibitively expensive and politically impossible for Telstra's competitors to duplicate.

The telecommunications legislation of 1991 had, however, established a framework for requiring Telstra to open up its newly acquired network to access and transmission by competing carriers. This pro-competition objective was ensured by promising all licensed telecommunications carriers, on terms that are mutually fair and consumer-friendly, the right to interconnect their own facilities to networks of other carriers and to obtain access to the services supplied by other carriers.<sup>14</sup> With effect from 1997, Telstra became compellable (ultimately at the instance of the end-user/retail customer) to make parts of its infrastructure network available to competitor carriers for a fee to be determined, in the last resort, by the Australian Competition and Consumer Commission.<sup>15</sup> Thus, if an existing Telstra customer now wishes to receive telephone services from a rival carrier, Telstra, as the incumbent carrier, can be completely excluded from advantageous use of its own 'last-mile' wiring for the duration of the end-user's election not to receive service from Telstra. The competitor gains mandatory and exclusive access to the 'unbundled' elements of the incumbent's network and the incumbent remains obligated to maintain and repair the relevant local loop. During this compulsory provision of carriage services for the competitor, the incumbent is, for all practical purposes, disconnected from its own network.

It will, of course, be noted that the regulatory scheme described here affords a perfect demonstration of the two proprietary drifts that Alice Tay found most disquieting. The assets of Telstra have been subjected to a 'bureaucratic-administrative' system of resource allocation in which the state 'stands above property owners' as the representative of a general 'socio-political' interest. Furthermore, the central organising principle is, quite explicitly, a concept of access as something independent of ownership and directly opposable to it.

### III The *Telstra* ruling

The compulsory unbundling of network facilities is now commonplace in many jurisdictions.<sup>16</sup> The mandatory concession of network access also affects areas beyond the telecommunications field, frequently extending, for example, to ensure inter-operability and enhanced competition within the transportation, water supply and energy industries. Yet the process of unbundling bears characteristics of expropriation or civil conscription which render most of these kinds of legislative scheme potentially vulnerable to challenge.<sup>17</sup> In 2007, not surprisingly, the Australian regime of mandatory network access in the telecommunications industry led to a constitutional challenge in *Telstra Corporation Ltd v Commonwealth*.<sup>18</sup>

In earlier decisions the High Court of Australia had repeatedly described the common law perception of 'property' as comprising 'rights of control over access to, and exploitation of, [a] place or

<sup>13</sup> *Telecommunications Act 1991* (Cth) s 3(i).

<sup>14</sup> *Telecommunications Act 1991* (Cth) s 136(2)(b).

<sup>15</sup> *Telecommunications Act 1997* (Cth) s 3; *Trade Practices Act 1974* (Cth) pt XIC. See *Trade Practices Act 1974* (Cth) s 152AR ('standard access obligations').

<sup>16</sup> In the United States the task was achieved by *Telecommunications Act 1996* (Pub L No 104-104, 110 Stat 56 (47 USC)), §§251–252.

<sup>17</sup> Similar questions can be tackled in terms of antitrust law (see *Otter Tail Power Co v United States*, 410 US 366 (1973); *Verizon Communications Inc v Federal Communications Commission*, 535 US 467 (2002); *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP*, 540 US 398 (2004)) and unfair trade practices (see *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90). See also Phillip Areeda, 'Essential Facilities: An Epithet in Need of Limiting Principles' (1989–90) 58 *Antitrust Law Journal* 841.

<sup>18</sup> (2008) 234 CLR 210. In Singapore, in the absence of any constitutional protection of property, no such challenge can of course be raised.

thing'.<sup>19</sup> On the facts present in the *Telstra* case it seemed at least plausible to suggest that Telstra had been deprived of precisely such control over access to, and use of, its own assets. Telstra had become irresistibly subject to exclusory rights of access exercisable on demand by commercial rivals. Telstra therefore asserted that, in violation of s 51(xxxi) of the *Commonwealth Constitution*, the relevant regulatory legislation sought to effect an 'acquisition' of 'property' otherwise than on just terms. (It was a necessary link in Telstra's reasoning that the default determination of access rates by a bureaucratic-administrative agency was apt to generate a revenue return for Telstra far inferior to that which would have resulted from arm's length bargaining between commercial parties.)

In March 2008 the High Court unanimously rejected Telstra's constitutional challenge. Telstra's claim to have been deprived of 'property' was condemned as 'synthetic' and 'unreal' because it rested on an unstated premise 'that Telstra has larger and more ample rights in respect of the PSTN than it has'.<sup>20</sup> At all relevant times, said the Court, Telstra's 'bundle of rights' had been circumscribed by its origin within a statutory context which, in the interests of enhanced competition, subordinated Telstra's entitlement to the access rights of other carriers. Since Telstra's rights had always been subject to variation pursuant to the statutory regime, the Court seemed to sympathise with the view that 'there was no compulsory acquisition and that there was "no deprivation of the reality of proprietorship" of the local loops'.<sup>21</sup> In other words, there had been no impairment of 'the bundle of rights constituting the property in question in a manner sufficient to attract the operation of s 51(xxxi)'.<sup>22</sup>

#### IV Some implications of the *Telstra* ruling

Although the reasoning in the *Telstra* case is not without its difficulties, a number of wider implications emerge from the decision of the High Court.

##### A *An autonomous category of statutory property*

The *Telstra* ruling effectively confirmed the existence of an autonomous form of *statutory property* as arising in conjunction with intensive bureaucratic-administrative regulation of various kinds of enterprise. A recurring emphasis in the High Court's joint judgment was the recognition that Telstra's rights had always been mere 'statutory rights inherently susceptible of change',<sup>23</sup> 'rights ... subject to a statutory access regime',<sup>24</sup> and rights that 'must not be divorced from their statutory context'.<sup>25</sup> Such rights are very different from their common law analogues. The common law analysis of property posits a relatively indefeasible right to specific performance of various expectations in respect of a resource. These expectations are generally defined in terms of extensive discretionary powers — vested in the so-called 'owner' — to enjoy, exploit, control access over, and ultimately alienate or destroy, the resource in question. Only infrequently and only in cases of compelling public interest is the amplitude of this common law perception of property cut back by specific legislation.

In sharp contrast, statutory property has no meaning at all *other than* that generated by its parent legislative framework. Being derived comprehensively and exhaustively from that legislation, statutory property has only the ambit conferred by statute itself. The content of this property is determined in a fashion worthy of Humpty Dumpty. Statutory property means just what the legislature chooses it to mean — 'neither more nor less'.<sup>26</sup> As the Commonwealth Solicitor-General contended before the High Court, the 'last mile' copper and aluminium wire was 'not owned by Telstra in any sense at all except a statutory sense ... this property only exists because of the Act'.<sup>27</sup> We might add that, in so far as

<sup>19</sup> *Western Australia v Ward* (2002) 213 CLR 1 [88] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See similarly *Yanner v Eaton* (1999) 201 CLR 351 [18] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Commonwealth v Yarmirr* (2001) 208 CLR 1 [13] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), [286] (Kirby J); Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, 292–304.

<sup>20</sup> (2008) 234 CLR 210 [52].

<sup>21</sup> *Ibid* [48].

<sup>22</sup> *Ibid* [52] (referring also at [42] to *Trade Practices Act 1974* (Cth) s 152EB(1)).

<sup>23</sup> *Ibid* [48].

<sup>24</sup> *Ibid* [53].

<sup>25</sup> *Ibid* [50].

<sup>26</sup> See Lewis Carroll, *Through the Looking Glass* (1871) ch VI.

<sup>27</sup> Transcript of Proceedings, *Telstra Corporation Ltd v Commonwealth* [2007] HCA Trans 663 (14 November 2007) 3411–12, 3748–9 (DMJ Bennett QC). As was put (at 5017–18) by SJ Gageler SC (counsel for Optus, a co-defendant with the

Telstra's assets were exposed to a form of compulsory hire by competitors, any semblance that Telstra was protected by 'property rules' of a conventional kind was falsified by its statutory subordination to 'liability rules' mandating the payment of mere money compensation.<sup>28</sup> On this basis 'owners' are converted into a class of *rentiers*, entitled only to draw an administratively determined income from the resource which is 'owned'. Ownership — even if purchased at a price of \$4 billion — is revealed as simply a limited species of franchise enjoyed under statutory authority. Money is revealed as the only ultimate form of property.

## B The adjustment of competing rights

Although the Australian perspective focuses on 'acquisition' rather than 'taking', the approach adopted in the *Telstra* case is consistent with the general acceptance across many jurisdictions that relevant deprivations of property rarely present themselves when an 'interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good'.<sup>29</sup> Constitutional safeguards of property tend not to be activated by the 'genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity' which 'needs to be regulated in the common interest'.<sup>31</sup> This recognition has a long pedigree. Thus, for example, the American railroad companies of the 19<sup>th</sup> century were held to be 'creatures of the law' and could be 'required to conduct their affairs in furtherance of the public objects of their creation'.<sup>32</sup> Railroad operators, as common carriers, were not entitled 'to the same broad liberty of action in business that the individual citizen has'.<sup>33</sup> In more recent times the United States Court of Appeals for the Federal Circuit has declared it simply a consequence of the 'regulated environment' in which certain commercial enterprises voluntarily operate that they hold 'less than the full bundle of property rights'.<sup>34</sup> This must be particularly so in a 'dynamic industry' where nobody can be promised 'a world free of rapidly changing technology or the inevitable consequences thereof'.<sup>35</sup> Government regulation — by definition — 'involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property'.<sup>36</sup> Such impositions are merely 'part of the regulatory scheme'.<sup>37</sup>

## V An (almost) unprecedented legal question

One of the fascinating aspects of the *Telstra* case is that it raised a legal issue which has few exact parallels in the comparative jurisprudence of property. Here, although not stripped of formal legal title, the 'owner' of a substantial asset was statutorily required, for a fee, to hand over exclusive use of that asset to a commercial rival.<sup>38</sup> To be sure, the handover may not have been permanent, but it is also

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Commonwealth), Telstra's right to use its local loops for the provision of telecommunications services was 'a right that is created, sustained and defined by the statute'. See also at 3417–18 (Gummow J).

<sup>28</sup> See Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089.

<sup>29</sup> *Penn Central Transportation Co v City of New York*, 438 US 104, 124 (Brennan J) (1978).

<sup>30</sup> *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 510 (Mason CJ, Brennan, Deane and Gaudron JJ).

<sup>31</sup> *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 [497] (Gummow J) (citing *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 189–90 (Deane and Gaudron JJ)).

<sup>32</sup> *Commonwealth v Louisville & Nashville Railroad Co*, 85 SW 712, 715 (1905); *Louisville & Nashville Railroad Co v Central Stockyards Co*, 97 SW 778, 782 (1906). See also *Proprietors of the Charles River Bridge v Proprietors of the Warren Bridge*, 36 US (11 Pet) 420, 551 (Taney CJ) (1837). English legislation regulating various utilities was similarly construed (see *Leeds and Liverpool Canal Co v Hustler* (1823) 1 B & C 424, 425; 107 ER 157, 158; *Kingston-upon-Hull Dock Co v La Marche* (1828) 8 B & C 42 at 51–2; 108 ER 958, 962; *Stourbridge Canal Co v Wheeley* (1831) 2 B & Ad 792, 793; 109 ER 1336, 1337).

<sup>33</sup> *Smyth v Ames*, 169 US 466, 548 (Harlan J) (1898).

<sup>34</sup> *California Housing Securities Inc v United States*, 959 F2d 955, 958 (1992). See likewise *Golden Pacific Bancorp v United States*, 15 F3d 1066, 1073 (Fed Cir 1994).

<sup>35</sup> *AT & T Communications of the Southern States Inc v GTE Florida Inc*, 123 F Supp2d 1318, 1324 (2000).

<sup>36</sup> *Andrus v Allard*, 444 US 51, 65 (Brennan J) (1979).

<sup>37</sup> *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 [501] (Gummow J).

<sup>38</sup> There is plenty of case law about the compellability of simultaneously shared access to someone else's profitable resource. Courts have been required, in various contexts, to deal with the claims of commercial competitors to coordinate access to such facilities as a football stadium (see *Hecht v Pro-Football Inc*, 570 F2d 982 (1977)) and a ticketing system at a ski resort (see *Aspen Skiing Co v Aspen Highlands Skiing Corp*, 472 US 585 (1985)). But seldom, if ever, do the cases raise the question of mandatory access to another's asset or facility on a more or less continuously exclusive (ie *unshared*) basis. See,

widely acknowledged that even temporary assumptions of control by a stranger can rank as a relevant form of ‘acquisition’<sup>39</sup> or ‘taking’,<sup>40</sup> thereby necessitating the payment of just compensation. Likewise, deprivation of all ‘economically beneficial uses’ of a resource constitutes a classic *per se* ‘taking’ for the purpose of the Fifth Amendment of the *United States Constitution*.<sup>41</sup> The *Telstra* case smacks, moreover, of a physical invasion of a resource,<sup>42</sup> a matter classically addressed in *Loretto v Teleprompter Manhattan CATV Corp.*<sup>43</sup> This landmark decision concerned the compulsory placement of a cable television company’s equipment on privately owned premises. The United States Supreme Court regarded such intrusion, however minimal, as being ‘of an unusually serious character’ and, therefore, as again constituting a *per se* ‘taking’ of property.<sup>44</sup> The precedent of *Loretto* was later pressed upon the United States Federal Claims Court in *Qwest Corporation v United States*,<sup>45</sup> a case involving the exact analogue of the unbundled access issue in *Telstra*. In *Qwest*, however, the Court distinguished *Loretto* as relating to a ‘direct physical attachment’<sup>46</sup> of equipment which was owned and installed by the cable television company itself rather than by the proprietor of the premises. By contrast, in *Qwest* (as again in *Telstra*), the local loops remained continuously within the ownership of the incumbent carrier and any physical interconnection (the ‘lift and lay’ procedure) was handled not by the competing carrier, but by the incumbent’s own employees. The degree of intrusion was — at least arguably — not quite the same.<sup>47</sup>

## VI The creation of a novel form of ‘regulatory property’

In the many areas covered by regulatory regimes it therefore seems no longer true that, subject to marginal restraint by the state, decisional and dispositive control resides with the ‘owner’ of a resource. If, as in the *Telstra* case, a utility operator’s rights exist only in the highly attenuated and defeasible form stipulated by legislation, where then does the ‘reality of proprietorship’ reside? The answer is that state intervention has quietly generated a novel species of property that stands the conventional paradigm of private property on its head. In this inversion of the property norm, an overriding control over specific categories of vital resource — let us call this control a form of ‘regulatory property’ — is confirmed as belonging to the public, who, by force of consumer choice, can determine whether, how and by whom a resource may be exploited. Thus, in relevant sectors of enterprise, the conceptual apparatus of private property has been reconfigured to accommodate a new ‘regulatory property’ now recognised by legislation, vested effectively in the citizenry, and subject only to such privileges as the state positively confers for the time being on the nominal ‘owners’ of the assets concerned. ‘Regulatory property’ becomes the direct and necessary correlative of the ‘statutory property’ held by the utility operator (see *Diagram 1*).

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however, *Louisville & Nashville Railroad Co v Central Stock Yards Co*, 212 US 132 (1909) (on appeal from 97 SW 778 (1906)).

<sup>39</sup> *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 286–7 (Rich J), 305–6 (Williams J).

<sup>40</sup> *First English Evangelical Lutheran Church v County of Los Angeles*, 482 US 304, 318–19 (1987).

<sup>41</sup> *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015–18 (1992). See Kevin Gray, ‘Can Environmental Regulation Constitute a Taking of Property at Common Law?’ (2007) 24 *Environmental and Planning Law Journal* 161, 175–9.

<sup>42</sup> It is noteworthy that the United States Supreme Court has always been suspicious of the imposition of obligatory easements on privately owned land. See *Nollan v California Coastal Commission*, 483 US 825, 841–2 (1987) (exaction of beachfront easement); *Dolan v City of Tigard*, 512 US 374, 388–96 (1994) (requirement to dedicate land for flood control and pedestrian/cycle way).

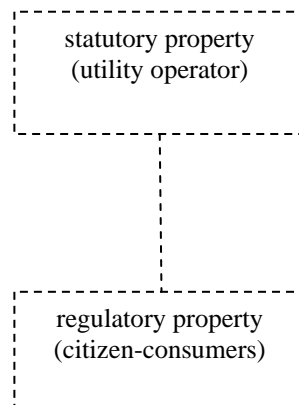
<sup>43</sup> 458 US 419 (1982) (*‘Loretto’*).

<sup>44</sup> *Ibid* 426 (Marshall J). See also *Penn Central Transportation Co v City of New York*, 438 US 104, 124 (1978).

<sup>45</sup> 48 Fed Cl 672 (2001) (*‘Qwest Corp’*).

<sup>46</sup> *Ibid* 690–1.

<sup>47</sup> Courts across the world have proved curiously resistant to the contention that the mandatory invasion of electrons and photons along someone else’s network wiring constitutes a ‘taking’ or ‘acquisition’ of property (see *Qwest Corp*, 48 Fed Cl 672, 693–4 (2001); Transcript of Proceedings, *Telstra Corporation Ltd v Commonwealth* [2007] HCA Trans 661 (13 November 2007) 3022–3046; [2007] HCA Trans 663 (14 November 2007) 3659–61, 6332–6).



*Diagram 1*

This reorientation of orthodox notions of entitlement is no wild metaphor and, indeed, the phenomenon of ‘regulatory property’ has led to a quickening of political pulses. In recent years the practice of forced access to network facilities has been castigated as ‘infrastructure socialism’.<sup>48</sup> The idea that certain privately owned assets are subject to control by a generalised civic interest has earned the disobliging epithet, ‘Marxism for the Information Age’. Ironically — almost paradoxically — the process of privatisation has often brought about a curious kind of nationalisation. In the United States this consequence has generated the bitter accusation that, in opening up swathes of semi-monopolistic corporate enterprise to statutorily regulated competition, the Republicans actually succeeded where the socialists had failed.

All of this leaves us, however, with the difficult task of analysing or rationalising in legal terms the developments that we see before us. Where has one ever heard of a property form in which the titular owner of a resource is restrained from beneficial control of the asset concerned and must instead divert beneficial enjoyment to another? In what circumstances can an owner be said to hold an asset while having no entitlement to dictate the terms on which access to that resource may be had by others? The answer lies, of course, in the institution of the trust; and it is no mere coincidence that the long and rich history of compulsory network access rights resonates with the terminology of trust. Indeed, the venerable tradition of trust has been silently, but effectively, transfused into much of the modern law of state-regulated corporate enterprise. In a world of mandatory interconnection to utility networks, the superficial beneficiary of any trust obligation affecting corporately owned assets is the competing carrier who, for a fee, may demand profitable access to an incumbent’s vital bottleneck facilities. In reality, however, the ultimate beneficiaries of any trust engrafted on regulated commerce are the public at large who, by invoking the power of election conferred by the relevant regulatory regime, may derive the substantial benefits of ‘wholesome competition’<sup>49</sup> between potential suppliers. As Gummow J observed during the oral proceedings in the High Court in the *Telstra* case, regimes of inter-operability in the public service sector are all ‘about assisting the position of customers by offering them competition’.<sup>50</sup>

## VII The coupling of commercial privilege with social obligation

Embedded somewhere near the origins of the common law is the idea that certain kinds of undertaking are so heavily coloured by a general or public interest that they require governance by special rules — rules endorsed not by the remorseless logic of the marketplace, but by a higher order of social and commercial obligation.

<sup>48</sup> Adam Thierer and Clyde W Crews, *What’s Yours is Mine: Open Access and the Rise of Infrastructure Socialism* (Cato Institute, 2003).

<sup>49</sup> See *McCoy v Cincinnati, Indianapolis, St Louis & Chicago Railroad Co*, 13 F 3, 6 (Baxter CJ) (1882).

<sup>50</sup> Transcript of Proceedings, *Telstra Corporation Ltd v Commonwealth* [2007] HCA Trans 663 (14 November 2007) 3678–9.

## A The doctrine of the 'common callings'

One of the historic demonstrations of the correlation between commercial advantage and generalised obligation is provided by the doctrine of the 'common callings'. This doctrine subjected (among others) the carrier, the farrier, the ferryman, the bargeman and the innkeeper to a range of duties in respect of the private property that they held in some valuable facility.<sup>51</sup> Under the ancient custom of the realm each was obligated to maintain his asset or workplace in a manner reasonably available for public service<sup>52</sup> on a non-discriminatory basis<sup>53</sup> and on financial terms that were themselves fair and reasonable.<sup>54</sup> In effect, the facilities covered by the common callings were required to be equally open to all; and there must be no exaction of inordinate or oppressive fees. The package of obligations associated with the common callings was indivisible not least since the object of any calling would be easily defeated if, for example, the fee demanded for service were extortionate or the services were withdrawn arbitrarily or offered randomly to only some members of the public. The doctrine of the common callings was pervaded by a subliminal awareness of the importance of travel, transportation, communication and, above all, the availability of competitive markets for goods and produce. In order to get one's goods to the market and one's profits or purchases safely home again, one needed to be able to command the services of the man who shod the horse, operated the ferry, provided safe shelter overnight at the roadside inn, and so on.<sup>55</sup>

## B Franchises

The obligations attached to the common callings were indirectly related to even earlier laws and customs which controlled the exercise of various sorts of franchise. A franchise was an incorporeal hereditament or proprietary right, arising from crown grant or by prescription,<sup>56</sup> to enjoy a monopoly of some kind and to derive commercial advantage from it. Particularly important were franchises to hold a fair or market<sup>57</sup> or to operate such facilities as a ferry,<sup>58</sup> bridge ('pontage'),<sup>59</sup> city gate ('murage') or wharf ('wharfage', 'cranage', 'keyage' and 'pesage'), such rights usually carrying an entitlement to charge a toll for the services offered to the public. Being exclusive by nature, royal or prescriptive franchises were accorded substantial protection against local competition.<sup>60</sup> Thus, although in principle monopolies were regarded as 'evil, being in derogation of common right',<sup>61</sup> franchises were nevertheless tolerated since, in most cases, they were 'obviously for the benefit of the public' and conduced to the convenience and welfare of the community at large.<sup>62</sup> The overriding imperative was freedom of commerce, a goal which had to be balanced carefully against the undesirable suppression of competition. As Coke pointed out, 'it hath ever been the policy and wisdom of this realm that faires and markets, and especially the markets, be well furnished and frequented'.<sup>63</sup>

<sup>51</sup> See Norman F Arterburn, 'The Origin and First Test of Public Callings' (1927) 75 *University of Pennsylvania Law Review* 411.

<sup>52</sup> Bruce Wyman, 'The Law of the Public Callings as a Solution of the Trust Problem' (1903-04) 17 *Harvard Law Review* 156, 217; Charles K Burdick, 'The Origin of the Peculiar Duties of Public Service Companies' (1911) 11 *Columbia Law Review* 514, 616.

<sup>53</sup> See Kevin Gray and Susan Francis Gray, 'Civil Rights, Civil Wrongs and Quasi-Public Space' (1999) 4 *European Human Rights Law Review* 46, 83-4.

<sup>54</sup> *Bastard v Bastard* (1679) 2 Show KB 81, 81-82; 89 ER 807, 808; *Harris v Packwood* (1810) 3 Taunt 264, 271-2; 128 ER 105, 108; *Citizens' Bank v Nantucket Steamboat Co* (1811) 2 Story 16, 35; 5 F Cas 719, 725; *Pickford v Grand Junction Railway Co* (1841) 8 M & W 372, 377; 151 ER 1083, 1085; *Peek v North Staffordshire Railway Co* (1863) 10 HL Cas 473, 511; 11 ER 1109, 1124; *McDuffee v Portland & Rochester Railroad*, 52 NH 430, 448-52; 13 Am Rep 72, 73-8 (1873); *Johnson v Pensacola & Perdido Railroad Co*, 16 Fla 623, 660-72; 26 Am Rep 731, 732-41 (1878).

<sup>55</sup> *R v Ivens* (1835) 7 C & P 213, 220-1; 173 ER 94, 97 (Coleridge J).

<sup>56</sup> *Co Litt*, 220; *Bl Comm*, Vol II, 37.

<sup>57</sup> See Edward F Cousins and Robert Anthony (eds), *Pease and Chitty's Law of Markets and Fairs* (Butterworths: 5<sup>th</sup> ed, 1998); *Downshire (Marquis) v O'Brien* (1887) 19 LR Ir 380, 390 (Chatterton V-C).

<sup>58</sup> See generally Douglass D Storey, 'Origin and Monopoly Rights of Ancient Ferries' (1914-15) 63 *University of Pennsylvania Law Review* 718.

<sup>59</sup> See Alan Cooper, *Bridges, Law and Power in Medieval England 700-1400* (Boydell Press, 2006) 127-48.

<sup>60</sup> *Bl Comm*, Vol II, 37, Vol III, 218-19. See *Huzzey v Field* (1835) 2 Cr M & R 432, 440-2; 150 ER 186, 190-1.

<sup>61</sup> *Letton v Goodden* (1866) LR 2 Eq 123, 131 (Kindersley V-C).

<sup>62</sup> *Ibid* 130-2 (Kindersley V-C). See also Morton J Horwitz, *The Transformation of American Law 1780-1860* (Harvard University Press, 1977) 118.

<sup>63</sup> *Co Litt*, 219.



The correlative of the franchisee's position of privilege was, however, his subjection to a significant measure of public administration and control.<sup>64</sup> Both in England and in the United States rights of franchise were 'always ... granted with a view to subserve the public convenience'<sup>65</sup> and were necessarily accompanied by 'certain duties to perform towards the public in respect of those rights'.<sup>66</sup> Thus the operator of the franchise was obligated to keep the relevant facility 'in a fit state for the use of the public'.<sup>67</sup> The monopoly could not be enforced (and might even in some circumstances be forfeited) if the operator was unable, for instance by reason of inadequate space, to accommodate the public demand.<sup>68</sup> Above all, the franchisee was disabled from recovering any 'outrageous' (that is, excessive) toll for the service provided.<sup>69</sup> As Chief Justice Hale observed of the farmer of the ferry, his operation became 'a thing of public interest and use' and 'ought to be under a public regulation',<sup>70</sup> this proposition being applicable equally to rights of pontage and other kinds of franchise, as also indeed to the common callings.<sup>71</sup> Underlying all these forms of enterprise was the idea that the franchisee or trader could 'take but reasonable toll'.<sup>72</sup> If there were any significant differences between the franchisee and the man who pursued a common calling, they centred on the fact that the former, unlike the latter,<sup>73</sup> enjoyed exclusive rights and was frequently equipped, by delegation, with sovereign powers of eminent domain or compulsory acquisition.

### C *Private property affected with a public interest*

The history of franchises is intertwined, sometimes indistinguishably, with that of the common callings doctrine. Together these two jurisprudential traditions were destined to leave a heavy imprint on the way in which the common law treated essential commercial services. Much of the early scheme of common law regulation is captured in what we, in convenient shorthand form, now term 'common carrier' rules of non-discriminatory and reasonably priced service.<sup>74</sup> These rules, designed to keep open the gateways of trade, gradually extended during the 18<sup>th</sup> and 19<sup>th</sup> centuries to cover the larger aggregations of economic power. These came to include, most notably, the great grain storage facilities and transportation systems which controlled the movement of vital food supplies across the United States to the populous Atlantic seaboard and, in England, the dockside cranes and warehouses which received the coffee, sugar, port wine and other valuable goods unloaded from ships returning from elsewhere in the world.

<sup>64</sup> See *Huzzey v Field* (1835) 2 Cr M & R 432, 441; 150 ER 186, 190 (Lord Abinger CJ) ('a corresponding obligation imposed ... in return for the benefit received' from the crown grant); *Mayor etc of Macclesfield v Chapman* (1843) 12 M & W 18, 23; 152 ER 1093, 1095.

<sup>65</sup> *Roper v McWhorter*, 77 Va 214, 219 (Va Sup Ct, 1883). See also *Dyer v Tuskaloosa Bridge Co*, 2 Port 296, 304 (1835); *York & Maryland Line Railroad Co v Winans*, 58 US (17 How) 30, 39 (1854); *Messenger v Pennsylvania Railroad Co*, 37 NJL 531, 536-7; 18 Am Rep 754, 759 (1874).

<sup>66</sup> *Prince v Lewis* (1826) 5 B & C 363, 371; 108 ER 135, 138 (Bayley J). See *Bl Comm*, Vol II, 38. For American authority to the same effect, see *Shepard v Milwaukee Gas Light Co*, 6 Wis 539, 547; 70 Am Dec 479, 483 (1858); *People ex rel Woodhaven Gaslight Co v Deehan*, 47 NE 787, 788 (1897); *Russell v Sebastian*, 233 US 195, 208-9 (1914).

<sup>67</sup> *Letton v Goodden* (1866) LR 2 Eq 123, 133. For example, it was a misdemeanour for a ferryman not to provide a proper boat at all appropriate times (see *Re Islington Market Bill* (1835) 3 Cl & Fin 513, 519; 6 ER 1530, 1532; *Mayor etc of Macclesfield v Chapman* (1843) 12 M & W 18, 23; 152 ER 1093, 1095). See also Hale, 'De Jure Maris et Brachiorum ejusdem' 1 *Harg L Tr* 6 (1787); *Bl Comm*, Vol III, 219.

<sup>68</sup> *Prince v Lewis* (1826) 5 B & C 363, 369-75; 108 ER 135, 138-40; *Mosley v Walker* (1827) 7 B & C 40, 55; 108 ER 640, 645-6; *Re Islington Market Bill* (1835) 3 Cl & Fin 513, 518-19; 6 ER 1530, 1532; *Mayor etc of Macclesfield v Chapman* (1843) 12 M & W 18, 23; 152 ER 1093, 1095; *Great Eastern Railway Co v Goldsmid* (1884) 9 App Cas 927, 960 (Lord Blackburn); *London Corporation v Lyons Son & Co (Fruit Brokers) Ltd* [1936] Ch 78, 124, 130.

<sup>69</sup> *Co Litt*, 219-22. See *Heddy v Wheelhouse* (1597) Cro Eliz 558, 559; 78 ER 803, 804 (no 'burthensome toll ... it ought to be a petit sum'). See also *Heddy v Wheelhouse* (1597) Cro Eliz 591, 78 ER 834.

<sup>70</sup> Hale, 1 *Harg L Tr* 6.

<sup>71</sup> *Co Litt*, 222.

<sup>72</sup> Hale, 1 *Harg L Tr* 6. See *Stamford Corporation v Pawlett* (1830) 1 Cr & J 57, 80-1; 148 ER 1334, 1343 (Alexander LCB); *Wright v Bruister* (1832) 4 B & Ad 116, 117-18; 110 ER 399, 399-400.

<sup>73</sup> See *McCarter v Firemen's Insurance Co*, 73 A 80, 84 (Garrison J) (1909).

<sup>74</sup> See *New Jersey Steam Navigation Co v Merchants' Bank of Boston*, 47 US (6 How) 344, 382 (1848); *Laurel Fork & Sand Hill Railroad Co v West Virginia Transportation Co*, 25 W Va 324, 337-8 (1884); *State of Nebraska ex rel Mattoon v Republican Valley Railroad Co*, 24 NW 329, 331-3 (1885).

The rationales underpinning common carrier regulation are interconnected, various and, to some degree, a matter of mild dispute between scholars.<sup>75</sup> It is clear, however, that the central explanatory themes included ideas of monopoly or virtual monopoly, scarcity and the proffering of essential service. These themes reflected a far-reaching philosophy that some goods and facilities comprise a 'prime necessity'<sup>76</sup> of sufficient public importance not only to displace the business imperatives of the purely rational commercial actor, but also to mandate state-imposed regulation on behalf of the public.<sup>77</sup> These doctrinal strands had already been subsumed within the late 17<sup>th</sup> century announcement of Chief Justice Hale that certain kinds of privately owned asset, when 'affected with a public interest, ... cease to be *juris privati* only'.<sup>78</sup>

Anglo-American jurisprudence was later pervaded by a recognition that private property becomes 'clothed with a public right'<sup>79</sup> when used in such manner as to make it 'of public consequence' and 'affect the community at large'.<sup>80</sup> In many cases, a heightened burden of duty could justifiably be viewed as the correlative of virtual monopoly<sup>81</sup> — all the more so because the duty-bearer had voluntarily assumed the privileged role to which this higher order of obligation pertained.<sup>82</sup> As Lord Ellenborough CJ pointed out in *Allnutt v Inglis*, if a man 'will take the benefit of [a] monopoly, he must as an equivalent perform the duty attached to it on reasonable terms'.<sup>83</sup> It became a constant refrain in the case law on both sides of the Atlantic that endowment with special commercial privilege entailed, in the public interest, the obligatory curtailment of otherwise normal commercial freedoms.<sup>84</sup> Thus, in Blackstone's view, the public right of access on reasonable terms to the services of the common innkeeper arose from some kind of 'universal *assumpsit*' or 'general undertaking'. The innkeeper had, in effect, entered into 'an implied engagement to entertain all persons who travel that way' and was liable in damages 'if he without good reason refuses to admit a traveller'.<sup>85</sup> As was true of all the common callings, the fact that a person advertised himself as conducting some trade of public importance was enough to fix upon him a duty to provide fair and reasonable service.<sup>86</sup> The act of holding oneself out generated obligations from which one could not resile.

## VIII The doctrine of quasi-public trust

Of particular significance in the present context is the way in which the jurisprudence relating to franchises and the common callings found expression, in a more than rhetorical sense, in the notion of

<sup>75</sup> Compare Bruce Wyman, 'The Law of the Public Callings as a Solution of the Trust Problem' (1903–04) 17 *Harvard Law Review* 156, 217 and Charles K Burdick, 'The Origin of the Peculiar Duties of Public Service Companies' (1911) 11 *Columbia Law Review* 514, 616, 620.

<sup>76</sup> In relation to the common law doctrine of 'prime necessity', see *Attorney General (Canada) v Toronto* (1893) 23 SCR 514, 520 (Strong CJ); *Minister of Justice for Canada v City of Lévis* [1919] AC 505, 513 (Lord Parmoor); *Sky City Auckland Ltd v Wu* [2002] 3 NZLR 621 [25]–[26] (Blanchard and Anderson JJ).

<sup>77</sup> The doctrine of commercial enterprise affected with a public interest was later extended to such businesses as fire insurance (see *McCarter v Firemen's Insurance Co*, 73 A 80, 84–5 (1909); *German Alliance Insurance Co v Lewis*, 233 US 389, 412–15 (1914)). In some jurisdictions even tobacco warehouses might, on this basis, merit public regulation (see *Reaves Warehouse Corporation v Commonwealth*, 126 SE 87, 90 (Va Sup Ct, 1925)).

<sup>78</sup> Hale, 'De Portibus Maris' 1 *Harg L Tr* 78 (1787). See Breck P McAllister, 'Lord Hale and Business affected with a Public Interest' (1929–30) 43 *Harvard Law Review* 759; Walton H Hamilton, 'Affectation with Public Interest' (1929–30) 39 *Yale Law Journal* 1089.

<sup>79</sup> See *Allnutt v Inglis* (1810) 12 East 527, 542; 104 ER 206, 212 (Le Blanc J).

<sup>80</sup> *Munn v Illinois*, 94 US (4 Otto) 113, 126 (Waite CJ) (1877). See similar references in *Mobile v Yuille*, 3 Ala (NS) 137; 36 Am Dec 441, 444 (1841), to 'private property [that] is employed in a manner which directly affects the body of the people' and in *McCarter v Firemen's Insurance Co*, 73 A 80, 84 (1909), to 'a business or calling ... that ... becomes a matter in which the public is vitally concerned'.

<sup>81</sup> *R v Ivens* (1835) 7 C & P 213, 219; 173 ER 94, 96 (Coleridge J). See likewise *Bolt v Stennett* (1800) 8 Term Rep 606, 608; 101 ER 1572, 1573 (Lord Kenyon); *Allnutt v Inglis* (1810) 12 East 527, 540; 104 ER 206, 211 (Lord Ellenborough CJ); *Simpson v Attorney-General* [1904] AC 476, 482 (Lord Macnaghten).

<sup>82</sup> See *McDuffee v Portland & Rochester Railroad*, 52 NH 430, 449; 13 Am Rep 72, 75 (1873) ('The profit could not be considered without taking the duty into account').

<sup>83</sup> (1810) 12 East 527, 538; 104 ER 206, 210–11.

<sup>84</sup> For a very early recognition of this principle in England, see *Anon* (1450) Keil 50, pl 4; 72 ER 208. See also *Johnson v Pensacola & Perdido Railroad Co*, 16 Fla 623, 660–3, 26 Am Rep 731, 732–4 (1878); *State to the use of the School Fund of Gentry County v Wabash, St Louis & Pacific Railway Co*, 83 Mo 144, 150–1 (1884); *Laurel Fork & Sand Hill Railroad Co v West Virginia Transportation Co*, 25 W Va 324, 336 (1884); *Clinton-Dunn Telephone Co v Carolina Telephone & Telegraph Co*, 74 SE 636, 638 (1912).

<sup>85</sup> *Bl Comm*, Vol III, 164, 212 ('a general licence'). For a comprehensive account of the legal status of the common innkeeper, see David S Bogen, 'The Innkeeper's Tale: The Legal Development of a Public Calling' (1996) *Utah Law Review* 51.

<sup>86</sup> *Lane v Cotton* (1701) 12 Mod 472, 484–5; 88 ER 1458, 1464–5 (Holt CJ).

trust. By ‘ancient law’ those engaged in the common callings were said to hold ‘as it were a public office’<sup>87</sup> and therefore to be ‘bound to the public’ or ‘bound to the discharge of a general duty’.<sup>88</sup> In both England and the United States this terminology of office-holding lent itself readily to the idea that the office in question was one of trust. Those governed by common carrier rules were deemed to be carrying out an office of trust and were, in some sense, analogous to ‘public servants’<sup>89</sup> or ‘public agents’,<sup>90</sup> exercising a ‘public employment’<sup>91</sup> and partaking in what Matthew Bacon described, tellingly, as a ‘political institution’.<sup>92</sup> Thus, in speaking of the common callings in 1701, Chief Justice Holt declared that ‘where-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office’.<sup>93</sup> Holt simply reflected the widely held perception that ‘one that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public’.<sup>94</sup> In all but name, the ‘profession’ operated as a declaration of trust under which some broadly conceived simulacrum of beneficial entitlement was created in favour of the public. Indeed, the case law reverberates with the language of ‘grant’ and ‘vesting’. Selecting one particular example, Holt was able to say that the common farrier, precisely ‘because he has made profession of a trade which is for the public good, ... has thereby exposed and vested an interest of himself in all the King’s subjects that will employ him in the way of his trade’.<sup>95</sup> Exactly the same sentiment is to be discerned, almost two centuries later, in the judgment of Chief Justice Waite in the United States Supreme Court in *Munn v Illinois*:

When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.<sup>96</sup>

The analogy of ‘public’ trust and ‘public’ service was, of course, an allusive approximation of the reality of the matter. The analogy was therefore pursued with just a touch of caution. Thus, for example, common innkeepers were often described, more guardedly, as merely ‘a sort of public servants’,<sup>97</sup> a turn of phrase which soon invited the use of the Latinate qualifier ‘quasi’. In a view subsequently articulated by many American courts, ‘the business of an innkeeper is of a quasi public character, invested with many privileges, and burdened with correspondingly great responsibilities’.<sup>98</sup> More generally it could be said that ‘[a]mong those customs which we call the common law, that have come down to us from the remote past, are rules which have a special application to those who sustain a *quasi* public relation to the community’.<sup>99</sup> The common callings lie, accordingly, in a sector situated

<sup>87</sup> *Ansell v Waterhouse* (1817) 2 Chi R 1, 4 (Holroyd J). See likewise *New Jersey Steam Navigation Co v Merchants’ Bank of Boston*, 47 US (6 How) 344, 382–3 (1848); *McDuffee v Portland & Rochester Railroad*, 52 NH 430, 447–8; 13 Am Rep 72, 73 (Doe J) (1873); *Munn v Illinois*, 94 US (4 Otto) 113, 130–2 (Waite CJ) (1877) (‘a sort of public office’).

<sup>88</sup> See the varying formulations of Holroyd J’s proposition in *Ansell v Waterhouse* (1817) 2 Chi R 1, 4; (1817) 6 M & S 385, 393; 105 ER 1286, 1289.

<sup>89</sup> *R v Ivens* (1835) 7 C & P 213, 219; 173 ER 94, 96 (Coleridge J). See also *McDuffee v Portland & Rochester Railroad*, 52 NH 430, 450; 13 Am Rep 72, 75 (1873).

<sup>90</sup> *Messenger v Pennsylvania Railroad Co*, 36 NJL 407, 413–14; 13 Am Rep 457, 463 (Beasley CJ) (1873); 37 NJL 531, 537, 18 Am Rep 754, 759 (Bedle J) (1874). See likewise *Johnson v Pensacola & Perdido Railroad Co*, 16 Fla 623, 663; 26 Am Rep 731, 734 (1878).

<sup>91</sup> *Messenger v Pennsylvania Railroad Co*, 36 NJL 407, 410; 13 Am Rep 457, 460 (Beasley CJ) (1873); 37 NJL 531, 533; 18 Am Rep 754, 756 (Bedle J) (1874).

<sup>92</sup> Matthew Bacon, *A New Abridgement of the Law* (7<sup>th</sup> ed, 1832) Vol II, 4. See also *Messenger v Pennsylvania Railroad Co*, 37 NJL 531, 533–4; 18 Am Rep 754, 756–7 (1874).

<sup>93</sup> *Lane v Cotton* (1701) 12 Mod 472, 484; 88 ER 1458, 1464.

<sup>94</sup> (1701) 12 Mod 472, 485; 88 ER 1458, 1465.

<sup>95</sup> (1701) 12 Mod 472, 484; 88 ER 1458, 1464. Similarly Hale wrote of rights that were ‘part of that *jus publicum* that is vested in the commonalty, to have their access thither as freely as formerly was used’ (1 *Harg L Tr* 78).

<sup>96</sup> 94 US (4 Otto) 113, 126 (1877). See similarly *State to the use of the School Fund of Gentry County v Wabash, St Louis & Pacific Railway Co*, 83 Mo 144, 149 (1884); *Laurel Fork & Sand Hill Railroad Co v West Virginia Transportation Co*, 25 W Va 324, 334–6, 340–1, 346, 350, 352 (1884).

<sup>97</sup> *R v Ivens* (1835) 7 C & P 213, 219; 173 ER 94, 96 (Coleridge J).

<sup>98</sup> *De Wolf v Ford*, 86 NE 527, 529 (Werner J) (1908). See likewise *Slaughter v Commonwealth*, 54 Va 767 (Appendix at [21]) (1856); *Civil Rights Cases*, 109 US 3, 41 (Harlan J) (1883).

<sup>99</sup> *Donnell v State of Mississippi*, 48 Miss 661; 12 Am Rep 375, 381 (Simrall J) (1873). See similarly *McCoy v Cincinnati, Indianapolis, St Louis & Chicago Railroad Co*, 13 F 3, 7, 10 (Baxter CJ) (1882) (‘quasi public trust ... quasi public functions’); *Laurel Fork & Sand Hill Railroad Co v West Virginia Transportation Co*, 25 W Va 324, 334–40 (1884) (‘quasi public officers’).

ambivalently between the domains of the public and the private,<sup>100</sup> exhibiting features which are nominally private, but functionally public. Their hybrid status seems most neatly characterised in terms of the ‘quasi-public’, at least so long as this phrase is understood as a shorthand reference to a spectrum where adjacent connotations of publicness and privacy shade almost imperceptibly into one another.<sup>101</sup>

### A The developing jurisprudence of the quasi-public tradition

‘Quasi-public’ terminology and the linked concept of private property ‘affected with a public interest’ came to play a vital role in underpinning the legal regulation of the expanding transportation and communications enterprises of the late 19<sup>th</sup> century and early 20<sup>th</sup> century United States.<sup>102</sup> This was an era in which the ‘quasi public corporation’,<sup>103</sup> the ‘quasi-public franchise’<sup>104</sup> and ‘quasi public employment’<sup>105</sup> became terms of common usage. The phrase ‘quasi public property’ soon came to characterise the assets of private companies regulated by the courts in the public interest.<sup>106</sup> At more or less the same time the ideology of trust came into its own in helping to explain the application of common carrier rules to such developing facilities as railroad and telegraph systems. To be sure, the regulation of such systems was now statutory, but the legislative framework was seen as merely a means to ‘reinforce and supplement the duties which are imposed ... by the common law’.<sup>107</sup> Moreover, the statutes that empowered newly formed corporations to build these vast systems were often explicitly analysed on the analogy of even older concepts of franchise or royal grant, thereby intensifying the obligations forged between the corporations and the ‘body politic’. Corporations were ‘given certain prerogative franchises and privileges for public purposes in return for which the state retains a right of supervision and control in excess of that exercised over purely private corporations’.<sup>108</sup> As, for example, the United States Supreme Court acknowledged in *Union Pacific Railway Co v Goodridge*, a railroad company:

deriving its franchise from the legislature, and depending upon the will of the people for its very existence, ... is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality.<sup>109</sup>

Here, as elsewhere, the discipline of the ‘quasi-public’ classification was invoked to control the commercial activities of powerful entities which were clearly ‘susceptible, when manipulated in the interest of selfish schemes, of being perverted to the most unjust and oppressive uses ... [having] it in their power to extort the utmost farthing which ... business is capable of bearing’.<sup>110</sup>

From these origins arose an entire jurisprudence of ‘quasi-public trust’ which required that the essential facilities of the burgeoning economy of the United States be made available to all citizens

<sup>100</sup> The appellation ‘quasi-public’ came strongly into vogue in the United States from the mid-19<sup>th</sup> century onwards. See eg *Chase v Sutton Manufacturing Co*, 58 Mass 152, 170 (1849) (referring to ‘quasi public’ purposes).

<sup>101</sup> See Kevin Gray and Susan Francis Gray, ‘Private Property and Public Propriety’ in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 11, 36.

<sup>102</sup> For an incisive analysis of this period, see Gregory S Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776–1970* (University of Chicago Press, 1997) 248–76.

<sup>103</sup> *McCoy v Cincinnati, Indianapolis, St Louis & Chicago Railroad Co*, 13 F 3, 7 (1882); *Laurel Fork & Sand Hill Railroad Co v West Virginia Transportation Co* 25 W Va 324, 341, 352, 361 (1884); *Louisville & Nashville Railroad Co v Pittsburg & Kanawha Coal Co*, 64 SW 969, 970 (1901). For even earlier reference to the concept of the ‘quasi public’ corporation, see *Dawson v Thruston*, 12 Va 132, 138 (1808); *Slaughter v Commonwealth*, 54 Va 767 (Appendix at [39], [63]) (1856). See also *Miners’ Ditch Co v Zellerbach*, 37 Cal 543, 577, 591; 99 Am Dec 300, 306, 319 (1869); *McCarter v Firemen’s Insurance Co*, 73 A 80, 81 (1909); *Imperial Irrigation Co v Jayne*, 138 SW 575, 585 (1911).

<sup>104</sup> *Clinton-Dunn Telephone Co v Carolina Telephone & Telegraph Co*, 74 SE 636, 637–8 (1912).

<sup>105</sup> *Johnson v Pensacola & Perdido Railroad Co*, 16 Fla 623, 663; 26 Am Rep 731, 734 (1878).

<sup>106</sup> *In the Matter of Swigert*, 6 NE 469, 473 (1886); *People v Illinois Cent Railway Co*, 84 NE 368, 373 (1908); *State v Nordskog*, 136 P 694, 695 (1913).

<sup>107</sup> Victor Morawetz, *A Treatise on the Law of Private Corporations* (Little Brown, 2<sup>nd</sup> ed, 1886) Vol 2, 1078 (§1117). See *Sandford v Catawissa, Williamsport & Erie Railroad Co*, 24 Pa 378, 381 (1855); *New England Express Co v Maine Central Railroad Co*, 57 Me 188; 2 Am Rep 31, 38 (1869); *McDuffee v Portland & Rochester Railroad*, 52 NH 430, 456–7; 13 Am Rep 72, 83–5 (1873).

<sup>108</sup> *Territory of New Mexico v Eastern Railway of New Mexico*, 110 P 852, 854 (Abbott J) (1910). See likewise *Messenger v Pennsylvania Railroad Co*, 37 NJL 531, 533, 536–7; 18 Am Rep 754, 756, 759 (Bedle J) (1874).

<sup>109</sup> 149 US 680, 690–1 (1893).

<sup>110</sup> *McCoy v Cincinnati, Indianapolis, St Louis & Chicago Railroad Co*, 13 F 3, 6–7 (Baxter CJ) (1882).

equally and at reasonable cost. The coded language used in the old cases to describe the engrafting of this trust follows exactly the formulation used in *Allnutt v Inglis*, where Le Blanc J spoke of 'private property clothed with a public right'.<sup>111</sup> Thus in 1873, in *Messenger v Pennsylvania Railroad Co*, Chief Justice Beasley of New Jersey laid down that a railroad company constituted by statute was 'by force of its inherent nature, a common carrier' and was therefore, 'to some extent at least ... clothed with a public capacity'.<sup>112</sup> The company's rights and powers in respect of the construction and use of the railroad were 'sovereign franchises' which 'must be held in trust for the general good'.<sup>113</sup> It was an 'implied condition' of such franchises that they be 'held as a *quasi* public trust for the benefit, at least to a considerable degree, of the entire community'.<sup>114</sup> Indeed the case law of the period teems with references to the franchises obtained by privately owned railroad companies as representing the subject-matter of a quasi-public trust.

## B *The corporate quid pro quo*

In the early American case law there was one circumstance, above all others, that both justified and confirmed the subjection of 'quasi-public corporations' to regulation by the state on behalf of the citizenry or 'commonalty'.<sup>115</sup> In view of their undeniable significance for the national economy and national welfare, the great transportation and utility companies were perceived to be entities 'dedicated',<sup>116</sup> or 'consecrated',<sup>117</sup> to public use.<sup>118</sup> As artificial bodies they were 'created for the public good, and affected with a quasi public trust and duty'.<sup>119</sup> What finally set the seal on this element of 'quasi-public trust' was the fact that, in most cases, the state had delegated critically important powers of eminent domain to each of these corporations in order to facilitate the performance of their respective functions.<sup>120</sup> The nascent railroad, telegraph, water, gas and electricity companies all needed to harness the state's powers of eminent domain in order to acquire their wayleaves, excavate their route through privately owned land or infrastructure, or otherwise install the plant and equipment vital for the achievement of their objectives. Moreover, the conferment of compulsory purchase powers on these corporations was frequently accompanied by various sorts of fiscal subsidy from the state. As was said in a Tennessee decision of 1887, common carriers and telegraph companies were alike in that they exercised 'a *quasi* public occupation, and both have by the public conferred upon them valuable franchises, and both may and do invoke the high prerogative of exercising the state's right of eminent domain'.<sup>121</sup> From such practical and inescapable dependence on the body politic emerged the correlative obligation of each corporation to serve the public in a fair, reasonable and impartial manner — in a manner ultimately controllable and enforceable in the name of the people.<sup>122</sup> The price of

<sup>111</sup> (1810) 12 East 527, 542; 104 ER 206, 212. Le Blanc J made it clear that, in such cases, the commercial assets concerned were governed by what later came to be called simply a 'doctrine of reasonableness' (see *McDuffee v Portland & Rochester Railroad*, 52 NH 430, 451, 453–4; 13 Am Rep 72, 77, 80 (1873)).

<sup>112</sup> 36 NJL 407, 412–13; 13 Am Rep 457, 462 (1873). See also *Messenger v Pennsylvania Railroad Co*, 37 NJL 531, 533; 18 Am Rep 754, 756 (1874); and see likewise *Palmer v Grand Junction Railway Co* (1839) 4 M & W 749, 766–7; 150 ER 1624, 1631.

<sup>113</sup> 36 NJL 407, 413; 13 Am Rep 457, 462 (1873).

<sup>114</sup> 36 NJL 407, 413; 13 Am Rep 457, 463 (1873). See also *Messenger v Pennsylvania Railroad Co*, 37 NJL 531, 536; 18 Am Rep 754, 759 (1874) (see text accompanying n 131 below); *State ex rel City of Bridgeton v Bridgeton & M Traction Co*, 43 A 715, 718 (1899); *Mayor etc of Borough of Rutherford v Hudson River Traction Co*, 63 A 84, 88–9 (1906). Similarly, in *McCoy v Cincinnati, Indianapolis, St Louis & Chicago Railroad Co*, 13 F 3, 7 (1882), Baxter CJ insisted that the grant and acceptance of railroad charters 'creates a *quasi* public trust, and clothes the public with an interest in the use of railroads, which can be controlled by the public to the extent of the interest granted therein'.

<sup>115</sup> For use of the term 'commonalty' in this context, see Hale, 1 *Harg L Tr* 78 (referring to the *jus publicum* as 'vested in the commonalty').

<sup>116</sup> *McCoy v Cincinnati, Indianapolis, St Louis & Chicago Railroad Co*, 13 F 3, 7 (1882); *Louisville & Nashville Railroad Co v Central Stockyards Co*, 97 SW 778, 785 (1906).

<sup>117</sup> *Farmers' Loan & Trust Co v Toledo & South Haven Railroad Co*, 54 F 759, 768 (6<sup>th</sup> Cir Ct App, 1893).

<sup>118</sup> See *Smyth v Ames*, 169 US 466, 544 (Harlan J) (1898).

<sup>119</sup> *Farmers' Loan & Trust Co v Toledo & South Haven Railroad Co*, 54 F 759, 768 (6<sup>th</sup> Cir Ct App, 1893).

<sup>120</sup> See *Sharpless v Mayor etc of Philadelphia*, 21 Pa 147, 170; 59 Am Dec 759, 775–6 (1853).

<sup>121</sup> *Marr v Western Union Telegraph Co*, 3 SW 496, 498–9 (1887).

<sup>122</sup> *York & Maryland Line Railroad Co v Winans*, 58 US (17 How) 30, 39 (1854); *Sandford v Catawissa, Williamsport & Erie Railroad Co*, 24 Pa 378, 381 (1855); *Miners' Ditch Co v Zellerbach*, 37 Cal 543, 577, 591; 99 Am Dec 300, 306, 319 (1869); *New England Express Co v Maine Central Railroad Co*, 57 Me 188; 2 Am Rep 31, 38 (1869); *Johnson v Pensacola & Perdido Railroad Co*, 16 Fla 623, 663; 26 Am Rep 731, 738 (1878); *Western Union Telegraph Co v Call Publishing Co*, 181 US 92, 99–100 (1901); *Russell v Sebastian*, 233 US 195, 209 (1914); *German Alliance Insurance Co v Lewis*, 233 US 389, 425–8 (Lamar J) (1914). See generally Morawetz, above n 107, Vol 2, 1092–3 (§1129).

commercial privilege was the acceptance of a *quid pro quo*<sup>123</sup> that marked an early and significant acknowledgement of a concept of corporate citizenship.

### C A presumption of constitutionality

The logic that underlay this recognition of corporate obligation rested upon a perception of proprietary morality which flourished strongly in bygone decades, but whose influence may have diminished in recent times. It certainly used to be true that, even on payment of a price, no sovereign power was entitled to take the property of A for the sole purpose of transferring it to another private party, B. For Justice Samuel Chase in 1798, any law that purported to bring about such an outcome was clearly 'contrary to the great first principles of the social compact ... [and] cannot be considered a rightful exercise of legislative authority'.<sup>124</sup> 'Private-to-private' taking was equally anathema within the corporate context.<sup>125</sup> The social compact was violated, in just the same way, by any delegation of the state's eminent domain power which threatened to result in the compulsory transfer of a private citizen's assets for the ultimate or substantial benefit of corporate shareholders. In order to avert such unpalatable consequences, it followed that any franchise that empowered such taking must be held by the corporation not for exclusively private benefit, but at least in part on trust for the general citizenry.<sup>126</sup> Utility corporations could not lawfully have access to the advantages of eminent domain except on the premise that they 'are public agents, and exercise a public employment'.<sup>127</sup> Thus, wrote one eminent 19<sup>th</sup> century American commentator, no state legislature has 'constitutional authority to grant a public bounty except for the purpose of accomplishing some public good'. There was no statutory power to 'dispose of the rights or funds of the people to assist a purely private enterprise'.<sup>128</sup> The conceptualism of 'public bounty' was a consistent and conspicuous feature of this jurisprudence. Whether in the form of eminent domain or financial aid or privileged access to government-owned land, the acceptance of 'public bounties' necessarily implied 'an assumption by the grantee of an obligation in favor of the public'.<sup>129</sup> As Chief Justice Beasley emphasised in *Messenger v Pennsylvania Railroad Co*, the 'important prerogative franchises' conferred on certain corporations were 'grants from the government, and public utility is the consideration for them'.<sup>130</sup> Such companies had rendered themselves 'public agents' and for each it was an 'implied condition' that its franchise be 'held as a *quasi* public trust, for the benefit of all the public'.<sup>131</sup> In effect, a presumption of constitutionality<sup>132</sup> drove the conclusion that the franchise in question was held on a trust to secure each citizen's equal right to fair, reasonable and non-discriminatory service.<sup>133</sup>

<sup>123</sup> For an early reference to this '*quid pro quo*', see Hale, 1 *Harg L Tr* 78.

<sup>124</sup> *Calder v Bull*, 3 US (3 Dall) 386, 388 (1798). See similarly *Proprietors of the Charles River Bridge v Proprietors of the Warren Bridge*, 36 US (11 Pet) 420, 642 (Story J) (1837); *Sutton's Heirs v City of Louisville*, 5 Dana 28; 35 Ky 28, 31–4 (1837); *Sharpless v Mayor etc of Philadelphia*, 21 Pa 147, 167, 173; 59 Am Dec 759, 772, 779 (1853); *Citizens' Savings and Loan Association v Topeka*, 87 US (20 Wall) 655, 663 (1874); *State to the use of the School Fund of Gentry County v Wabash, St Louis & Pacific Railway Co*, 83 Mo 144, 149 (1884). However, compare now *Kelo v City of New London, Connecticut*, 545 US 469 (2005).

<sup>125</sup> See Kevin Gray, 'There's No Place Like Home!' (2007) 11 *Journal of South Pacific Law* 73.

<sup>126</sup> See *Roper v McWhorter*, 77 Va 214, 218 (Va Sup Ct, 1883) ('for the public weal').

<sup>127</sup> *Western Union Telegraph Co v Short*, 14 SW 649, 650 (1890). See similarly *McCoy v Cincinnati, Indianapolis, St Louis & Chicago Railroad Co*, 13 F 3, 7 (Baxter CJ) (1882).

<sup>128</sup> Morawetz, above n 107, Vol 2, 1075 (§1114). See *Citizens' Savings and Loan Association v Topeka*, 87 US (20 Wall) 655, 662–4 (1874); *Messenger v Pennsylvania Railroad Co*, 37 NJL 531, 536–7; 18 Am Rep 754, 759 (Bedle J) (1874).

<sup>129</sup> Morawetz, above n 107, Vol 2, 1076 (§§1114–1115). See likewise *Lumbard v Stearns*, 58 Mass (4 Cush) 60 (1849); *State, Trenton and New Brunswick Turnpike Co v American and European Commercial News Co*, 43 NJL 381, 385 (1881); *State to the use of the School Fund of Gentry County v Wabash, St Louis & Pacific Railway Co*, 83 Mo 144, 150–1 (1884); *Smyth v Ames*, 169 US 466, 544 (Harlan J) (1898); *Russell v Sebastian*, 233 US 195, 209 (1914).

<sup>130</sup> 36 NJL 407, 413–14; 13 Am Rep 457, 462 (1873). See *Thomas v West Jersey Railroad Co*, 101 US 71, 83 (1879); *York & Maryland Line Railroad Co v Winans*, 58 US (17 How) 30, 39 (Campbell J) (1854) (referring to 'corporate responsibility ... as a remuneration to the community for their grant').

<sup>131</sup> *Messenger v Pennsylvania Railroad Co*, 37 NJL 531, 536; 18 Am Rep 754, 759 (Bedle J) (1874). See similarly *Lowell v Boston*, 111 Mass 454, 463 (1873); *State of Nebraska ex rel Mattoon v Republican Valley Railroad Co*, 24 NW 329, 332–3 (1885); *California v Central Pacific Railroad Co*, 127 US 1, 40 (1888); *Minnesota Canal & Power Co v Pratt*, 101 Minn 197, 212–14 (1907).

<sup>132</sup> See *Olmstead v Proprietors of Morris Aqueduct*, 47 NJL 311, 331–2 (1885).

<sup>133</sup> *Sandford v Catawissa, Williamsport & Erie Railroad Co*, 24 Pa 378, 381 (1855); *Messenger v Pennsylvania Railroad Co*, 37 NJL 531, 536–7; 18 Am Rep 754, 758–9 (1874); *Johnson v Pensacola & Perdido Railroad Co*, 16 Fla 623, 663, 667–8; 26 Am Rep 731, 734, 738 (1878); *State to the use of the School Fund of Gentry County v Wabash, St Louis & Pacific Railway Co*, 83 Mo 144, 150–1 (1884).

## D *The application of trust theory*

On appeal in the *Messenger* case the powerful idiom of trust was taken several stages further. Here the superior court spoke of the railroad company's obligation of 'perfect impartiality to all who seek the benefit of the trust'. Such corporations, although private, were 'entrusted with certain functions of the government, in order to afford the public necessary means of transportation'. Under this trust every citizen had an equal right to 'fair treatment and immunity from unjust discrimination ... and the trust must be performed so as to secure and protect it'.<sup>134</sup> It followed inexorably that:

Every trust should be administered so as to afford to the *cestui que trust* the enjoyment of the use intended, and these railroad trustees must be held, in their relation to the public, to such a course of dealing as will insure to every member of the community the equal enjoyment of the means of transportation provided, subject, of course, to their reasonable ability to perform the trust.<sup>135</sup>

The language used here is demonstrably integrative and communitarian in its bias.<sup>136</sup> But the vernacular of the trust was to be pressed yet further. A railroad company, having 'assumed certain obligations in favor of the public in the nature of a *quasi* public trust', was liable to find that 'the duty of enforcing the execution of this trust ... devolves upon courts of equity', in whose 'peculiar cognizance' are '[a]ll matters of confidence and trust'.<sup>137</sup> Any failure by the company's officers to 'execute the trusts reposed in them' — whether by a neglect to maintain its track and rolling stock in good condition, to charge travellers fairly, to establish stations and depots, or indeed otherwise — would trigger 'the imperative duty of the courts of equity ... to interfere, and by an exercise of their extraordinary powers compel a faithful observance and discharge of all of its obligations'.<sup>138</sup>

The precise subject-matter of the 'quasi-public trust' involved here is also open to informative scrutiny. Some of the early American case law on railroad franchises tended to speak of the trust as attaching to the franchise itself (that is, as a species of intangible personal property).<sup>139</sup> It was perfectly understandable that the package of rights and powers inherent in the franchise should be regarded as caught by some fiduciary obligation directed toward the public interest.<sup>140</sup> In time, however, the corpus of the 'quasi-public trust' reached beyond the incorporeal entitlement comprised within the franchise to envelop the essential tangible assets of the railroad company. In most cases — particularly (and most commonly) in cases of mortgage — these physical assets were realistically inseparable from the operating licence under which they were acquired and exploited.<sup>141</sup> It came to be accepted widely that, where a corporation had received state aid for a public purpose, 'any property which is necessary to enable it to accomplish this purpose is impressed with a trust in favor of the public'.<sup>142</sup> The fiduciary obligation therefore affected not merely the franchise itself, but also the physical railroad and 'any property essential to the operation of the railroad'.<sup>143</sup> Indeed, for those who cared to enquire, this extended obligational coverage replicated the authentic ambit of Chief Justice Hale's proposition that certain physical assets might be 'no longer bare private interest', but should instead be 'affected with a public interest'.<sup>144</sup> In the case of the American railroad companies, several important consequences

<sup>134</sup> 37 NJL 531, 536–7; 18 Am Rep 754, 759 (Bedle J) (1874).

<sup>135</sup> 37 NJL 531, 537; 18 Am Rep 754, 759 (Bedle J) (1874). 'The trusts are active, potential, and imperative, and must be executed until lawfully surrendered' (*People v New York Central & c Rail Road Co*, 28 Hun 543, 558 (Davis CJ) (1883)). See also *Smyth v Ames*, 169 US 466, 544 (Harlan J) (1898); *Greisman v Newcomb Hospital*, 192 A2d 817, 821–2 (1963).

<sup>136</sup> The common carrier 'owes a duty to the community' (*Messenger v Pennsylvania Railroad Co* 36 NJL 407, 410; 13 Am Rep 457, 460 (Beasley CJ) (1873)).

<sup>137</sup> *McCoy v Cincinnati, Indianapolis, St Louis & Chicago Railroad Co*, 13 F 3, 8 (1882).

<sup>138</sup> 13 F 3 (1882) 8–10. See similarly *Roper v McWhorter*, 77 Va 214, 217 (Va Sup Ct, 1883); *Clinton-Dunn Telephone Co v Carolina Telephone & Telegraph Co*, 74 SE 636, 639 (1912); Morawetz, above n 107, Vol 2, 1097–8 (§1132).

<sup>139</sup> See eg *Peoria & Springfield Railroad Co v Thompson*, 103 Ill 187, 208 (1882); *State of Nebraska ex rel Mattoon v Republican Valley Railroad Co*, 24 NW 329, 332–3 (1885); *Territory of New Mexico v Eastern Railway of New Mexico*, 110 P 852, 854 (1910). See likewise *Roper v McWhorter*, 77 Va 214, 219–20, 222 (Va Sup Ct, 1883) (ferry franchise).

<sup>140</sup> It was doubtless the element of public interest that alleviated any possible concern on the part of its 19th century proponents that the quasi-public trust might be invalidated by any uncertainty as to the objects benefited by this particular trust variant.

<sup>141</sup> See eg *Peoria & Springfield Railroad Co v Thompson*, 103 Ill 187, 208–9 (1882).

<sup>142</sup> Morawetz, above n 107, Vol 2, 1088 (§1125). See *Louisville & Nashville Railroad Co v Central Stockyards Co*, 97 SW 778, 789 (1906) (railroad company's 'cars, like its roadbed and track, are property held for public purposes').

<sup>143</sup> Morawetz, above n 107, Vol 2, 1083 (§1120).

<sup>144</sup> Hale, 1 *Harg L Tr* 77–8 ('the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only'). See *Allnutt v Inglis* (1810) 12 East 527, 539; 104 ER 206, 211 (Lord Ellenborough CJ).

followed from the engrafting of a quasi-public trust upon corporate assets. *First*, in the absence of express authority from the state in legislative form, no such corporation could sell, lease or mortgage its franchise or any property essential to its enterprise,<sup>145</sup> since to do so ‘would be a dereliction of the duty owed by the corporation to the state and to the public’.<sup>146</sup> *Second*, no asset ‘necessary to enable the company to perform its duties to the public’ could be seized or sold by its creditors under an execution or forced sale. For creditors the remedy lay instead in sequestration of the company’s earnings.<sup>147</sup>

## IX The social compact, the body politic and the ‘quasi-public trust’

It is clear, at least in retrospect, that the ideology of quasi-public trust went to the core of a public or civic morality that prevailed in 19<sup>th</sup> century America. Legal and constitutional thinking was still dominated by notions of government by ‘social compact’, under which each citizen ceded individual rights to the commonalty or ‘body politic’. As Chief Justice Waite cited with evident approval in *Munn v Illinois*, a ‘body politic’ is ‘a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good’.<sup>148</sup> This was a happier age of more primitive, more clear-sighted democracy, in which the state comprised the people and the people comprised the state.<sup>149</sup> This was an era responsive to the noble ideal, immortalised in Abraham Lincoln’s Gettysburg address of 1863, of a ‘government of the people, by the people and for the people’. And, indeed, the jurisprudence of the quasi-public trust as applied to corporations of huge public significance was none other than the translation of the Gettysburg message into the language of trust — of a trust for the people — of a trust engrafted, on behalf of the citizenry, on the exercise of vitally important sources of power.

### A Contractual foundations

It is noticeable that, in the present context, the early American case law persistently emphasised the elements of contract, covenant and charter. The basis of the corporate franchisee’s obligation to serve the public good was distinctly contractarian.<sup>150</sup> For example, the delegation of eminent domain powers to railroad companies was said to be inseparably linked with the status of those companies as ‘*quasi* public corporations’ and, ‘[i]n accepting their charters they necessarily accept them with all the duties and liabilities annexed’.<sup>151</sup> The obligations of the railroad company, said Chief Justice Davis of the Supreme Court of New York, comprised ‘a public trust which, having been conferred by the State, and accepted by the corporation, may be enforced for the public benefit’. It was ‘the duty of the State to see to it that the franchise so put in trust be faithfully administered by the trustee’. Such consequences followed naturally from ‘the contract between the corporation and the State’.<sup>152</sup>

This recurring reference to a contractual substratum — an all-important *quid pro quo* — reaches back to the medieval law of franchise. Here the right of the franchisee to charge a toll in respect of a bridge crossing or highway or wharf landing required to be ‘supported on some form of consideration or public benefit’ such as the franchisee’s undertaking to repair and maintain the same.<sup>153</sup> A similar contractual analysis characterised much of the landmark American litigation of the 19<sup>th</sup> century. For

<sup>145</sup> Morawetz, above n 107, Vol 2, 1082–3 (§1120). See *Thomas v West Jersey Railroad Co*, 101 US 71, 83 (1879); *Black v Delaware & Raritan Canal Co*, 22 N J Eq 130, 399 (1871).

<sup>146</sup> *Branch v Jesup*, 106 US 468, 478 (Bradley J) (1883). See likewise *York & Maryland Line Railroad Co v Winans*, 58 US (17 How) 30, 39 (1854) (‘an overturn of the relations which the charter has arranged between the corporation and the community’); *Roper v McWhorter*, 77 Va 214, 218–22 (Va Sup Ct, 1883) (‘violation of ... trust’).

<sup>147</sup> Morawetz, above n 107, Vol 2, 1088 (§1125).

<sup>148</sup> 94 US (4 Otto) 113, 124 (1877). Multiple reference is made to the ‘body politic’ throughout Waite CJ’s judgment (at 126, 133).

<sup>149</sup> ‘The people are the source of all political powers’ (*Sharpless v Mayor etc of Philadelphia*, 21 Pa 147, 180; 59 Am Dec 759 (Woodward J) (1853)). For a latter-day evocation of the same theme, see Bruce A Ackerman, *We The People* (Harvard University Press, 1991).

<sup>150</sup> See eg *Munn v Illinois*, 94 US (4 Otto) 113, 133–4 (Waite CJ) (1877).

<sup>151</sup> *McCoy v Cincinnati, Indianapolis, St Louis & Chicago Railroad Co*, 13 F 3, 7 (Baxter CJ) (1882). See similarly *Smyth v Ames*, 169 US 466, 545–6 (Harlan J) (1898).

<sup>152</sup> *People v New York Central & c Railroad Co*, 28 Hun 543, 553 (1883). For further reference to this ‘contract with the State’, see *Thomas v West Jersey Railroad Co*, 101 US 71, 83 (Miller J) (1879). See similarly *Wilmington & Weldon Railroad Co v Reid*, 80 US (13 Wall) 264, 266 (1872); *Humphrey v Pegues*, 83 US (16 Wall) 244, 249 (1873).

<sup>153</sup> Storey, above n 58, 721. See also Cooper, above n 59, 105–6, 127–48.



example, in the *Charles River Bridge* case the Supreme Court adopted a ruthlessly contractual perspective in assessing the claimed entitlement of a bridge franchisee to resist potential competition. Quoting verbatim from rulings by his English counterpart,<sup>154</sup> Chief Justice Taney remarked that the disputed bridge franchise comprised ‘a bargain between a company of adventurers and the public’,<sup>155</sup> the terms of which required, in any instance of ambiguity, to be construed strictly against the ‘adventurers’ and in favour of the community.<sup>156</sup>

The importance of this consensual relation between the quasi-public enterprise and the body politic touches on one further feature of the law of trust. It is increasingly acknowledged today that a vital element of contractual bargain or deal lies at the heart of the classic trust form. In all cases other than those of self-declared trust, the trust is, in the words of the American jurist John Langbein, ‘a bargain about how the trust assets are to be managed and distributed’.<sup>157</sup> At the back of the trust is a ‘trust deal that defines the powers and responsibilities of the trustee in managing the property’.<sup>158</sup> In the political ideology of 19<sup>th</sup> century America the deal underlying the quasi-public trust was still, effectively, bipartite. The body politic agreed certain conditions of trade, on behalf of the citizenry, with the purveyors of prime necessities, the body politic and citizenry being fundamentally one and the same.<sup>159</sup> Thus, when Chief Justice Waite reviewed Hale’s account of the regulation imposed on the ancient ferryman in the exercise of the ‘privilege or prerogative’ granted to him by the king, it was clear to Waite that the king ‘in this connection only represents and gives another name to the body politic’ and that ‘such terms and conditions as the body politic may from time to time impose’ were intended simply for ‘the protection of the people and the promotion of the general welfare’.<sup>160</sup>

Today, with the undemocratic distancing of the people from the organs of government, the coalescence of the citizenry and the body politic may not be quite so apparent. This need not, however, greatly affect the conceptual structure of the quasi-public trust. As Langbein says, the three-party trust is ‘a prevailingly contractarian institution’, in which a settlor entrusts an asset, advantage or resource to a fiduciary, on agreed terms, for the benefit of a beneficiary.<sup>161</sup> A trust is, in short, ‘a contract for the benefit of a third party’.<sup>162</sup> This analysis still fits quite nicely the dynamic of the modern quasi-public trust, under which an implicit bargain or *quid pro quo* is agreed between the state and the regulated corporation for the benefit of the citizenry at large.

## B Mutations of terminology

The late 19<sup>th</sup> century and early 20<sup>th</sup> century case law of the United States evidences a truly remarkable adaptation of the apparatus of trust for the better regulation of important commercial enterprises. It was perhaps inevitable that the quaint terminology of private property ‘affected with a public interest’ should eventually fade from subsequent legal discourse.<sup>163</sup> In *Tyson v Banton*, for example, Justice Holmes disobligingly described the notion as ‘little more than a fiction intended to beautify what is disagreeable to the sufferers’.<sup>164</sup> Likewise ‘quasi-public’ terminology began to go out of fashion, partly because of disquiet over the imprecision allegedly implicit in the concept<sup>165</sup> and partly (no doubt) because of the suspicions unfairly aroused by its Latinate connotation.<sup>166</sup> Exactly the same motivational

<sup>154</sup> *Kingston-upon-Hull Dock Co v La Marche* (1828) 8 B & C 42, 52; 108 ER 958, 962 (Lord Tenterden CJ); *Stourbridge Canal Co v Wheeley* (1831) 2 B & Ad 792, 793; 109 ER 1336, 1337 (Lord Tenterden CJ).

<sup>155</sup> *Proprietors of the Charles River Bridge v Proprietors of the Warren Bridge*, 36 US (11 Pet) 420, 544 (1837). See similarly Justice M’Lean (at 558).

<sup>156</sup> See similarly *Roper v McWhorter*, 77 Va 214, 219 (Va Sup Ct, 1883).

<sup>157</sup> See John H Langbein, ‘The Contractarian Basis of the Law of Trusts’ (1995) 105 *Yale Law Journal* 625, 627. The idea is certainly not new. Contemporaneously with the early American cases, Maitland was describing the trust as having its origin in ‘something that we can not but call an agreement’ (Frederic W Maitland, *Equity* (ed by AH Chaytor and WJ Whittaker, Cambridge University Press, 1909) 28).

<sup>158</sup> Langbein, above n 157, 627.

<sup>159</sup> See *Sharpless v Mayor etc of Philadelphia*, 21 Pa 147, 160; 59 Am Dec 759, 763–4 (1853).

<sup>160</sup> *Munn v Illinois*, 94 US (4 Otto) 113, 126 (1877). See Hale, 1 *Harg L Tr* 6.

<sup>161</sup> Langbein, above n 157, 627.

<sup>162</sup> FH Lawson, *A Common Lawyer looks at the Civil Law* (Oxford University Press, 1964) 200.

<sup>163</sup> See the refinement of the notion in *Chas Wolff Packing Co v Court of Industrial Relations*, 262 US 522, 535 (1923).

<sup>164</sup> 273 US 418, 446 (1927). See also *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 [499] (Gummow J).

<sup>165</sup> See *McCarter v Firemen’s Insurance Co*, 73 A 80, 82 (1909), where a New Jersey court regarded the term ‘quasi-public’ as ‘characterized only by its unmeaning vagueness’ and preferred to speak of a ‘corporation affected with a public interest’.

<sup>166</sup> See, in a different context, *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164, 192 (Deane J).

ideals were, however, captured in references to the ‘public service company’, a substitute appellation which began to gather currency during the first half of the last century.<sup>167</sup> Later, in 1967, Matthew Tobriner and Joseph Grodin, both in their time Justices of the Supreme Court of California, delved into the ‘storehouse of the common law’ in their explanation of ‘public service enterprises’ as founded on ‘quasi-public’ functions and affectation ‘with a public interest’.<sup>168</sup> In more recent decades, allusions to the hybrid status of ‘quasi-public’ property have been only thinly concealed in such neologisms as the ‘semicommons’, a phrase used to describe a property regime ‘which combines elements of private and common property’.<sup>169</sup> The organising concept of trust would simply not go away. If anything, the general development of trust law during the 20<sup>th</sup> century accorded an added legitimacy to fiduciary language in the present context. It became widely accepted within the common law world that fiduciary status no longer precludes the retention of certain advantages and the receipt of some benefits by the fiduciary himself.<sup>170</sup> Thus, for John Langbein,<sup>171</sup> the kernel of the fiduciary bond is not — as was once believed to be the case — the enforcement of an unquestioning duty to serve the ‘sole interest’ of the principal. Instead the fiduciary relation connotes a much more relativist standard of conduct encapsulated in a duty to promote the ‘best interest’ of the entrustor / beneficiary. If this be so, there is nothing improper or inconsistent in the idea that assets held on ‘quasi-public trust’ should nevertheless generate an income stream for their nominal owner, provided that the best interest of the *cestuis que trust* — the body politic or the public at large — is simultaneously served.

## X A concluding retrospect on the *Telstra* case

This article has been, in part, an exploration of the changing meaning of property within the modern regulatory state. Towards this end we have traced the origin and development of an explicit theory of ‘quasi-public trust’ in the Anglo-American law of the 19<sup>th</sup> and early 20<sup>th</sup> centuries. The delineation of the ‘quasi-public’ as a distinct jurisprudential category was not, however, novel even during that era — as is demonstrated by the rather more ancient doctrines relating to the common callings and the exercise of rights of franchise. There has always been some deep recognition that certain kinds of private enterprise are so fundamentally important to the general functioning of the community that no rigid divide can be maintained between the private and the public. In these instances the inevitable response has been the imposition of some regulatory control on behalf of the citizenry and in restraint of any potential abuse of a commercially privileged position. During the past 150 years, with the arrival of a vastly more complex era of railroads, bulk transportation systems and new modes of communication, the need for regulation of prices and for universality of service became even more pressing as a precondition of equal and effective citizenship. In particular, monopolies or virtual monopolies which owed their existence to land or fiscal subsidies made available by government were apt to be analysed, in at least some qualified sense, as held on a trust for the public. Hence the emergence of a tradition of ‘quasi-public trust’, which predicated that certain essential services and facilities are held by their nominal owners subject to various kinds of fiduciary obligation towards the people.

### A *The achievements of the quasi-public trust*

Over the years this adaptation of the powerful symbolism of the trust brought about several consequences of great moment. By engrafting some form of fiduciary responsibility upon massive aggregations of economic power — the huge utility corporations of the modern era — the doctrine of quasi-public trust redefined the ideology of conventional property law. The diffusion of trust benefits amongst the citizenry connoted, in some meaningful sense, that a ‘regulatory property’ in the assets of

<sup>167</sup> See Bruce Wyman, ‘The Law of the Public Callings as a Solution of the Trust Problem’ (1903–04) 17 *Harvard Law Review* 156, 171; Charles K Burdick, ‘The Origin of the Peculiar Duties of Public Service Companies’ (1911) 11 *Columbia Law Review* 514, 616.

<sup>168</sup> Matthew O Tobriner and Joseph R Grodin, ‘The Individual and the Public Service Enterprise in the New Industrial State’ (1967) 55 *California Law Review* 1247, 1253.

<sup>169</sup> See Henry E Smith, ‘Governing the Tele-Semicommons’ (2005) 22 *Yale Journal on Regulation* 289.

<sup>170</sup> See eg Sir Frederick Jordan, ‘Chapters on Equity in New South Wales’ in *Selected Legal Papers* (Legal Books Pty Ltd, 1983) 113, cited with approval in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 102 (Mason J).

<sup>171</sup> John H Langbein, ‘Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?’ (2005) 114 *Yale Law Journal* 929.

certain large corporations was now recognised as vested in the civic beneficiaries of the trust. An effective measure of control over the exploitation of these assets now lay with the people as part of their 'social compact' within the 'body politic' (to use the classic phrases of 'quasi-public' discourse). Access to vital facilities — ranging from rail transportation to the electricity supply and the telephone system — was opened up for all citizens equally and at a reasonable and administratively supervised cost. The 'regulatory property' confirmed in the citizenry by the quasi-public trust was more than a mere metaphor. It refashioned the relationship between the large utilities and their customers by coercing the former into some kind of fiduciary nexus with the public. It transformed the power relationship between economically vulnerable citizens and the corporate behemoths who could otherwise hold them to ransom.<sup>172</sup> It forced large companies to be better citizens, less driven by the self-regarding entrenchment of commercial advantage and more concerned with inter-connectedness<sup>173</sup> and the achievement of some degree of social cohesion and mutual regard. Above all, the phenomenon of the quasi-public trust represented a significant intersection of commercial life with the claims of social obligation — a reinforcement of older, more integrative values that operated to constrain the predatory strategies of large and potentially uncontrollable corporations. Where socially important goods are concerned, it has always seemed undesirable that economic power and market coverage should be allowed to become simply a licence to print money for senior executives and corporate shareholders.

The advent of a 'regulatory property' vested in the people also marked a significant stage in the modern democratisation of property. In effect, the ideology of the quasi-public trust converted the corporate providers of essential services into corporate citizens, compelling them to treat citizen-consumers as persons entitled to participate on fair and equal terms in what Crawford Macpherson called the 'kind of society which is instrumental to a full and free life'.<sup>174</sup> Indeed, the conferment of 'regulatory property' under a quasi-public trust went some distance towards realising Macpherson's vision that 'individual property' would evolve, more generally, into 'a right to a set of power relations that permits a full life of enjoyment and development of one's human capacities'. By reformulating property in terms of access rights to vital services, the doctrine of quasi-public trust played a role in helping to resolve one of the ancient tensions present in our law of economic relations. The quasi-public trust of early American law was, in many ways, the forerunner of Charles Reich's 'new property'.<sup>175</sup> It connoted an intellectual shift away from the idea that property is a private right of exclusion towards a recognition that individual citizens may sometimes rank as the beneficiaries of certain socialised obligations which guarantee more equitable access to critically important utilities.<sup>176</sup> Like Reich's 'new property' and its welfare beneficiaries, the 'regulatory property' of a different era fastened a variant of the trust form upon the assets which were deemed to constitute important 'goods of life'.

## B The modern fate of the quasi-public trust

What then of the quasi-public trust today? The phrase is little used in contemporary law and seems to have faded from view as a subject of legal discourse or analysis. Is there any life left in the concept? Curiously, part of the answer to these questions can be found in the litigation which came before the High Court of Australia in *Telstra Corporation Ltd v Commonwealth*<sup>177</sup> and which was discussed earlier in this article. In the *Telstra* case the High Court delivered an abrupt, almost cursory, response to the constitutional challenge raised by Telstra Corporation. The unanimous judgment is in many ways unsatisfying, but it is always an important task of legal analysis to read between the bare lines of judicial prose. It is perhaps even more revealing to examine the oral argument in court which provides the backdrop to the ruling eventually handed down. This argument inevitably plays a subliminal role, one way or the other, in influencing and illuminating the conclusions expressed more formally in the terms of a judgment.

<sup>172</sup> See eg *McCoy v Cincinnati, Indianapolis, St Louis & Chicago Railroad Co*, 13 F 3, 6–7 (Baxter CJ) (1882).

<sup>173</sup> See Eric T Freyfogle, 'Context and Accommodation in Modern Property Law' (1988–89) 41 *Stanford Law Review* 1529, 1530–1.

<sup>174</sup> CB Macpherson, above n 4, 121.

<sup>175</sup> Reich, above n 5.

<sup>176</sup> For a recent, and important, contribution towards this theme, see Gregory S Alexander, 'The Social-Obligation Norm in American Property Law' (2009) 94 *Cornell Law Review* 745.

<sup>177</sup> (2008) 234 CLR 210.

Although in *Telstra* the High Court avoided any explicit reference to 'quasi-public trust', the observations of the justices during the oral hearing, coupled with coded clues to be found in their joint judgment, provide eloquent evidence of the durable potency of the earlier tradition of 'quasi-public' jurisprudence. It is almost as if, without telling anyone, the Court sneaked a look at the old Anglo-American law and incorporated many of its insights in the *Telstra* ruling. In many ways *Telstra* holds the promise of the enforcement of a new, yet old, commercial morality.<sup>178</sup> Amidst a number of unresolved uncertainties of interpretative approach, the High Court sought to place its decision on the more secure ground of historical context. The Court emphasised that it was 'of especial importance ... to recognise that the [challenged statutory rules] ... must not be understood in isolation from the history of the provision and regulation of telephone and telecommunications services in Australia'.<sup>179</sup> The network now owned by Telstra Corporation, said the Court, 'was originally a public asset owned and operated as a monopoly since federation by the Commonwealth'.<sup>180</sup>

Behind these pointed observations lay a theme which had been sounded frequently during the course of the oral hearing. Justice Kirby, in particular, had adverted several times to the fact that, by reason of the statutory vesting of the telecommunications network in 1992, Telstra Corporation had become the recipient of 'the bounty of the people of Australia'.<sup>181</sup> In Justice Kirby's view, Telstra Corporation had been allowed to take over, and derive great commercial advantage from, 'tremendously economically valuable resources which were built up with the blood and sweat of the people of Australia over a century'.<sup>182</sup> The 'advantages ... secured from a century of infrastructure' had been 'given to [Telstra] ... by the people of Australia through their Parliament, but the people of Australia through their Parliament have said there is an offsetting side in this'.<sup>183</sup> It was simply 'the downside of getting a very great resource with ... duopolistic or semi-monopolistic advantages [that] you have got to use a resource within the system in a way that is available to other users'.<sup>184</sup> The imposition of mandatory network access could not therefore be seen as an unconstitutional 'acquisition' of property on unjust terms. Justice Kirby's persistently populist concern was taken even further in his acute observation that the Australian focus on 'acquisition' rather than on the more expansive concept of 'taking' conduces to 'a much more substantial protection for the people'.<sup>185</sup>

Similar sentiments were latent in the oral interventions of other High Court justices who stressed the extraordinary privilege inherited, and further exploited, by Telstra Corporation. For Chief Justice Gleeson, the value of the Telstra network was 'not the copper wire, it is the right that [Telstra] got to dig all those trenches and put its tunnels under public roads'.<sup>186</sup> With the harnessing of legislative power to 'commit acts that would otherwise be a public nuisance and build trenches and so forth to develop your infrastructure', a 'part of the quid pro quo is that you have to provide access to that infrastructure to your potential competitors'.<sup>187</sup> As Stephen Gageler SC (counsel for one of the Commonwealth's co-defendants) expressed it, 'privatisation comes with strings attached'.<sup>188</sup> The exclusive use of its own local loops was a right that Telstra had 'voluntarily given up as part of the price it has paid for the privilege of becoming a licensed carrier'.<sup>189</sup> These perceptions all belong among the thematic concerns of an earlier ideology of public service enterprise. But none of this should seem surprising. The fundamental tenets of 'quasi-public trust' doctrine are in fact embedded, almost word for word, in the Telecommunications Acts of 1991 and 1997. Among the explicitly declared objects of both pieces of legislation was the desire to ensure that, in view of their 'social importance', standard telephone services are 'reasonably accessible to all people in Australia on an equitable basis ... as efficiently and economically as practicable ... at performance standards that reasonably meet the

<sup>178</sup> See now also *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 [2009] HCA 12.

<sup>179</sup> (2008) 234 CLR 210 [50].

<sup>180</sup> *Ibid* [51].

<sup>181</sup> Transcript of Proceedings, *Telstra Corporation Ltd v Commonwealth* [2007] HCA Trans 661 (13 November 2007) 488, 804–5. Kirby J had already referred (at 458–9) to 'the old days of the bounty of the Postmaster General'.

<sup>182</sup> *Ibid* 2269–71.

<sup>183</sup> *Ibid* 2328–32.

<sup>184</sup> *Ibid* 2286–9.

<sup>185</sup> *Ibid* 3106, 3111.

<sup>186</sup> *Ibid* 2300–1.

<sup>187</sup> *Ibid* 2236–7.

<sup>188</sup> Transcript of Proceedings, *Telstra Corporation Ltd v Commonwealth* [2007] HCA Trans 663 (14 November 2007) 5181–3.

<sup>189</sup> *Ibid* 5030–1.

social, industrial and commercial needs of the Australian community'.<sup>190</sup> All the key phrases of 'quasi-public trust' terminology are present in this formulation.

It was left to Gageler SC to articulate the most striking juristic trope to emerge from the *Telstra* litigation. In the course of argument he advanced the proposition that '[i]f you want to play in the telecommunications sandpit, then you play by the rules ... and the rules include a rule that in some cases at some times you are going to have to share your bucket'.<sup>191</sup> The metaphor was rapidly seized upon by Justice Kirby, who rationalised this form of mandatory access on the basis that the bucket in question was 'a very old bucket that was made in much earlier times from the blood and sweat of the people of Australia'.<sup>192</sup> Again, the seminal idea is that of a sharing obligation born of some kind of democratic ownership of a resource which is itself generated by the effort and sacrifice of the people and is thereafter regulated in the common interest. The underlying collective ownership of the resource bespeaks a diffusion of benefit from titular owner to ordinary citizen, connoting in all but name the relationship we traditionally categorise as one of trust. Nor is it inappropriate that this obligation to afford access should be linked with the children's sandpit. The sandpit is that primal and universal forum in which elementary rules of cooperation, forbearance, shared endeavour, mutual regard and promotion of the common weal — in short, rules of good citizenship — are learned. The lasting message of the High Court's ruling in the *Telstra* case is that, in the telecommunications sandpit, the compulsory unbundling of network facilities enables competition between the suppliers of essential services and thereby ultimately enhances the regulatory dividend for all citizen-consumers. This is not such a bad result. Bureaucratic-administrative regulation may not be the *monstrum horrendum* that Alice Tay so feared. And, in the light of the civic values which are elevated by the ancient 'quasi-public trust' tradition and still lie barely concealed in our modern regulatory schemes, Alice might even have been quite pleased.

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<sup>190</sup> *Telecommunications Act 1991* (Cth) s 3(a); *Telecommunications Act 1997* (Cth) s 3(2)(a).

<sup>191</sup> Transcript of Proceedings, *Telstra Corporation Ltd v Commonwealth* [2007] HCA Trans 663 (14 November 2007) 4955–6, 4964–6.

<sup>192</sup> *Ibid* 6553–4.