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Due Process and the Administrative State

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If ever a constitutional doctrine has fallen from grace, it is the doctrine of procedural due process. By far the oldest of our civil rights,[1] its content seemed so clear to prior generations that they included the term "due process" in the fifth and fourteenth amendments virtually without discussion.[2] Although great controversy arose about the applicability of due process to nonprocedural or substantive matters, procedural due process doctrine evolved quietly and steadily, surviving the demise of its controversial cognate without notable impairment. Even the expanded reliance on procedural due process during the loyalty-security crisis of the 1950's and the welfare rights movement of the 1960's did little to disturb its charmed stability.

All of this has come to an end during the past decade. The procedural due process doctrine is now the subject of intense debate, with its central meaning regularly questioned by both courts and commentators. This descent into uncertainty is largely the result of the Supreme Court's conscious effort to define the interests to which the due process clause relates. While the answer seems clear enough for criminal and civil trials, it has proved to be a dark conundrum for newer forms of government activity, such as benefits programs, licensing, mass em-

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1. The positive law history of the doctrine dates back to the Magna Carta. *See* R. MOTT. DUE PROCESS OF LAW 2-5, 30-37 (1926); Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, 18 NOMOS: DUE PROCESS 3, 4-5 (1977).

2. *See* R. MOTT, *supra* note 1, at 159-67.

ployment, education, and corrections. The Court's answer in these areas has been that procedural protections must be triggered by some underlying "liberty" or "property" right—a right that is generated either by the state's positive law or by constitutional provisions other than the due process clause itself.[3] Dissenters on the Court, and virtually all of the early commentators, objected vigorously, arguing that this underlying rights approach undermines the essential nature of the protection that procedural rights provide.[4]

Recently, a revisionist mood seems to have developed, however, with several commentators maintaining that the Court's position makes sense after all.[5] The Court, meanwhile, has been less certain. In *Vitek v. Jones*,[6] Justice White conceded that the due process clause itself created the right to avoid being stigmatized by government activity.[7] And in *Hewitt v. Helms*,[8] Justice Rehnquist, principal architect of the underlying rights approach, wrote: "Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States."[9]

The procedural due process doctrine's fall from grace may be ascribed to an excess of ambition. In content, the Court's new approach relies on other sources of law; in form, or methodology, it strikes off largely on its own. The notion that the scope of due process protection can be derived from definitions of the terms "liberty" and "property" is unprecedented. The subsidiary notion, also prominent in current doctrine, that specific due process protections can be deter-

3. *See, e.g.*, Meachum v. Fano, 427 U.S. 215 (1976); Paul v. Davis, 424 U.S. 693 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972).

4. *See, e.g.*, Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting); Paul v. Davis, 424 U.S. 693, 721 (1976) (Brennan, J., dissenting); Board of Regents v. Roth, 408 U.S. 564, 588-89 (1972) (Marshall, J., dissenting); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 10-9 to -11, at 520-32 (1978); Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981); Michelman, *Formal and Associational Aims in Procedural Due Process*, 18 NOMOS: DUE PROCESS 126 (1977); Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977); Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261.

5. *See* Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146 (1983); Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982); *cf.* Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 GEO. L.J. 861 (1982) (approving of Court's emphasis on terms "liberty" and "property," but proposing alternative definition); Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3 (1983) (same).

6. 445 U.S. 480 (1980).

7. *Id.* at 491-93.

8. 459 U.S. 460 (1983).

9. *Id.* at 466.

mined by balancing a series of policy-related factors[10] is equally unprecedented. Both notions, moreover, indicate a desire to start from first principles and proceed by means of logical argument. Although an admirable effort, such an approach aspires to a level of certainty that is generally denied to legal doctrine and raises risks of unexpected consequences to which legal doctrine is uniquely subject.

Combined with the Court's unconstrained ambition, as so often is the case, is a substantial element of naiveté. The Court seems to have assumed that it could reach solid ground by invoking the terms "liberty" and "property." Unfortunately, these terms have had no fixed boundaries since the decline of legal formalism, and they lack even an intuitive core when applied to modern administrative situations.[11] As a result, the effort to determine whether a prisoner can be subjected to solitary confinement by discussing "liberty"[12] or to determine whether a student can be suspended from school by discussing "property"[13] is little more than arid conceptualism. It either conceals the real issues behind a screen of unrelated terms or, worse still, uses the unrelated connotations of those terms to control the real issues. What it clearly fails to do is to provide a coherent, realistic doctrine for applying our notion of procedural due process to the recently developed features of the administrative state.

As this Article will show, there is little need for the Court's ambition to transform either preexisting due process doctrine or the modern legal theory that underlies it. Since virtually all recent due process cases involve administrative agencies, the Court does not have to abandon the received tradition; the basic problem is simply to translate a protection developed for judicial trials into the administrative context. And since the terms liberty and property are used in the Constitution in connection with that protection, there is no reason to rely upon contemporary interpretations of their literal meaning when analyzing administrative action. The Court could determine what the effect of this language was in its original context, and then interpret it to achieve the same effect in administrative cases. In other words, modern procedural due process issues lend themselves to assessment by analogy. Rather than starting from first principles and then resorting to textual literalism in their application, the Court could start from existing doctrine and develop new solutions by an incremental approach that is more congenial to the case-law method.

10. Mathews v. Eldridge, 424 U.S. 319 (1976). For a discussion of the *Mathews* test, see *infra* text accompanying notes 416-39.

11. *See infra* text accompanying notes 219-52.

12. Hewitt v. Helms, 459 U.S. 460 (1983).

13. Goss v. Lopez, 419 U.S. 565 (1975).

Part I of this Article is historical. It traces the development of procedural due process strands that have appeared and disappeared over time. Of particular significance is the relationship between the Supreme Court's theory of due process and the administrative actions that it has attempted to subject to or shield from constitutional scrutiny.

Part II analyzes the scope of the due process clause, maintaining that the Court's use of the terms "liberty" and "property" is conceptually incoherent in the context of modern legal theory, and largely meaningless in relation to the modern administrative state. The starting point for due process analysis, it argues, should not be liberty, property, or any other individual interest. Instead, the inquiry should focus on the fairness of the governmental action. Our generally accepted standards for fairness are that the government must follow applicable rules and provide a minimal level of procedural protection. The necessary limit on the scope of procedural due process in administrative contexts, then, is most readily captured by the familiar, albeit imperfect, distinction between legislative-type action, or rulemaking, and judicial-type action, or adjudication. This limit helps clarify the "procedural" and "substantive" nature of various due process decisions, as well as the differential legitimacy of these two uses of the clause. It is, moreover, precisely what the terms "liberty" and "property" imply when their effects are translated from the judicial to the administrative context.

Part III then initiates a direct inquiry into the content of due process protection. It suggests that this content can be determined by the familiar methodology of applying procedural archetypes to particular categories of governmental action. The crucial issues that arise in utilizing this methodology can be analyzed in terms of standard administrative law notions about the permissible scope of agency discretion. Such analysis reveals, rather than obscures, the policy choices that are truly at stake in modern procedural due process cases. The basic choice is whether to defer to state law on the matter of administrative discretion, or to impose federally based limitations. The Article does not attempt to resolve this debate, but it concludes that a coherent set of federal limitations can be derived from existing case law in procedural due process and related areas.

I
THE EVOLUTION OF CURRENT DOCTRINE

A. The Rise and Fall of the Right-Privilege Approach

Despite the many controversies about the "cryptic and abstract

words of the Due Process Clause,"[14] it has always been clear that the clause applied to the conduct of criminal and civil trials. The origin of the clause lies in Chapter 39 of the Magna Carta,[15] although the actual phrase "due process of law" first appeared as part of a later revision.[16] Well before our Constitution was drafted, British jurists had definitively associated this phrase with a variety of protections inherent in the trial process, most notably trial by jury.[17] The framers of the fifth amendment could not have doubted that the due process concept included such protections, whatever they may have thought about its effect on substantive legislation.[18] The framers of the fourteenth amendment were certainly of the same view.[19] The extent to which the fourteenth amendment's due process clause was intended to incorporate the Bill of Rights may be disputed, but it was at least intended to incorporate the due process clause of the fifth amendment. And no subsequent interpretation of either provision has seriously called its applicability to judicial trials into question.

1. The Administrative State and the Problem of Due Process

The rise of the administrative state in the late nineteenth and early twentieth centuries created major complexities for the procedural due process doctrine. To begin with, some administrative agencies were empowered to make decisions in areas previously governed by the common law.[20] The Supreme Court applied the concept of due process

14. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

15. Chapter 39 of the Magna Carta provides: "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." A. HOWARD, THE ROAD FROM RUNNYMEDE 388 (1968) (translation of selected portions of the Magna Carta); *see also* R. MOTT, *supra* note 1, at 30-36.

16. *See* R. MOTT, *supra* note 1, at 4-5; Miller, *supra* note 1, at 5. Since the Magna Carta was a personal treaty between the king and the barons, it had to be reissued in each successive reign. The term "due process" first appears in the reissue of Edward III (1354). By this time the provision that contained it was Chapter 29 of the document.

17. *See* 4 W. BLACKSTONE, COMMENTARIES *342-43; 1 E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45-56 (4th ed. London 1797).

18. *See* A. HOWARD, *supra* note 15, at 326-31; R. MOTT, *supra* note 1, at 143-61.

19. *See* H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 151 (1908); R. MOTT, *supra* note 1, at 163-66. Before the adoption of the 14th amendment, a number of leading cases and commentaries had linked the term due process to the guarantee of fair procedure established by the Magna Carta. *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 517, 581 (1819) (argument of D. Webster); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1945 (5th ed. 1891). The framers of the 14th amendment can hardly have intended to exclude such traditional and authoritative interpretations, particularly since they regarded the meaning of "due process" as obvious.

20. The most familiar example is fixing rates for a particular industry. The administrative agency determines the charge for goods or services that would previously have been determined by private contract and enforced at common law. *See, e.g.*, Arizona Grocery Co. v. Atchison, T. &

to these proceedings with great rigor. In essence, it held that the agency's decisionmaking must meet the procedural standards of a civil trial,[21] and that even when the standards were met, only certain types of questions could be definitively decided by the agency. If the question went to the agency's jurisdiction, as in *Crowell v. Benson*,[22] or to the constitutionality of its action, as in *Ohio Valley Water Co. v. Ben Avon Borough*,[23] due process required de novo review. Thus, the Court not only found that due process imposed traditional procedural restrictions upon administrative decisions, but also that it imposed absolute limits on the scope of an agency's power.

During the 1940's, however, the latter part of this doctrine was significantly eroded.[24] Perhaps the New Deal had persuaded the Court, if by no other means than by having populated it, that administrative agencies were essential to the operation of a modern state. To put the matter in more principled terms, the Court had accepted the notion that an administrative agency, when subjected to procedural standards, could function as fairly as a judicial decisionmaker.[25]

S.F. Ry., 284 U.S. 370, 384 (1932); Transportation Act of 1920, ch. 91, § 410, 41 Stat. 456, 483 (repealed 1978).

21. *E.g.*, Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292 (1937); United States v. Abilene & S. Ry., 265 U.S. 274 (1924); ICC v. Louisville & N. Ry., 227 U.S. 88 (1913). Unlike civil trials, however, agency adjudications did not require formal rules of evidence, *see, e.g.*, Opp Cotton Mills, Inc. v. Administrator of the Wage & Hour Div. of the Dep't of Labor, 312 U.S. 126, 155 (1941); *Louisville & N. Ry.*, 227 U.S. at 93, and did not require a jury, *see, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937); Wickwire v. Reinecke, 275 U.S. 101, 105-06 (1927).

22. 285 U.S. 22 (1932) (trial de novo required for "jurisdictional facts," i.e., facts that are conditions precedent to operation of administrative program). *Crowell* relies largely on a separation of powers rationale rather than a due process rationale, possibly because it involved a federal agency and the former rationale was readily available. Although the Court did not need to rely on due process, some language in the opinion suggests that it might otherwise have done so. *See id.* at 56; *cf.* Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953, 974-75 (1957) (similarity of separation of powers and due process rationales).

23. 253 U.S. 287 (1920) (trial de novo required where company appealed from agency ratesetting on ground that rate effectively confiscated company's property without due process).

24. *See, e.g.*, Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944); Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 257-58 (1940); *see also* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

25. *But see* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (Congress may not delegate determinations of "private rights" to courts established under article I). While Justice Brennan's majority opinion distinguishes the scope of the delegation in *Northern Pipeline* from that in Crowell v. Benson, 285 U.S. 22 (1932), 458 U.S. at 80-86, the decision seems to be a throwback to earlier views of the administrative agency. However, it is based entirely on a separation of powers rationale and not on due process concerns with the fairness of the adjudication. In fact, Justice Brennan virtually conceded that the opposite result obtains under the due process clause. After stating that Congress has the power to transfer adjudication of public rights to article I courts, he wrote: "Doubtless it could be argued that the need for independent judicial determination is greatest in cases arising between the Government and an individual." *Id.* at 68 n.20. Doubtless indeed. Yet everyone agrees that this consideration does

Besides traditional adjudicative powers, administrative agencies were granted two other types of power that raised procedural due process issues. First, agencies could make rules governing the substance of their adjudicative decisions. Second, agency adjudicative powers included decisionmaking about matters that had never before been adjudicated by courts, but that resembled judicial adjudications in certain ways. This posed the question whether the requirement of due process should extend to either of these powers, as it had to the agency's powers to adjudicate traditional judicial questions. Courts ultimately decided that the due process clause was not applicable in either context. Administrative rulemaking was treated as equivalent to legislation, and was thus exempt from procedural requirements.[26] The problem was to distinguish such rulemaking from the adjudications to which procedural due process applied. Addressing this question in *Londoner v. City of Denver*,[27] the Supreme Court held that the enactment of a street-paving ordinance was not controlled by due process standards, even though the legislative body had apparently violated legally established rules in passing the ordinance.[28] In contrast, the assessment of the cost to individual property owners was held to violate the clause, because the property owners had not been given notice and a hearing before the assessment became final.[29]

The Court clarified the *Londoner* principle several years later in *Bi-Metallic Investment Co. v. State Board of Equalization*.[30] *Bi-Metallic* involved a due process challenge to an order of the State Board of Equalization that increased the valuation of all taxable property in the City of Denver by forty percent. In rejecting this challenge, Justice Holmes wrote: "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption."[31] *Londoner* was a different case, he continued, because a "relatively small number of persons was concerned, who were excep-

not yield a due process right to an article III judge. The reason, presumably, is that a decisionmaker does not need all the accoutrements of an article III judge to be sufficiently independent of the government for due process purposes.

26. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908).

27. 210 U.S. 373 (1908).

28. *Id.* at 378-79. On the issue of whether there is a federal right to have a governmental body follow preestablished rules, see *infra* text accompanying notes 297-306 (administrative body must follow rules); *infra* text accompanying note 330 (legislative body distinguished).

29. *Londoner*, 210 U.S. at 385-86. The assessment was also fixed by the city council, sitting as a board of equalization. *Londoner* thus quite clearly distinguishes rulemaking from adjudication on the basis of governmental function, rather than the nature of the governmental actor. *See infra* text accompanying notes 465-75.

30. 239 U.S. 441 (1915).

31. *Id.* at 445.

tionally affected, in each case upon individual grounds."[32] While the precise rule of *Bi-Metallic* is not entirely clear, the idea appears to be that procedural controls do not apply when rules of general applicability are declared, but do apply to binding legal determinations regarding specified individuals. Thus, a generally worded provision that applies to only a few persons need not conform to due process requirements, but governmental action determining the rights or obligations of numerous specified persons is invalid unless the mandates of due process are satisfied.[33]

As for the powers of administrative agencies to adjudicate matters not traditionally dealt with by common law courts, the Court again held that the due process clause did not apply. The rationale for this conclusion was the now notorious right-privilege distinction.[34] As Professor Stewart has described, common law causes of action were regarded as defining the fundamental rights of liberty and property, the natural law entitlements of individuals.[35] These rights received procedural due process protection against government deprivation,[36] just as they received substantive due process protection against regulation.[37] If a matter lay beyond the limits of these rights, however, any interest that the individual could claim was necessarily a government creation that could be abolished by the same power that created it.[38] It seemed chimerical to hold that a person had a right to such contingent, temporal creations. Conversely, it seemed heretical to hold that the government could place whatever restrictions it wished on a person's

32. *Id.* at 446. Justice Holmes had dissented without opinion in *Londoner.* Londoner v. City of Denver, 210 U.S. 373, 386 (1908) (Holmes, J., dissenting).

33. For a contemporary explication of this approach, see J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 21 (1927). The modern case that raises this issue, and invokes *Londoner* and *Bi-Metallic,* is United States v. Florida E. Coast Ry., 410 U.S. 224 (1973), discussed *infra* at text accompanying notes 342-44.

34. On the right-privilege distinction generally, see Reich, *The New Property,* 73 YALE L.J. 733 (1964); Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1667 (1975); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

35. *See* Stewart, *supra* note 34, at 1717-19.

36. *See, e.g.,* Moore v. Dempsey, 261 U.S. 86 (1923) (deprivation of liberty without proper trial violates due process); Londoner v. City of Denver, 210 U.S. 373 (1908) (taxation of property without adjudication violates due process); Hovey v. Elliott, 167 U.S. 409 (1897) (deprivation of property without trial violates due process).

37. The most notable example is the "liberty of contract" doctrine. *See, e.g.,* Adkins v. Children's Hosp., 261 U.S. 525 (1923); Adair v. United States, 208 U.S. 161 (1908); Loclmer v. New York, 198 U.S. 45 (1905).

38. *See, e.g.,* Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934) (attendance at college); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (*The Chinese Exclusion Case*) (immigration); McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) (public employment). The classic statement of the doctrine is by then-Judge Holmes in *McAuliffe.* "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 220, 29 N.E. at 517.

"privilege" to sell ice, for example. Selling ice, the courts knew, was not a privilege, but a fundamental right.[39]

Although the right-privilege distinction was deeply ingrained in the judicial consciousness, it was not followed with absolute consistency. By the beginning of this century, the Supreme Court had held that resident aliens were entitled to procedural due process protection before they could be deported,[40] even though they had been granted entry as a privilege and were subject to the rules of an administrative agency. Similarly, courts concluded that certain types of licenses, although granted as a privilege by the government, could not be revoked without a hearing.[41]

Perhaps courts felt these situations involved interests that were sufficiently independent of the government, like the fundamental rights of common law adjudication, to require due process protection. Resident aliens had not simply been given permission to enter the United States; they had made use of that permission to develop careers, personal relationships, and social reputations, all indistinguishable from those of their nationalized compatriots. Similarly, license holders were often professionals or entrepreneurs who had amassed assets and built reputations that went well beyond the original benefit. It was difficult for courts of this era, given their solicitude for private enterprise, to deny protection to such interests. Neither the *Bi-Metallic* distinction nor the right-privilege distinction was developed with great precision during the first half of this century. Perhaps the Supreme Court was too preoccupied with the stormy subject of substantive due process to devote much thought to other applications of the clause. More likely, neither doctrine addressed major social issues the way substantive due process did. Although some administrative rules may have been so specific in their application and some licensing authorities so arbitrary in their decisions that they seemed unfair, there was no general pattern of behavior that appeared outrageous to the Court or to society at large.[42] There was thus little need to clarify these two doctrines, and even less need to question them.

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39. *See* New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

40. *See* Yamataya v. Fisher, 189 U.S. 86 (1903) (*The Japanese Immigrant Case*); *see also* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); United States *ex rel.* Vajtauer v. Commission of Immigration, 273 U.S. 103 (1927).

41. *See, e.g.*, Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926) (admission of certified public accountant to practice before Board of Tax Appeals); *Ex parte* Robinson, 86 U.S. 505 (1873) (license to practice law); Gilchrist v. Bierring, 234 Iowa 899, 14 N.W.2d 724 (1944) (license to operate cosmetology school).

42. Despite the uproar over the invalidation of state legislation on substantive due process grounds, judges of this era were not particularly hostile to the government. Being firm believers in legal rules, and public servants themselves, they were willing to grant government agents considerable discretion, as indicated by their exemption of both rulemaking and "privilege" from the

2. *The Loyalty-Security Cases*

The advent of the loyalty-security programs of the 1940's and the 1950's marked the great watershed in the application of procedural due process to administrative agencies. These programs were designed to rid the government of subversives, and to express society's general condemnation of leftist activity.[43] Their basic strategy was not to bring criminal or civil actions, but to deny or terminate government benefits, positions, and required licenses.

Federal judges—the Supreme Court Justices in particular—were frequently incensed by the vague grounds and arbitrary procedures that characterized so many of these administrative actions.[44] An obvious solution was to apply the due process clause to the denial of benefits with the same rigor that it had been applied to adjudications of traditional common law rights. But the courts could not do so as long as they remained unwilling to declare that people had a right to government benefits.[45] Instead, they relied on three principal rationales to translate their concerns about loyalty-security programs into legal doctrine: the doctrine of unconstitutional conditions, an inquiry into the government's compliance with applicable legislative or administrative authorization, and the concept of arbitrary action.

a. *The Unconstitutional Conditions Doctrine*

The unconstitutional conditions doctrine states that if the govern-

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strictures of due process. Courts thus invalidated legislation only when the acknowledged power of government conflicted with their more strongly held belief in liberty and property rights.

43. *See generally* R. BROWN, LOYALTY AND SECURITY EMPLOYMENT TESTS IN THE UNITED STATES (1958); W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS (1956); Note, *The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972).

44. This sense of outrage can be seen in the Court's use of doctrinal innovations to invalidate loyalty-security dismissals, *see* cases cited *infra* in notes 46, 50, 53, 56, 59, 61, and from the general tone of the opinions. The Justices often indicated their dismay by reproducing in their opinions transcripts of the loyalty-security investigations, many of which contained questions that would grate on virtually anyone's sensibilities. *See, e.g.*, Greene v. McElroy, 360 U.S. 474, 489 n.16 (1959) (asking witness: "Did you ever hear it said that [petitioner's former wife] slept on a board in order to keep the common touch? . . . When you were [a guest] in [her] home did she dress conventionally when she received her guests?"); Vitarelli v. Seaton, 359 U.S. 535, 541 n.4 (1959) (" 'I was wondering whether you had ever heard of Consumers Union?' "); *id.* at 542 n.5 (" 'What were your feelings at that time concerning racial equality?' . . . 'I think you indicated . . . that you at times voted for and sponsored the principles of Franklin Delano Roosevelt, Norman A. Thomas, and Henry Wallace?' "); Sweezy v. New Hampshire, 354 U.S. 234, 244 (1957) ("Did you in this last [invitational] lecture on March 22 or in any of the former lectures espouse the theory of dialectical materialism?"); *id.* at 260 (Frankfurter, J., concurring) (same quotation).

45. *See, e.g.*, Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 894-99 (1961) (employment at defense installation); Barsky v. Board of Regents, 347 U.S. 442, 449-53 (1954) (license to practice medicine); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (entry into United States by noncitizen); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950) (government employment), *aff'd by an equally divided Court*, 341 U.S. 918 (1951).

ment may not infringe upon a certain right directly, it cannot achieve the same result by conditioning the acquisition or retention of a benefit on the nonassertion of that right.[46] The leading cases were *Speiser v. Randall*,[47] invalidating a California requirement that claimants for a veteran's tax exemption swear that they did not advocate overthrow of the government, and *Sherbert v. Verner*,[48] a free exercise case. As Justice Brennan wrote in *Speiser*, "[t]he appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech."[49]

The unconstitutional conditions doctrine, of course, can only be invoked when the government infringes some independently protected right.[50] Most crucial questions, however, involve the way in which independent rights are interpreted. Had the Supreme Court of the 1950's been prepared to hold that people had a first amendment right to join the Communist Party or to advocate the overthrow of the government,[51] it could have used the doctrine to terminate the entire range of loyalty-security programs. Had it simply been prepared to hold that people had a fifth amendment right to refuse to answer questions about Communist Party membership, it could have terminated many of these programs.[52] Since the Court was unwilling to reach either conclusion, its use of the doctrine was necessarily limited.[53]

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46. *See generally* Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Van Alstyne, *supra* note 34, at 1445-49; Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741 (1981).

47. 357 U.S. 513 (1958).

48. 374 U.S. 398 (1963) (denial of unemployment compensation to Seventh Day Adventist who refused to work on Saturday violates free exercise clause, although any refusal to accept work rendered applicants ineligible for the benefit under applicable state law).

49. *Speiser*, 357 U.S. at 518; *see also Sherbert*, 374 U.S. at 404 ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.") (footnote omitted).

50. In addition, the doctrine's coherence has been questioned on the ground that the government's action should be analyzed directly, rather than on the basis of its connection with other constitutional provisions. Westen, *supra* note 46; *see also* Van Alstyne, *supra* note 34, at 1448.

51. The Court was clearly unwilling to take this position. *See* Scales v. United States, 367 U.S. 203 (1961); Dennis v. United States, 341 U.S. 494 (1951).

52. The Court was also unwilling to take this position. It consistently held that the government could require answers to questions about Communist Party membership as a condition of employment. Nelson v. County of Los Angeles, 362 U.S. 1 (1960); Lerner v. Casey, 357 U.S. 468 (1958); Beilan v. Board of Educ., 357 U.S. 399 (1958). Curiously, the Court did not even rely on the unconstitutional conditions doctrine in Slochower v. Board of Higher Educ., 350 U.S. 551 (1956), which involved a dismissal from public employment for the specific reason that the employee had invoked the fifth amendment. The Court did invalidate the dismissal, but it did so on the ground that invoking the fifth amendment was not evidence of guilt, and that dismissal of an employee without any evidence of wrongdoing violated due process.

53. *But see infra* note 82 (Court's subsequent willingness to hold loyalty-securtiy program unconstitutional on first amendment grounds).

b. Improper Legislative or Administrative Authorization

The second and most frequently employed rationale for attacking loyalty-security programs was to find that the government's action was improperly authorized. Again, this argument was not universally available, but it was a genuine issue in a surprising number of cases that reached the federal courts.[54]

When federal agencies were involved, the improper authorization analysis could have taken several forms. The most obvious approach would have employed separation of powers considerations to invalidate administrative adjudication as an exercise of the judicial function.[55] Such an approach, however, would have constituted an application of the *Crowell v. Benson* rationale,[56] and would thus have treated government benefits like common law rights.[57]

The Supreme Court eventually adopted an alternative, nonconstitutional approach that acknowledged that the legislature could delegate broad powers to administrative agencies, but that held the agency to the scope and terms of the specific delegation.[58] And the Court applied the same rationale to delegations of power from the President to executive agencies, where no separation of powers argument was available.[59]

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54. *See* cases cited *infra* in notes 63-68.

55. To hold that administrative action was invalid as an exercise of improperly delegated legislative power would have struck at the heart of the administrative state, which depends on such delegations. The Supreme Court so held once, in response to the most far-reaching of the New Deal programs, The National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); *cf.* Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (invalidating one provision of same act). But modern courts have recognized broad congressional power to delegate legislative authority. *See, e.g.*, American Power & Light Co. v. SEC, 329 U.S. 90 (1946); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971).

56. *See supra* note 22 and accompanying text.

57. The Court in *Crowell* explicitly distinguished privileges from the rights with which it was concerned. In Chief Justice Hughes' view, "the distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." Crowell v. Benson, 285 U.S. 22, 50 (1932). With respect to the latter, all factual determinations may be delegated to legislative courts. But *Crowell* was a case "of private right, that is, of the liability of one individual to another under the law as defined." *Id.* at 51. It was with respect to those cases that the *Crowell* doctrine of jurisdictional facts applied. *See supra* note 22.

58. The leading cases were Greene v. McElroy, 360 U.S. 474 (1959) (Department of Defense not authorized by Congress to deny security clearance to employees of private company on the basis of confidential information); Kent v. Dulles, 357 U.S. 116 (1958) (Secretary of State not given "unbridled discretion" to grant or withhold passports to citizens); and Cole v. Young, 351 U.S. 536 (1956) (Food & Drug Administration not authorized to apply loyalty program to inspector).

59. Any general question of unproper delegation of presidential power was eliminated in 1950 by the provision that is now 3 U.S.C. § 301 (1982) (authorizing "delegation" to federal administrators of powers President received from Congress).

In other words, even if Congress or the Constitution itself had granted the President plenary power, the President had not necessarily transferred that power to the agency, at least not in its pristine condition.[60]

An implicit principle of the delegation doctrine is that an agency must obey any rules that are applicable to it. By extension, then, an agency's own rules, as well as rules imposed by its superiors, should constrain it. Since rational administration generally requires standards of some sort, an agency will often promulgate rules in situations where its discretion is otherwise unlimited. If such rules bind the agency, courts can construe them like congressional or presidential delegations to determine whether they authorize the particular action in question.[61]

By the 1950's the notion that administrative agencies must follow their own rules had already been established with respect to substantive rules affecting traditional property rights.[62] The principle was then extended to require an agency to obey rules governing the manner of its adjudications. *United States ex rel. Accardi v. Shaughnessy*[63] involved a procedure voluntarily adopted by the Attorney General under which requests for the suspension of deportation were first submitted to an appointed Board of Immigration Appeals. The Court held that the Attorney General, although he initially had absolute discretion to grant or deny suspensions, could not circumvent the procedure he had established by sending the Board a list of "unsavory characters" whom he wanted to deport.[64] *Accardi* was followed by two loyalty-security cases,

60. *See, e.g.*, Peters v. Hobby, 349 U.S. 331 (1955) (Loyalty Review Board not authorized to hear appeals from favorable determinations of employee loyalty at the department level); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (Attorney General not authorized to list organizations as "communist," unless he has factual evidence, based on specific criteria, to support that designation). In Greene v. McElroy, 360 U.S. 474 (1959), the Court also held that the President had not authorized the denial of security clearances. *Id.* at 507-08. By doing so, it avoided the question of whether the President would have an inherent power to authorize such denials without congressional authorization.

61. *See generally* Smolla, *The Erosion of the Principle that Government Must Follow Self-Imposed Rules*, 52 FORDHAM L. REV. 472, 477-81 (1984).

62. *See* Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370, 387-89 (1932) (once ICC has established maximum rates by action "legislative in character," it may not declare specific carrier's rate below that maximum to be illegally high by action "judicial" in character). The Court described the ICC's power to set maximum rates as having "altered the common law." *Id.* at 384; *cf.* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765-66 (1969) (adjudicative precedents, unlike rules, may be changed by agency in appropriate circumstances). *See generally* Berger, *Do Regulations Really Bind Regulators?*, 62 NW. U.L. REV. 137, 143-44 (1967); Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1319-31 (1972). Apparently, the basis for the principle was the power of federal courts to establish a common law of federal agencies.

63. 347 U.S. 260 (1954).

64. *Id.* at 267. The holding was that the Board must exercise its own discretion. This should not be read, however, as contradicting the established administrative law principle that the agency may limit adjudicatory discretion by adopting general rules. *See* Federal Power Comm'n v. Texaco, Inc., 377 U.S. 33 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

Service v. Dulles[65] and *Vitarelli v. Seaton*.[66] Justice Harlan wrote in *Vitarelli*: "Having chosen to proceed against petitioner on security grounds, the Secretary here, as in *Service*, was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily."[67] Although all these cases involved pure privileges—matters that were initially within the administrator's discretion[68]—the Court did not need to concern itself with the right-privilege distinction. Its argument did not depend on finding rights in the affected individual, but in imposing limits on the agency—limits derived from the rules the agency itself had adopted.

c. Arbitrary Action

The review of agency decisions for their fealty to legislative, presidential, or internal rules proved to be a powerful tool, but it had two very obvious limitations. First, it could be circumvented by an outright grant of discretion by the legislature, coupled with an outright retention of discretion by the agency.[69] Second, and even more important, federal courts could not apply it to the states because the courts have no jurisdiction to interpret state laws or administrative rules, or to create a federal common law of state administrative agencies. Indeed, even the nondelegation doctrine does not generally apply when federal courts review the actions of state governments.[70] The only federal basis for

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Instead, *Accardi* holds that when an agency does adopt a rule, that rule must be followed in particular cases. *See* Sofaer, *supra* note 62, at 1321-23.

65. 354 U.S. 363 (1957) (regulations for loyalty-security dismissals adopted by State Department must be followed, even for dismissal that would otherwise have been entirely discretionary).

66. 359 U.S. 535 (1959).

67. *Id.* at 539-40. The Court was unanimous on this point. The invalidation of a second attempt to dismiss, on more technical grounds, drew a dissent from four justices. *Id.* at 546 (Frankfurter, J., dissenting). For a contemporaneous case outside the loyalty-security area that adopts the same position, see Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959).

68. *Vitarelli*, 359 U.S. at 539 (petitioner, "as a 'Schedule A' employee, could have been summarily discharged by the Secretary at any time without the giving of a reason"); *Service*, 354 U.S. at 377-78 (Secretary of State authorized " 'in his absolute discretion to "terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States." ' ") (quoting S. REP. No. 2108, 81st Cong., 2d Sess. 15-16 (1950)); *Accardi*, 347 U.S. at 261-62 (petitioner was "[a]dmittedly deportable").

69. *See, e.g.*, Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 889-94 (1961) (commanding officer of naval installation has absolute authority to deny access to employees of concessionaire operating at installation); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

70. *See, e.g.*, Highland Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."); Dreyer v. Illinois, 187 U.S. 71, 83-84 (1902); Women's Health Servs., Inc. v. Maher, 514 F. Supp. 265, 271 (D. Conn. 1981).

invalidating a state loyalty program was the Constitution.

In state cases, therefore, the Court had to articulate a third way to invalidate loyalty-security programs, a constitutional one, based on the due process clause. The idea was that a state's arbitrary or irrational action is itself a violation of due process. By arbitrary action, the Court generally meant that the state agency had failed to follow applicable rules, or that it had failed to employ certain minimum procedures. Of course, invalidation of a benefit termination on this ground, the Court hastened to add, did not imply that people had a right to governmental benefits.[71] Rather, it meant that due process constraints always apply to the manner in which a state carries out adjudications or similar determinations. Thus, even if the state could abolish a certain benefit entirely, it could not deny that benefit to individuals by arbitrary means.

Although the arbitrary action doctrine represented a significant advance in due process jurisprudence, it was neither clearly articulated nor consistently employed. Nonetheless, it served as the basis of a number of significant decisions,[72] and proved sufficiently vigorous to

71. Virtually every one of these decisions explicitly disclaims that forbidden notion. *See, e.g.*, Slochower v. Board of Higher Educ., 350 U.S. 551, 559 (1956) ("This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College."); Wieman v. Updegraff, 344 U.S. 183, 192 (1952) ("We need not pause to consider whether an abstract right to public employment exists."). The one area where the Court expressed some doubt about the state's plenary power was in the bar admission cases. *See* Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). But even here the Court was unwilling to commit itself, *see id.* at 239 n.5 ("We need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' "). Apart from its unsurprising empathy for attorneys, the Court's doubts may have arisen from the fact that bar admission is more akin to a license to pursue a private calling than it is to a public benefit. *See supra* text accompanying notes 40-41. But the real issue involves the nature of the government's actions. *See infra* text accompanying notes 465-75.

72. *See, e.g.*, Schware v. Board of Bar Examiners, 353 U.S. 232, 239-44, 247 (1957) (unanimous decision) (denying applicant permission to take bar examination on grounds of arrest record, use of aliases, and long-past membership in Communist Party, but without any evidence of bad moral character, is so arbitrary and irrational that it violates due process); Slochower v. Board of Higher Educ., 350 U.S. 551, 557-59 (1956) (automatic dismissal from teaching position for invocation of privilege against self-incrimination violates due process, because guilt cannot be inferred from exercise of privilege); Wieman v. Updegraff, 344 U.S. 183, 190-92 (1952) (unanimous decision) (state law barring person from employment solely because of membership in organization, with no requirement that the person have actual knowledge of the organization's goals, is so arbitrary that it violates due process).

Four justices dissented in *Slochower*. Justice Harlan argued that a statute providing for automatic dismissal does not presume guilt, but rather punishes refusal to cooperate. 350 U.S. at 566 (Harlan, J., dissenting). This later became the Court's standard position. A possible distinction on doctrinal grounds is that in all the subsequent cases, the questions that the individuals refused to answer were posed by the affected person's actual employer or licensing agency. In *Slochower*, the statute provided that any invocation of the privilege against self-incrimination required dismissal, and the particular case involved questions posed by a body totally unrelated to Slochower's employment. In that situation, the notion that the statute simply punishes a refusal to cooperate is less clear, and a stronger argument can thus be made for the arbitrariness of the

resist, albeit in diluted form, a major congressional effort to limit the Court's jurisdiction.[73] The reason for its appeal may have been its connection with two major themes of related Court decisions. First, the federal administrative cases had established the principle that an agency must follow applicable rules, whether such rules were generated by the legislature, the President, or the agency itself. To be sure, these decisions were based on nonconstitutional grounds, but it was only a short step to hold that due process also required obedience to rules. This principle generally appeared as a requirement that a state have some evidentiary basis for its adjudications, but such a requirement would be irrelevant unless the state was required to follow applicable rules in particular cases.[74] What was explicit was the principle's independence from the right-privilege distinction, since its operation did not depend on the individual's right, but on the existence of a binding state enactment.[75]

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dismissal. *Cf.* Beilan v. Board of Pub. Educ., 357 U.S. 399, 423-24 (1958) (Brennan, J., dissenting) (timing of inquiry by employer suggests that actual concern was triggered by employee's refusal to answer questions before unrelated body, thus dismissal was totally arbitrary).

73. This effort, which provides a political explanation for the retreat from *Slochower*, was the Jenner-Butler bill. S. 2646, 85th Cong., 1st Sess. (1957). Originally introduced in 1957 by Senator Jenner to deny the federal courts jurisdiction over loyalty-security and bar admissions programs, the bill was reintroduced the following year with the cosponsorship of Senator Butler, S. 3386, 85th Cong., 2d Sess. (1958), as a more limited proposal to deny the Supreme Court jurisdiction over state bar admission cases. The latter bill was defeated by a close vote. *See generally* W. MURPHY, CONGRESS AND THE COURT (1962). Following these events, a series of Supreme Court decisions came down sustaining employee dismissals and bar admission denials for loyalty-security reasons. *See, e.g.*, Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886 (1961); *In re* Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961); Nelson v. County of Los Angeles, 362 U.S. 1 (1960); Lerner v. Casey, 357 U.S. 468 (1958); Beilan v. Board of Pub. Educ., 357 U.S. 399 (1958).

It is not clear how exteusively the Jenner-Butler bill affected the Court. There had been several cases sustaining loyalty-security programs prior to 1957-58, *see, e.g.*, Barsky v. Board of Regents, 347 U.S. 442 (1954); Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951), and there were several important decisions striking down loyalty-security actions shortly after that date, *see, e.g.*, Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963); Greene v. McElroy, 360 U.S. 474 (1959). Moreover, almost all the decisions upholding loyalty-security actions after Jenner-Butler were based on the ground that an employee's refusal to provide information about his political associations was a valid, and thus nonarbitrary, basis for dismissal. This position did not conflict with the existing due process rationale. To reject it, the Court was required to articulate a new first amendment right to have such inquiries regarded as invalid. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1960); *infra* note 82 (citing cases that ultimately accepted this position).

74. *See* Konigsberg v. State Bar, 353 U.S. 252, 261-74 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-46 (1957); Slochower v. Board of Higher Educ., 350 U.S. 551, 558-59 (1956).

75. Another significant case based on a similar rationale is Sweezy v. New Hampshire, 354 U.S. 234 (1957). The Court's somewhat obscure opinion seems at certain points to espouse the forbidden position that a state legislature's delegation of power can violate the federal Constitution, *see supra* note 70, but it ultimately abjures that position, 354 U.S. at 255. The real holding seems to be that the Legislature's delegation of power to the Attorney General was so broad and uncertain that it was impossible to determine whether he was following the rules and requirements

The second notion was that fair procedures were a "fundamental right," central to a "scheme of ordered liberty."[76] This was the prevailing rationale by which procedural requirements for criminal trials and investigations were imposed upon the states. Sentencing an unrepresented defendant to death,[77] interrogating him for thirty-six hours without respite,[78] or pumping his stomach to obtain essential evidence[79] were held to violate fundamental principles of fairness implicit in the concept of due process. Similarly, the Court reasoned, reaching factual conclusions without a hearing constituted a due process violation.[80] Such a practice smacked of Star Chamber Courts, bills of attainder, arrests without trial, and other measures that constitute our historical image of oppresssion. Again, by viewing minimal procedures themselves as a fundamental right, courts avoided the distinction between rights and privileges.

3. Goldberg v. Kelly *and the Welfare Rights Cases*

By the 1960's, loyalty-security programs had ceased to be a major social issue.[81] The dampening of the controversy occurred at the same time, and was possibly a reason for the Court's increasing willingness to hold that loyalty requirements violated the first amendment.[82] As

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the Legislature had established. *Id.* at 253-54. Strictly speaking, *Sweezy* is not an administrative case, since the Attorney General was acting, under the statutes, as a "one man legislative committee." *Id.* at 237. Whatever that means, there was unquestionably a delegation of power to an administrative agent. *Id.* at 253.

76. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

77. Powell v. Alabama, 287 U.S. 45 (1932).

78. Ashcraft v. Tennessee, 322 U.S. 143 (1944).

79. Rochin v. California, 342 U.S. 165 (1952); *see also* Wolf v. Colorado, 338 U.S. 25 (1949) (arbitrary intrusion by police violates due process clause), *overruled on other grounds*, Mapp v. Ohio, 367 U.S. 643 (1961).

80. *See* Slochower v. Board of Higher Educ., 350 U.S. 551, 559 (1956) ("[I]t may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law."); Wieman v. Updegraff, 344 U.S. 183, 191 (1952) ("Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process.").

By the 1960's, the Court was more specific about the requirements of due process. In Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963), the Court held that an applicant was entitled to notice and a hearing, including the right to cross-examine adverse witnesses, before being denied admission to the bar. *Id.* at 106. Similarly, *In re* Ruffalo, 390 U.S. 544 (1968), held that a state disbarment proceeding was an inadequate basis for federal disbarment, because the state had not provided proper notice of the charges. *Id.* at 552.

81. *See* Askin, *Loyalty Oaths in Retrospect: Freedom and Reality*, 1968 WIS. L. REV. 498; Newman, Book Review, 46 CALIF. L. REV. 654 (1958) (reviewing R. BROWN, LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES (1958)).

82. *See, e.g., In re* Stolar, 401 U.S. 23 (1971) (requirements for admission to bar); Baird v. State Bar, 401 U.S. 1 (1971) (same); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (eligibility requirements for government employment); Elfbrandt v. Russell, 384 U.S. 11 (1966) (loyalty oath); DeGregory v. Attorney Gen., 383 U.S. 825 (1966) (demand for list of members of organiza-

this issue faded from the due process arena, however, a new one took its place: the "welfare rights" or "rights of the poor" movement.[83] This movement's primary concern was the content of social welfare legislation and, possibly, the general distribution of income;[84] but one subsidiary goal was the prevention of summary terminations of welfare, educational services, and related social benefits.

Naturally, the desire to prevent the termination of benefits suggested an appeal to the courts on procedural due process grounds. Lower federal courts decided a number of these cases, using the approach followed in the loyalty-security decisions. Though doggedly maintaining that there was no right to government benefits, they struck down a variety of administrative procedures as arbitrary or irrational.[85] As in previous cases, agency failure to follow preestablished rules and to provide certain minimum procedures in reaching factual determinations was found to constitute arbitrary action. The problem was the potential scope of the welfare rights cases. While the loyalty-security decisions had concerned only a single administrative program, whose primary importance lay in its political and symbolic implications, the new trend implicated virtually the entire range of administrative decisions.

In 1970, the Supreme Court finally decided a paradigmatic welfare rights case. *Goldberg v. Kelly*[86] addressed the specific issue whether the due process clause required New York City to give welfare recipients an evidentiary hearing before terminating their benefits. With the creative spirit that comes from ultimate authority, the Court ignored its loyalty-security decisions and advanced a new rationale to decide the

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tion). Some loyalty requirements continued to pass constitutional scrutiny. *See, e.g.*, Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971). But when the Court did strike down a loyalty provision—and it did so with increasing frequency—it tended to rely directly on first amendment grounds.

83. *See generally* J. AXINN & H. LEVIN, SOCIAL WELFARE (1974); M. HARRINGTON, THE OTHER AMERICA (1962); A. KAHN, SOCIAL POLICY AND SOCIAL SERVICES (1973); F. PIVEN & R. CLOWARD, REGULATING THE POOR (1971). For a discussion of legal issues surrounding the movement, see J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970); Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Reich, *supra* note 34.

84. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (public education); James v. Valtierra, 402 U.S. 137 (1971) (public housing); Dandridge v. Williams, 397 U.S. 471 (1970) (public welfare); Shapiro v. Thompson, 394 U.S. 618 (1969) (same). These cases were generally decided on equal protection grounds.

85. *See, e.g.*, Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969) (college disciplinary proceedings); Holmes v. New York City Hous. Auth., 398 F.2d 262 (2d Cir. 1968) (applications for public housing); Hornsby v. Allen, 326 F.2d 605, 609 (5th Cir. 1964) (application for liquor license); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 156 (5th Cir.) (college disciplinary proceedings), *cert. denied*, 368 U.S. 930 (1961).

86. 397 U.S. 254 (1970).

case. The opinion, written by Justice Brennan, began with the familiar declaration that "[t]he constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right." ' "[87] The opinion suggested instead that the entire distinction be abandoned, since "[i]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' "[88] The proper basis for decision, the opinion continued, should be "whether the recipient's interest in avoiding [the] loss outweighs the governmental interest in summary adjudication."[89] Applying this test, Justice Brennan concluded that even a temporary deprivation of one's welfare benefits is sufficiently serious to require an evidentiary hearing before termination.[90]

There are probably several reasons why the Court did not use the doctrine of the loyalty-security cases in *Goldberg*. First, the welfare rights movement had produced a change in emphasis. Commentators were focusing on the intrinsic importance of the benefits themselves, instead of the unfairness of government procedures for determining these benefits.[91] Moreover, neither of the basic elements by which procedural unfairness had been judged in the past seemed relevant in *Goldberg*. Fidelity to applicable rules was not an issue, because New York City had followed its rules in every detail,[92] and there was no suggestion of specific animus toward the individuals involved.[93] As for the fundamental right to minimum procedures, intervening judicial developments had rendered the notion somewhat quaint by 1970. The fundamental rights approach, central to the Court's criminal procedure rulings at the time of the loyalty-security cases, had long been criticized by Justice Black as conceptually identical to substantive due process.[94]

87. *Id.* at 262 (citing Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969)).

88. *Id.* at 262 n.8 (citing Reich, *supra* note 83; Reich, *supra* note 34).

89. *Id.* at 263.

90. *Id.* at 266.

91. *See* Reich, *supra* note 83; Reich, *supra* note 34; *see also Goldberg*, 397 U.S. at 262 n.8. Reich's basic argument was that government benefits were now as economically important as private possessions (hence the term "new property"). To distinguish between them, he pointed out, was to revive the discredited idea that free enterprise was a constitutionally preferred activity. Instead, the protections of constitutional law should attach equally to both types of property. Reich viewed procedural due process as simply one of these constitutional protections. His central point was the importance of the benefits to individuals.

92. *Goldberg*, 397 U.S. at 256-60; *see id.* at 256-57 ("At the time the suits were filed there was no requirement of prior notice or hearing of any kind before termination of financial aid.").

93. In fact, the benefits of several of the named plaintiffs were restored during the course of the litigation, *see id.* at 256 n.2, a phenomenon unknown in the loyalty-security cases.

94. *See* Adamson v. California, 332 U.S. 46, 90 (1947) (Black, J., dissenting) ("[T]he natural-law-due-process formula, which the Court today reaffirms, . . . has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals."), *overruled on other grounds*, Malloy v. Hogan, 378 U.S. 1 (1964); *see also* Duncan v. Louisiana, 391 U.S. 145, 168-71 (1968) (Black, J., concurring).

His solution was to interpret the due process clause of the fourteenth amendment as incorporating the provisions of the Bill of Rights in their entirety.[95] This approach was basically adopted, albeit incrementally;[96] by 1970, it was essentially complete,[97] and fundamental rights language had virtually disappeared from the Court's procedural due process opinions.[98] Having labored so long to eliminate this approach in the field of criminal procedure, the Court was understandably reluctant to resurrect it in administrative cases.

Perhaps the most significant reason why the *Goldberg* Court ignored the arbitrary action rationale, however, was that the question whether welfare benefits merit procedural protection was not presented in the case. New York City had already conceded that point and provided a post-termination hearing that generally complied with due process requirements.[99] The only issue, as Justice Brennan emphasized, was whether a hearing was required prior to the termination.[100] On the crucial question whether an individual is entitled to any hearing, or to due process rights in general, the opinion is essentially silent. Its direct contribution in this area was only to deal one more blow—the fatal one, as it turned out—to the already moribund right-privilege distinction. Indirectly, of course, *Goldberg* was profoundly influential. It signaled the Court's willingness to extend due process protections to the daily operations of virtually every state and federal administrative agency, and thus to a vast range of government benefits that had not been explicitly protected by due process prior to that time.

Goldberg and its immediate successors are sometimes portrayed as articulating an "interest" standard for determining the applicability of the due process clause.[101] But *Goldberg*, as noted, deals with the issue of timing, not applicability. Arguably, some notion of an applicability

95. *See* Adamson v. California, 332 U.S. 46, 90 (1947) (Black, J., dissenting).

96. The doctrine that emerged was termed "selective incorporation." The case that began the process was Mapp v. Ohio, 367 U.S. 643 (1961), which recognized the incorporation of the fourth amendment's exclusionary rule.

97. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

98. Of course, the Court did create a "fundamental rights or interests" strand to equal protection analysis. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Douglas v. California, 372 U.S. 353 (1963) (access to courts). Perhaps the Court felt less uncomfortable using an open-ended standard to interpret the equal protection clause, since that clause had not played a major role in the pre-1937 rejection of state legislation. It is suggestive that Justice Harlan, for whom substantive due process held no terrors, *see* Poe v. Ullman, 367 U.S. 497, 548-55 (1961) (Harlan, J., dissenting), argued that *Douglas* should have been decided solely on due process grounds. *Douglas*, 372 U.S. at 361 (Harlan, J., dissenting).

99. Goldberg v. Kelly, 397 U.S. 254, 259 n.5, 259-60, 260 n.7 (1970).

100. *Id.* at 260.

101. *See, e.g.*, Monaghan, *supra* note 4, at 407-08; Simon, *supra* note 5, at 150.

standard can be gleaned from these cases,[102] but it requires the retrospective light of recent developments to discern any explicit concern with the scope of due process protection. In fact, the Court apparently did not consider the problem, probably because the cases did not require it to do so.[103]

The interest standard for the applicability of the due process clause came somewhat more to the forefront in *Fuentes v. Shevin*.[104] *Fuentes* did not involve welfare rights, but arose from the related consumer rights movement.[105] The issue in the case was whether state agents could repossess goods purchased through a conditional sales contract if the buyer was not provided with prior notice and a hearing. As in *Goldberg*, only the right to a prior hearing was involved; no one questioned that the buyer was entitled to the full range of procedural rights in a subsequent challenge to the repossession. Justice Stewart, writing for the Court, tracked *Goldberg* by focusing on the individual's interest as the crucial question in determining the timing of the hearing.

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102. *See* Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970), where the Court stated: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss . . . .'" (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). The language suggests that individual interest helped determine the extent of due process protection, rather than the clause's applicability in a particular case.

103. Wisconsin v. Constantineau, 400 U.S. 433 (1971), for example, involved a state law that permitted officials such as police chiefs to post notices in liquor stores forbidding the sale of liquor to specified persons engaging in "excessive drinking." The Court had little difficulty holding that the state could not attach the sobriquet of drunkeness without notice and a hearing. Justice Douglas' opinion required only four paragraphs to establish the point, *id.* at 436-37, and the Court was unanimous on it. Three justices dissented from the decision, believing that the Court should have allowed the state courts to consider the validity of the statute first, but they made clear that they would have joined the majority had they been willing to reach the merits. *Id.* at 439-40 (Burger, C.J., dissenting); *id.* at 443-44 (Black, J., dissenting).

The Court's rationale was that the notice was "a stigma, an official branding of a person." *Id.* at 437. While Justice Douglas referred to the individual's interest, the thrust of the decision was the nature of the state's action in posting the notice. In essence, the Court held that the action was arbitrary for lack of minimum procedures, although the Court again eschewed the language of its previous decisions. *Cf.* Jenkins v. McKeithen, 395 U.S. 411 (1969) (board of inquiry's action identifying violators of criminal law in labor relations action violated due process clause).

Another case that has been described as articulating a generalized interest standard for due process is Bell v. Burson, 402 U.S. 535 (1971). *See* Monaghan, *supra* note 4, at 407-08. The case involved suspension of a driver's license. While the Court's opinion does acknowledge the essential nature of a driver's license in today's society, *Bell*, 402 U.S. at 539, the decision turns on the preclusion of various issues from the suspension determination. In fact, *Bell* is an irrebuttable presumptions case, not a true procedural due process case. *See infra* note 384.

104. 407 U.S. 67 (1972).

105. On the consumer rights movement, see generally D. CAPLOVITZ, THE POOR PAY MORE (1963); E. COX, R. FELLMETH & J. SCHULTZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969); W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE (1968); R. NADER, UNSAFE AT ANY SPEED (1965). This movement spawned a number of Supreme Court decisions in addition to *Fuentes*. *See, e.g.*, Swarb v. Lennox, 405 U.S. 191 (1972) (confessions of judgment); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (wage garnishment).

But to Justice Stewart, it was not immediately apparent whether the buyer had any interest at all. He acknowledged that the buyer did not have title to the goods,[106] and that repossession was not a final judgment.[107] However, he found the requisite interest in the conditional sales contract. "Clearly," he wrote, "this possessory interest in the goods, dearly bought and protected by contract, was sufficient to invoke the protection of the Due Process Clause."[108] Since Justice Stewart found the property interest he sought, this aspect of the decision received relatively little notice. But the straw man that he so readily disposed of in *Fuentes* was about to become a figure of considerable substance.

B. The Rise and Falter of the Liberty-Property Approach

1. Board of Regents v. Roth

The current approach of the Supreme Court, and the current agony of procedural due process, began a few weeks after *Fuentes v. Shevin*[109] in *Board of Regents v. Roth*.[110] At issue in *Roth* were the procedures that administrators of a public university had to follow before refusing to renew an untenured faculty member's contract. Justice Stewart's opinion for the Court proceeded in three basic steps. First, he declared that only certain types of interests constituted the sort of "liberty or property" protected by the due process clause.[111] Next, he defined the liberty interest and concluded that Roth's interest in renewal did not qualify.[112] Finally, he defined the property interest and concluded that Roth did not have a property interest either.[113]

In declaring that due process protection applied "only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property,"[114] Justice Stewart seemed simply to restate the text of the amendment itself. The district court, he wrote, had held due process protection applicable "by assessing and balancing the weights of the particular interests involved."[115] But Justice Stewart found that approach unacceptable: "[T]o determine whether due process requirements apply in the first place, we must look not to the

106. *Fuentes*, 407 U.S. at 86.
107. *Id.* at 84.
108. *Id.* at 86-87 (footnote omitted).
109. 407 U.S. 67 (1972).
110. 408 U.S. 564 (1972).
111. *Id.* at 569-72.
112. *Id.* at 572-75.
113. *Id.* at 576-78.
114. *Id.* at 569.
115. *Id.* at 570.

'weight' but to the *nature* of the interest at stake."[116]

This analysis represented a marked change from *Goldberg*, which had indeed focused on the weight of the individual's interest. Moreover, the interest in *Goldberg* was the hardship of a temporary financial deprivation, which did not fit very well under the rubric of either liberty or property. But *Roth* did much more than repudiate *Goldberg*. *Goldberg* had assessed the individual's interest only to determine the proper timing of due process rights whose basic existence was conceded. In shifting from the weight of the interest to the nature of the interest, *Roth* also shifted from the question of when the hearing was required to the question of whether the hearing was required at all.

Although this shift was obviously crucial to Justice Stewart's analysis, he did not offer any reason for it. The shift was hardly compelled, since the explicit issue in *Roth*, as in *Goldberg*, was whether the individual was entitled to a hearing before termination. One possible explanation is a sort of linguistic one. In deciding to move from the weight of the interest to its nature, Justice Stewart shifted from a relative to a categorical standard. It may thus have seemed natural to apply the standard used to analyze the categorical question of whether a hearing was required, rather than the relative question of when the hearing was required. But this does not explain why Justice Stewart made the shift from weight to nature in the first place. For that answer, *Roth*'s doctrinal predecessors provide at least a clue.

The *Roth* opinion cites only *Morrissey v. Brewer*[117] for the proposition that the nature of the interest determines whether due process requirements are applicable. *Morrissey*, decided the same day as *Roth*, held that informal hearings were required before termination of a convicted criminal's parole. Because a valid criminal conviction obviously restricts an individual's right to be at liberty, the Court posed the threshold question whether the parolee had any legally cognizable interest at all.[118] Only then did it consider whether that interest was sufficient to justify the imposition of minimum procedures. *Morrissey* itself cited only one precedent for this analysis—Justice Stewart's opinion in *Fuentes v. Shevin*.[119] And as noted, Justice Stewart was quite concerned in *Fuentes* about whether a person buying goods through a conditional sales contract had any rights at all.[120] Thus, in *Roth*'s doctrinal predecessors, one decided the same day and the other a few

116. *Id.* at 570-71 (emphasis in original).

117. 408 U.S. 471 (1972).

118. *Id.* at 481-82. The notion that prisoners retain certain due process liberty rights even after they have been incarcerated was not clearly articulated until Wolff v. McDonnell, 418 U.S. 539, 556 (1974); *see also* Meachum v. Fano, 427 U.S. 215, 225 (1976) (dictum).

119. 407 U.S. 67 (1972).

120. *See supra* text accompanying notes 105-08.

weeks earlier, it was possible that the weight of the individual's interest was zero. This possibility tended to suggest an either-or, categorical determination, rather than a sliding-scale, balancing approach.

Justice Stewart had previously shown a predilection for individual interest analysis in *Cafeteria & Restaurant Workers Union, Local 473*.[121] Writing for the majority, he denied due process protection to a cook excluded from the military facility where she worked by focusing on the minimal interest the cook had in the position, as well as the strength of the government's interest in summary exclusion. But *Cafeteria Workers* assessed the weight of the individual interest, not its nature.[122] By taking the additional step in *Roth*, Justice Stewart essentially obliterated the arbitrary action rationale that had dominated the Court's due process thinking for two decades. Instead, he employed an approach quite similar to the right-privilege distinction, establishing one category of individual interests to which due process applies, and another to which it does not. This seems particularly odd since Justice Stewart had clearly restated the Court's repudiation of the right-privilege distinction in the paragraph of the *Roth* opinion that immediately followed his articulation of the applicable standard.[123]

The real explanation for the *Roth* analysis may lie in the extent to which the Burger Court majority, which was just taking shape at this time,[124] was troubled by the expansive nature of the Warren Court doctrines it had inherited. Its response was to limit rather than overturn these doctrines, by establishing well-defined boundaries that restricted the number of cases in which they would operate. The Court's decisions on standing are perhaps the most notable example of this response.[125] Others include the reinvigoration of the state action concept,[126] and the elimination of various grounds for habeas corpus

121. 367 U.S. 886 (1961).

122. *See id.* at 894 ("[The] question cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action."). Although Justice Stewart did refer to the "nature" of the employee's interest, *id.* at 895, 896, he did so in the process of balancing that interest against the government's interest.

123. Board of Regents v. Roth, 408 U.S. 564, 571 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights.") (footnote omitted).

124. President Nixon's four appointees—Chief Justice Burger, and Justices Blackmun, Powell and Rehnquist—were all on the Court when *Roth* was decided, although Justice Powell did not participate in the case. The other three, together with Justices Stewart and White, comprised the *Roth* majority. Justices Douglas, Brennan and Marshall dissented.

125. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (Powell, J.); Warth v. Seldin, 422 U.S. 490 (1975) (Powell, J.); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (Burger, C.J.); United States v. Richardson, 418 U.S. 166 (1974) (Burger, C.J.).

126. *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (Rehnquist, J.); Hudgens v. NLRB,

review.[127]

Given this general predilection for restrictive boundaries, the Court's search for a limitation on the categories of interests protected by due process seems natural. Conscious of the power that administrative agencies wield in the modern state, it was not prepared to revive the right-privilege distinction and thereby insulate most administrative actions from due process review. But it was also clearly anxious to limit *Goldberg*, whose vast implications for administrative law were already being felt. Consequently, the *Roth* majority followed its right-privilege predecessors, refusing to equate due process requirements applicable to administrative agencies with due process concepts associated with court adjudications.

Having established that only certain categories of individual interests merit due process protection, Justice Stewart assumed, without discussion, that those categories are identified by the terms "liberty" and "property" as they appear in the text of the fourteenth amendment. He then proceeded to consider whether Roth could assert any such interest. He defined liberty expansively,[128] quoting the resounding language of *Meyer v. Nebraska*,[129] a noneconomic substantive due process case. In assessing the factual situation of *Roth*, however, he identified two more discrete and carefully defined strands of protected liberty: the right to one's good name, and the right to pursue one's chosen occupation.[130]

Turning to the property interest, Justice Stewart adopted a notably different approach. Instead of articulating specific illustrations of interests inherent in the concept, he assessed the nature of the property concept itself: "To have a property interest in a benefit, a person clearly . . . must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[131] Justice Stewart was then able to define the sort of entitlements that would constitute property interests with surprising ease: "Property interests, of course, are not created by the Constitution. Rather they are created and their

424 U.S. 507 (1976) (Stewart, J.); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (Rehnquist, J.); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (Rehnquist, J.).

127. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977) (Rehnquist, J.) (untimely objection to admission of confession); Stone v. Powell, 428 U.S. 465 (1976) (Powell, J.) (objections to state search and seizure when litigated in state trial); Estelle v. Williams, 425 U.S. 501 (1976) (Burger, C.J.) (untimely objection to trial in prison clothes).

128. Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

129. 262 U.S. 390 (1923).

130. *Roth*, 408 U.S. at 573-74. Had the case presented the issue, Justice Stewart would undoubtedly have identified a third element: the right to be free of bodily restraint. Although no particular textual support exists in the 14th amendment for any of these elements, they are certainly more precise than the term "liberty" itself.

131. *Id.* at 577.

dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[132] For this proposition, he offered no support at all.[133] He could have referred back to the right-privilege cases, since they held that interests beyond the scope of the common law were not protected. Being unwilling to do so, for reasons stated above, he was compelled to recognize that administrative regulations were as much a source of law as judicial decisions. He then had to create a new, and indeed unprecedented distinction: not between private and public rights, but between rights defined by some positive law and rights, or nonrights, that were not.

2. *The "Underlying Rights" Cases of the Mid-1970's*

The *Roth* opinion had an immediate impact. It was new, it was written in definitive terms, and it served the Supreme Court's purposes. What was not apparent at the time were its far-reaching implications.

Two years after *Board of Regents v. Roth*,[134] in *Arnett v. Kennedy*,[135] the Court had to decide whether a federal civil service employee could be dismissed without a prior evidentiary hearing.

132. *Id.*

133. Justice Stewart did state that "[c]ertain attributes of 'property' interests protected by procedural due process emerge from [prior] decisions." *Id.* at 577. Of the six cases he cited, however, five held that an individual had a right to procedural due process in a given administrative context: Connell v. Higgenbotham, 403 U.S. 207 (1971) (dismissal from public employment); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) (dismissal from public employment); Wieman v. Updegraff, 344 U.S. 183 (1952) (same); Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926) (denial of permission to practice law before a public agency). All of these cases involved interests created by state law, but the Court's willingness to extend procedural protection to these interests does not necessarily imply that there is some other set of interests not based on state law to which such protection would be denied. While the cases Justice Stewart cited support his statement that the right-privilege distinction had been rejected, they hardly support the creation of another somewhat similar distinction in its place.

The sixth case cited, Flemming v. Nestor, 363 U.S. 603 (1960), was the only one that denied the individual relief. *Nestor* involved a challenge to a federal law that terminated the Social Security benefits of certain deported aliens, particularly those who had been deported for being members of the Communist Party. While the Court denied relief on the ground that the benefit termination was validly enacted general legislation, it acknowledged in dictum that the individual's interest in the benefits was "of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause," *id.* at 611, and this was the page Justice Stewart cited. *See Roth*, 408 U.S. at 576. That language hardly requires the conclusion that there is some closed category of property rights that qualify for due process protection, particularly since the *Nestor* Court emphasized that the individual's interest, although qualified for such protection, was not "property." *Nestor*, 363 U.S. at 608-10. *See infra* text accompanying notes 339-49 (procedural due process inapplicable to general rules). Even assuming its relevance, any limitation *Nestor* may have placed on due process rights was effectively overruled by *Goldberg*, 397 U.S. at 262 n.8 (rejecting the right-privilege distinction and citing Reich, *supra* note 34, who bases his analysis on a critique of *Nestor*).

134. 408 U.S. 564 (1972).

135. 416 U.S. 134 (1974).

Following *Roth*, Justice Rehnquist's plurality opinion first inquired whether the employee had a sufficient property interest in his job—generated by some source independent of the due process clause—to trigger that clause's application. He held that such an interest clearly was created by the civil service statute that prohibited dismissal of employees "except for such causes as will promote the efficiency of [the] service."[136] But he also found that this same statute also specified the procedures to be followed in divesting the employee of that interest. These procedures defined the limits of the employee's interest, and thus the limits of its constitutional protection; the employee could not obtain the benefits of the statute without being subject to its limitations. As Justice Rehnquist wrote, he must "take the bitter with the sweet."[137]

The bitterness that the *Arnett* plurality would inflict is an understandable extension of *Roth*. If the government can control the creation of property, it should be able to create property that is subject to various limitations, either substantive or procedural in nature. This would, in effect, eliminate one of the two elements of due process that had been identified by the arbitrary action rationale:[138] the clause would no longer impose minimum procedures on adjudications, and would only require that government decisionmakers follow applicable rules.

Six members of the Court, whose positions were most fully stated in Justice Powell's concurrence, found this view unacceptable.[139] They

136. Lloyd-LaFollette Act, ch. 389, § 6, 37 Stat. 555 (1912) (current version at 5 U.S.C. §§ 7503, 7513 (1982)).

137. *Arnett*, 416 U.S. at 154.

138. *See supra* notes 69-71 and accompanying text.

139. Chief Justice Burger and Justice Stewart joined Justice Rehnquist's opinion. Justice Powell, joined by Justice Blackmun, rejected the plurality's bitter-sweet argument, but concurred in the result, finding that the procedural protection the employee had received satisfied constitutional requirements. *Arnett*, 416 U.S. at 164 (1974) (Powell, J., concurring). The four dissenters also rejected Justice Rehnquist's approach. *See id.* at 177 (White, J., concurring and dissenting); *id.* at 206-31 (Marshall, J., dissenting). Justice Douglas also wrote a separate dissent on the first amendment issue. *Id.* at 203 (Douglas, J., dissenting).

The Supreme Court has granted certiorari in Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550 (6th Cir. 1983), *cert. granted*, 104 S. Ct. 2384 (1984), a case in which the majority opinion relies on Justice Powell's *Arnett* opinion to establish the existence of a property interest. Presumably, however, the Court's concern is with the decision's extensive discussion of the amount of process due. *But see infra* note 142. The process due discussion is problematic on the basis of the Court's recent decisions, *see, e.g., infra* text accompanying notes 388-439, whereas the discussion of the due process clause's applicability is consistent with the weight of recent authority, *see, e.g.*, Vitek v. Jones, 445 U.S.480 (1980); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

To be sure, Judge Wellford's partial dissent seems to take issue with the majority's reliance on Justice Powell's *Arnett* opinion. *Loudermill*, 721 F.2d at 565 (Wellford, J., concurring and dissenting). But the dissent is not entirely coherent. While Judge Wellford cites Justice Rehnquist's bitter-sweet idea, he goes on to say that the amount of protection in *Loudermill* is adequate because it is equivalent to the amount of protection five members of the Court found adequate in *Arnett*. *Id.* at 565 & n.2. He thus conflates the applicability of the clause (the "property interest")

perceived a clear distinction between substantive and procedural rights: substantive rights were subject to plenary government control, but procedural rights were not. Consequently, the government could neither reduce procedural rights directly, nor do so indirectly by conditioning a substantive right on their reduction.[140] To this extent at least, the purpose of the due process clause was to make life somewhat more sweet, without permitting the government to make it once again more bitter. The result, of course, was to concede that the due process clause itself generated concrete and absolute requirements: the minimum procedures that had been regarded as a fundamental right in the loyalty-security cases.[141]

The resolution achieved in Justice Powell's concurrence in *Arnett v. Kennedy*, and reiterated in several other cases,[142] was not, however, a stable one. This became apparent two years later in *Bishop v. Wood*.[143]

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issue with the scope of protection (the "process due") issue. Moreover, he distinguishes *Vitek* because it dealt with a liberty interest, an argument that does not account for *Memphis Light*. *Id.* at 565.

140. *Id.* at 164-67 (Powell, J., concurring).

141. The approach used in *Arnett*, and the more general approach initiated by *Roth*, are often described as "positivist." *See* Mashaw, *supra* note 4, at 888-95. The term is meant to indicate that the Court requires some underlying positive law right before the due process protections apply. This is not the same as the legal philosophy of positivism, however. Positivism, roughly speaking, maintains that all true legal rules originate from some authoritative source. *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961). The due process clause obviously has such a source. Being part of the Constitution, it is itself a positive law right in the jurisprudential sense. The Court has held that this positive law right should be interpreted as creating procedural protections for rights generated by other positive laws, i.e., substantive rights, rather than creating procedural protections that exist independently of those rights. This is not positivism, but the Court's own due process philosophy. There is nothing in positivist theory to suggest that the lawmaking authority cannot create purely procedural rights, unattached to any underlying right. In fact, the notion that there is any constraint upon that authority in doing so, as the Supreme Court may believe, *see infra* text accompanying notes 275-83, would be a natural law argument of sorts, in direct conflict with the positivist approach. As a result, this Article describes the Court's theory of procedural due process as an underlying rights approach, rather than a "positivist" one.

142. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 573 (1975) (since state law created entitlement to education, student could not be suspended from school without prior hearing, even though suspension was pursuant to state law); *see also* Mathews v. Eldridge, 424 U.S. 319, 332 (1976). Curiously, Justice Powell rejected his own *Arnett* approach in *Goss*, and adopted Justice Rehnquist's. His dissent argued that "the very legislation which 'defines' the 'dimension' of the student's entitlement, while providing a right to education generally, does not establish this right free of discipline imposed in accord with Ohio law." *Goss*, 419 U.S. at 586 (Powell, J., dissenting). He then labored to distinguish his *Arnett* concurrence, arguing that termination of employment and suspension (as opposed to expulsion) of a student were qualitatively different. *Id.* at 587 n.4. However, the distinction he draws goes to the weight of the interest, not its nature; presumably the latter is decisive in Justice Powell's approach in *Arnett*. Justice Powell's shift here might be indicative of the doctrinal instability. Perhaps, therefore, the Court will address the *Arnett* issue in Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550 (6th Cir. 1983), *cert. granted*, 104 S. Ct. 2384 (1984), rather than merely discussing the amount of process due. *See supra* note 138. (It should also be noted that the case presents a res judicata issue, *Loudermill*, 721 F.2d at 556-59, and that this also drew a dissent from Judge Wellford, *id.* at 565 (Wellford, J., concurring and dissenting).)

143. 426 U.S. 341 (1976).

A policeman who had achieved the status of a "permanent employee" was dismissed from the force without a prior hearing. The applicable city ordinance set out several bases for dismissal of a permanent employee and specified certain procedures, not including a pretermination hearing.

The Court conceded that such an ordinance might create a property right for fourteenth amendment purposes. "However, . . . the ordinance may also be construed as granting no right to continued employment, but merely conditioning an employee's removal on compliance with certain specified procedures."[144] Indeed, the Court followed the district court by construing the ordinance in just that fashion.[145] As a result, the policeman was entitled only to those procedures specified in the statute. The *Bishop* opinion is closely related to the "bitter-sweet" rationale of the *Arnett* plurality, as all four dissenters charged.[146] Although *Bishop* does not allow the government simultaneously to create a property right and the procedures to eliminate that right, it does allow it to declare that a property right was not created, and then prescribe procedures governing deprivations of the underlying and now-demoted interest.[147] This tends to eliminate most of the limits that the *Arnett* concurrence would impose. Statutes governing benefit programs generally include both criteria for granting the benefit and procedures for taking it away; only rarely do they contain explicit declarations that a property right has been created. Unless the state concedes the existence of a property right, therefore, the *Bishop* approach would allow courts to deny it in most situations.

There was, however, even more to come. When Justice Stewart held in *Roth* that the due process clause's property interest was determined by positive law, it apparently did not occur to him that the liberty interest should be similarly determined. Instead, he invoked a substantive due process case to define the fundamental interest in liberty[148] and then articulated two aspects of liberty that were clearly fed-

144. *Id.* at 345 (footnote omitted).

145. It did so by deferring to the district judge's greater expertise in state law, noting that he "sits in North Carolina and practiced law there for many years." *Id.* This explanation is not really satisfactory since it conflates the structural and invariable fact that a district judge sits in the forum state with the incidental facts of the particular judge's biography.

146. *Id.* at 353 n.4 (Brennan, J., dissenting); *id.* at 355-56 (White, J., dissenting); *id.* at 361 (Blackmun, J., dissenting). The fourth dissenter was Justice Marshall.

147. The importance of this grant of power to the government, in practical terms, will depend upon the way the applicable statute or regulation is interpreted. *Bishop* allows the government's negation of a property right to be implicit as well as explicit. Moreover, it concludes that the specification of neither dismissal criteria nor dismissal procedures will counteract the initial negation. In fact, the Court contrasted the specification of procedures with the creation of a constitutionally protected property right. *Id.* at 347.

148. *See* Board of Regents v. Roth, 408 U.S. 564, 572 (1972); *supra* notes 128-30 and accompanying text.

eral in origin.[149] *Morrissey*, on which *Roth* relied, also treated liberty as a federally defined right,[150] as did various post-*Roth* cases,[151] including *Bishop*.[152] This is hardly surprising in view of the modern perception of the differences between liberty rights and property rights. But it is also not surprising, given the rhetoric of *Roth* and the predilections of the Burger Court majority, that the view of what constitutes liberty would begin to move toward the prevailing view of what constitutes property.

The case that initiated the movement toward a positive law definition of "liberty" was probably *Wolff v. McDonnell*,[153] though the holding actually extended the scope of due process protection. In *Wolff*, prison officials had denied inmates good-time credits that they would otherwise have been entitled to, on grounds of misconduct. The Court conceded that there was no constitutional guarantee of good-time credit. But "having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct,"[154] the state acknowledged the liberty interest involved and could not deny the credit without minimum procedures. The Court could have found that the state's failure to employ its own procedures rendered the state's action arbitrary.[155] Instead, the Court reasoned that the existence of rules governing good-time credits had created a liberty interest, and that "[t]his analysis as to liberty parallels the accepted due process analysis as to property."[156]

What Justice White probably meant was that liberty interests over and above those inherent in the due process clause could be created by state law, just as property interests of all kinds were created. But once the parallel between liberty and property interests had been articulated, it was a small step for the Court to find that the liberty interest, like the

149. *See* Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972). The first was good name or reputation and the second was further employment opportunity. It is difficult to read *Roth* and the cases it cites as establishing anything other than a federal, i.e., constitutional, standard for the liberty interest.

150. Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (parolee's liberty interests include "many of the core values of unqualified liberty").

151. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 574 (1975) ("The Due Process Clause also forbids arbitrary deprivations of liberty," including deprivation of " 'a person's good name, reputation, honor or integrity.' ") (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)); Wolff v. McDonnell, 418 U.S. 539, 557 (1974) ("[T]he prisoner's interest [in good-time credit] has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' . . . .").

152. Bishop v. Wood, 426 U.S. 341, 348 (1976) (no injury to liberty interest since "petitioner's interest in his 'good name, reputation, honor or integrity' " was not impaired) (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).

153. 418 U.S. 539 (1974).

154. *Id.* at 557.

155. *See supra* notes 69-71 and accompanying text.

156. *Wolff*, 418 U.S. at 557.

property interest in *Roth*, could be created only by state law. That step was taken in 1976 in *Paul v. Davis*[157] and *Meachum v. Fano*.[158] These cases modify *Wolff* much the same way *Roth* modified *Goldberg*. In both, the Court began by extending the guarantee of minimum procedures to additional, statutorily created interests, and ended by holding that it applied only to such interests.

Paul v. Davis[159] is one of the most peculiar opinions in due process jurisprudence. A police department had compiled a list of "active shoplifters" largely on the basis of arrest records, and had distributed it to local merchants. It seemed apparent, based on the existing precedents, that such an action would be held unconstitutional as arbitrary "stigmatization" of an individual. But Justice Rehnquist's majority opinion insisted that a positive law liberty interest was required before due process protection applied, and he found no such interest. State law, he wrote, "does not extend to [an individual] any legal guarantee of present enjoyment of reputation which has been altered as a result of [the police department's] actions."[160] Admittedly, the plaintiff might have been able to sue the police department for defamation, a state law cause of action. But to regard this as a due process interest, Justice Rehnquist argued, "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[161]

The most obvious difficulty with *Paul* was the unbroken line of cases, extending back to the loyalty-security era, that had imposed due process requirements on government action when that action stigmatized a person. Justice Rehnquist expended substantial energy distinguishing these cases by asserting that they all had involved the loss of something more than reputation.[162] This argument was at its most baroque when discussing two other cases that involved an administrative agency's "undesirables list"—*Joint Anti-Fascist Refugee Committee v. McGrath*[163] and *Wisconsin v. Constantineau*.[164] The third such case, *Jenkins v. McKeithen*,[165] was essentially ignored.[166] But perhaps the

157. 424 U.S. 693 (1976).
158. 427 U.S. 215 (1976).
159. 424 U.S. 693 (1976).
160. *Id.* at 711-12.
161. *Id.* at 701; *see also infra* notes 316-27 and accompanying text.
162. *Paul*, 424 U.S. at 702-10.
163. 341 U.S. 123 (1951).
164. 400 U.S. 433 (1971).
165. 395 U.S. 411 (1969).
166. Justice Brennan's dissent, however, compensated for this oversight by discussing *Jenkins* at considerable length. *Paul*, 424 U.S. at 725-29 (Brennan, J., dissenting). Justice Rehnquist responded to this point in a footnote, *id.* at 706 n.4, which made the less than illuminating observation that the impact on reputation in *Jenkins* was direct rather than collateral.

most difficult task, as Justice Rehnquist seemed to recognize, was to distinguish *Roth*, the mother case. *Roth* involved dismissal—admittedly something more than reputation—but it discussed stigmatization as a government action quite distinct from dismissal.[167] Because *Roth* spoke the same language as *Paul*, its delineation of stigma avoidance as a separate interest established by the Constitution was quite clear and quite difficult to explain away. Justice Rehnquist did not succeed in doing so. His opinion, in fact, represents a new departure—the application of *Roth*'s property analysis to what was previously the federal preserve of liberty.

The true peculiarity of the case, even accepting this state law based approach to property interests, is its notion that a tort cause of action does not qualify as a state law interest for due process purposes. After all, the state did grant individuals the right to sue for defamation. But, in Justice Rehnquist's view, such a tort interest is somehow different from a job—essentially a contract law cause of action—although he did not really explain the distinction. One might well ask whether any common law right would qualify under this approach, since the principal indication of such a right is the existence of a cause of action. *Paul* would thus appear to be much more restrictive than any of the right-privilege cases, all of which granted protection to common law rights. The effect is to eliminate many situations for which minimal procedures are required, and to shrink the scope of due process to the requirement that the government follow applicable rules. *Paul* may thus be regarded as another effort by Justice Rehnquist to effect that shrinkage, thereby achieving the long-sought goal of his *Arnett* opinion.

The Court was back on statutory ground in the other liberty interest decision of 1976, *Meachum v. Fano*.[168] Pursuant to statutory authority, correction officials transferred a prisoner from one state facility

167. The *Roth* Court addressed the issue as follows:

> The State, in declining to rehire the respoudent, did not make any charge against him that might seriously damage his standing and associations in his community. . . . Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)) (citations omitted). Justice Rehnquist claimed that he was following *Roth*, but he quoted the case's discussion of property rights, which was of course quite different from its discussion of liberty rights. *Paul*, 424 U.S. at 709. While he did not acknowledge *Roth*'s quotation of *Constantineau*, he did quote the same language from *Constantineau* himself. *Id.* at 708. He then explained that *Constantineau* did not really establish a federal right to avoid stigmatization, although he admitted that the case's explicit statement of that right, 400 U.S. at 437, "could be taken" to have that meaning. The real meaning of *Constantineau*, he insisted, was to safeguard the person's state law right to purchase or obtain liquor. *Paul*, 424 U.S. at 708. One's amusement at finding this satire of stare decisis in the U.S. Reports is tempered by a nagging sympathy for the petitioner.

168. 427 U.S. 215 (1976).

to another, allegedly for disciplinary reasons, without prior notice or hearing. The Court upheld the transfer, observing that the legislative scheme gave prison officials complete discretion to transfer prisoners without requiring any specific factual determination. Thus, the prisoner had no state law right, no fourteenth amendment liberty interest and, as a result, no due process protection.[169]

Meachum is notable for its clear refusal to give the liberty notion any independent force. The state may eliminate any liberty interest, and thus escape any minimum procedures requirement, by statutory negation or by not specifying positive criteria for decision. To be sure, the result is less controversial in relation to prison inmates—which is the way subsequent cases deal with *Meachum*[170]—but the language of the opinion suggests no such qualification. *Meachum* treated liberty just like property; both interests had to be created by a positive state law or an independent constitutional provision. This submersion of the liberty concept proved to be too much for Justice Stevens, the author of *Bishop v. Wood*,[171] who replied in dissent: "I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights."[172]

3. Partial Retreat from Underlying Rights

Bishop v. Wood, *Paul v. Davis*, and *Meachum v. Fano* represent the high water mark of the underlying rights approach to the due process clause. All three were close decisions, drawing spirited dissents,[173] and subsequent fact patterns have made their specific holdings appear untenable. This is not to suggest that the Court has abandoned the liberty-property analysis, for it has not. But it has ceased to maintain that liberty is exclusively the product of state law or independent constitutional provisions, as it did in *Paul* and *Meachum*; it has ceased to read statutes the way it did in *Bishop*; and it has certainly abandoned *Paul*'s view that a common law right is not sufficient to constitute a fourteenth

169. *Id.* at 226-29.

170. *See* Olim v. Wakinekona, 103 S. Ct. 1741, 1745 (1983); Hewitt v. Helms, 459 U.S. 460, 466-20 (1983); Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 9-10 (1979).

171. 426 U.S. 341 (1976).

172. *Meachum*, 427 U.S. at 230 (Stevens, J., dissenting). *Meachum* had a companion case, Montanye v. Haymes, 427 U.S. 236 (1976), in which the Court reached essentially the same result. Justice Stevens, though dissenting on other grounds, agreed that no due process protection was required in *Montanye*, because, unlike in *Meachum*, the prisoner had not alleged any difference between the two prison facilities, and thus had suffered no grievous loss. *Id.* at 244 (Stevens, J., dissenting).

173. *Bishop* was a 5-4 decision, *Paul* 5-3, and *Meachum* 6-3. Justice Stevens, who did not participate in *Paul*, disagreed with at least its rationale. *See* Ingraham v. Wright, 430 U.S. 651, 701 (1977) (Stevens, J., dissenting).

amendment interest. Instead, the Court has fashioned criteria that, while maintaining the underlying rights framework, provide a significantly broader scope for due process protection.

The first major departure from *Paul* and *Meachum* came one Term later when the Court acknowledged that the due process clause itself gives rise to certain liberty interests. In *Ingraham v. Wright*,[174] the Court held that the corporal punishment of school children constitutes a deprivation of liberty, and thus requires minimally adequate procedural protection. Justice Powell's opinion cast away the underlying rights requirement with a rousing citation of *Meyer v. Nebraska*,[175] Blackstone, and the Magna Carta[176]—only the Almighty was absent from the list. "It is fundamental," he wrote, "that the state cannot hold and physically punish an individual except in accordance with due process of law."[177] The Court was unanimous on the point.[178] Indeed, it seems inconceivable that the Court would permit a state to establish an administrative scheme where people were restrained and beaten simply because the state legislature declared that there was no positive law right to avoid such treatment.

Subsequent cases have confirmed and extended *Ingraham*'s basic principle. In *Vitek v. Jones*,[179] the Court reiterated that the right to personal security was inherent in the due process clause. Moreover, it found a right to avoid being stigmatized by the government in the clause,[180] and gave *Paul v. Davis*[181] a taste of its own medicine by ignoring it. In *Hewitt v. Helms*,[182] Justice Rehnquist conceded that the due process clause itself creates certain liberty interests, although he declined to find that those interests include a right to parole. Finally,

174. 430 U.S. 651 (1977).

175. 262 U.S. 390 (1923).

176. *Ingraham*, 430 U.S. at 673 & n.41. Justice Powell preferred a due process analysis to the eighth amendment analysis that would seem to be more intuitively obvious. He argued that the eighth amendment applies only to convicted criminals, and that any other abuse the state inflicts upon individuals is not "punishment" within the meaning of the amendment. This analysis provides another example of the Burger Court's tendency to use definitional preclusions to limit the potential sweep of Warren Court doctrines. *See supra* text accompanying notes 124-27.

177. *Ingraham*, 430 U.S. at 674.

178. Justice White, joined by Justices Brennan, Marshall, and Stevens, disagreed only with the level of due process protection which the Court provided. *Id.* at 693-96 (White, J., dissenting).

179. 445 U.S. 480 (1980) (transfer of prisoner to mental hospital without adequate notice and hearing violates due process).

180. *Id.* at 491-92; *see also* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM Supp. 128-29 (2d ed. 1973 & Supp. 1981) (discussing Vitek v. Jones, 445 U.S. 480 (1980)); *cf. id.* at Supp. 129 ("The cases at times suggest a difference in analytical approach depending upon whether a 'property' or 'liberty' interest is asserted. The premise is apparently that property can be viewed as a creature of state law, but liberty cannot.").

181. 424 U.S. 693, 701-10 (1976).

182. 459 U.S. 460, 466-67 (1983) (transfer of a prisoner to administrative segregation implicated state-created interest, but procedures provided were adequate).

in *Olim v. Wakinekona*,[183] the Court explained *Meachum* as holding that "an intrastate prison transfer does not directly implicate the Due Process Clause."[184] Thus domesticated, the case leaves room for the conclusion that some protected liberty interests exist apart from statutory law and independent constitutional provisions.

Another major change since the mid-1970's was the Court's more charitable interpretation of administrative statutes in areas where it continued to employ the underlying rights approach. In contrast to its analysis in *Bishop*, the Court became willing to read statutes that established procedures and criteria for decisions as creating liberty or property interests, holding that these procedures and criteria constituted a "legitimate claim of entitlement" within the meaning of *Roth*. Quite possibly, the *Roth* opinion used this language to refer only to claims that the state itself would recognize.[185] But the Court had now concluded that the existence of such a legitimate claim is a federal question, to be determined by an independent reading of the statute.

The central idea in the Court's approach was that a statute must specify criteria for administrative action in order to create any liberty or property rights. Without statutory criteria the administrator has complete discretion, and the individual, absent a separate liberty interest, has no cause for complaint. In *Leis v. Flynt*,[186] the Court held that an out-of-state lawyer had no property right to appear *pro hac vice* because "the rules of the Ohio Supreme Court expressly consign the authority to grant a *pro hac vice* appearance to the discretion of the trial court."[187] Similarly, in *Connecticut Board of Pardons v. Dumschat*,[188] the Court held that a person had no liberty interest in a state's pardoning process, because pardons were within the " 'unfettered discretion' "

183. 103 S. Ct. 1741 (1983) (transfer of a prisoner to prison outside state without a prior hearing does not violate due process).

184. *Id.* at 1745 (emphasis omitted). Justice Blackmun described *Vitek* as applying the *Meachum* principle. This is true of *Vitek*'s first rationale, which relied on state law, but not of its second rationale, which went beyond *Meachum* by deriving the prisoner's interest directly from the due process clause. *Wakinekona* does not specify the standard it is using, but categorical statements to the effect that "an inmate has no justifiable expectation that he will be incarcerated in any particular . . . State," *id.* (footnote omitted), and that "it is neither unreasonable or unusual for an inmate . . . to be transferred to an out-of-state prison after serving a portion of his sentence in his home State," *id.* at 1746, suggest that the reference is to a general, federal standard rather than the laws of the state.

185. For a discussion of this issue, see *infra* text accompanying notes 213-17.

186. 439 U.S. 438 (1979).

187. *Id.* at 443. Justice Stevens' dissent, after declaring that a lawyer's right to pursue his or her calling was a liberty interest protected by the due process clause, *id.* at 445, 452 & n.17 (Stevens, J., dissenting), took direct issue with the majority opinion on the discretion issue. He argued that permission to appear *pro hac vice* is no longer a matter of discretion, but a routine practice in modern judicial administration. *Id.* at 448-57 (Stevens, J., dissenting). *See infra* text accompanying note 504.

188. 452 U.S. 458 (1981).

of the admininstering agency.[189] Justice Brennan, a dissenter in many previous cases, concurred on precisely the same grounds.[190] Since the statute in *Meachum* had granted the administrators total discretion, that case could also be read as standing for the same principle. *Paul* continued to be ignored.

This emphasis on statutes, particularly statutes governing administrative agencies, yielded an important result. In interpreting these statutes the Court naturally focused on the presence of decisionmaking criteria and conversely, on the scope of discretion that the agency had been granted. Thus, it came to grips once more with the administrative nature of the governmental action under review.[191] Questions of administrative discretion had been prominent in the loyalty-security cases, but they had been somewhat forgotten since *Roth* had begun the search for individual interests. The cases after *Paul* and *Meachum* represented the Court's renewed awareness that it was dealing with a type of government that had emerged relatively recently, and marked the Court's renewed willingness to explore specific agency operations in the effort to define due process.

Several of these post-1976 cases have granted due process protection on the basis that the relevant statutory criteria for agency decisionmaking created a property interest. In *Memphis Light, Gas & Water Division v. Craft*,[192] for example, the Court found such an interest in the requirement that a public utility not terminate service " 'except for good and sufficient cause.' "[193] In *Barry v. Barchi*,[194] the Justices all agreed that a property interest arose from a licensing statute that permitted revocation "only upon proof of certain contingencies."[195] A

189. *Id.* at 462, 466 (quoting Dumschat v. Board of Pardons, 618 F.2d 216, 219 (2d Cir. 1980), *rev'd*, 452 U.S. 458 (1981)).

190. *Id.* at 467 (Brennan, J., coucurring) ("[R]espoudents must show . . . that particularized standards or criteria guide the State's decisionmakers.").

191. A number of administrative law texts, treatises and analyses have heavily emphasized the issue of discretion. *See, e.g.*, S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 103-64 (1979); K. DAVIS, DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY (1969); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546-94 (1965); Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1983).

192. 436 U.S. 1 (1978).

193. *Id.* at 11 (quoting Farmer v. Nashville, 127 Tenn. 509, 515, 156 S.W.2d 189, 190 (1913)). Justice Powell's opinion contains a clear statement of the Court's curreut position on the property interest: "Although the underlying substantive intcrest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'lcgitinnate claim of entitlement.' " *Id.* at 9 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). The Court was unanimous on this point and in finding a property interest present. Justice Steveus' dissent took issue ouly with the conclusion that the consumers had not been afforded adequate procedural protection. *Id.* at 22 (Stevens, J., dissenting).

194. 443 U.S. 55 (1979).

195. *Id.* at 64 & n.11.

third property case, *Logan v. Zimmerman Brush Co.*,[196] merits particular attention. Logan had filed a complaint with the Illinois Fair Employment Practices Commission, pursuant to a statute that gave the Commission 120 days after the date of the complaint to convene a factfinding panel. When the Commission failed to meet its deadline, the Illinois Supreme Court held that the statute's mandatory language deprived it of jurisdiction. Thus, Logan had no remedy because the Commission had delayed. This result was obviously untenable, and the Supreme Court reversed it unanimously as a violation of due process. The Court held that Logan was deprived of a property interest because "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."[197]

Another line of cases, mainly in the prison administration context, found that statutory limitations on administrative discretion created protectable liberty interests. Nebraska's parole statute was held to create a liberty interest in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*,[198] although the Court ultimately found that the statute allowed administrators sufficient discretion so that no procedures beyond those already provided were required. Similarly, in *Vitek v. Jones*,[199] Nebraska's statute for transferring prisoners to a mental hospital was held to require due process protection because the statute grounded transfer on a finding of mental disease or defect.[200] And *Hewitt v. Helms*[201] held that a Pennsylvania statute created a liberty interest for inmates in avoiding administrative segregation. The crucial factor was that certain procedures were made mandatory by the statute, so that inmates were to be segregated only on the occurrence of "specified substantive predicates."[202]

196. 455 U.S. 422 (1982).

197. *Id.* at 428 (footnote omitted). The Court defined property as "an individual entitlement grounded in state law, which cannot be removed except 'for cause.' " *Id.* at 430 (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11-12 (1978)). Since that would appear to be a definition of a state law cause of action, a cause of action certainly qualifies as property.

198. 442 U.S. 1 (1979). Chief Justice Burger's opinion reached this conclusion somewhat grudgingly. After noting that the prisoners' decision to sue in federal court had precluded a state interpretation of the statute, he wrote:

> We can accept respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection. However, we emphasize that this statute has unique structure and language and thus whether any state statute provides a protectible entitlement must be decided on a case-by-case basis.

Id. at 12. No other analysis was presented on the point, but the Chief Justice's immediately preceding discussion of Nebraska's statutory criteria for parole, *id.* at 11, suggests that these criteria created the perceived expectancy.

199. 445 U.S. 480 (1980).

200. *Id.* at 488-91. *Vitek*'s alternative holding grounded the same requirement on the due process clause itself. *See supra* text accompanying notes 179-82.

201. 459 U.S. 460 (1983).

202. *Id.* at 471-72.

The trend of these cases has been to expand the range of due process protection. Their rationale, however, is as unstable as that of *Bishop* and *Arnett*, and for essentially the same reason. All of them are grounded on the Court's interpretation of state statutes. As doggedly as the loyalty-security cases disclaimed any right to government benefits, these cases abjure the notion that the fourteenth amendment creates property interests or liberty interests beyond the basic categories of restraint and stigma. Consequently, their holdings are vulnerable to more authoritative statutory constructions. If the federal courts do not happen to get the case before a state court has interpreted the relevant statute, federal inquiry into administrative discretion will be precluded.[203]

That is precisely what happened in *Olim v. Wakinekona*.[204] Administrative regulations for the Hawaii prisons required a hearing prior to prisoner transfers to out-of-state institutions, with review by the prison administrator. Wakinekona was transferred out of state after a hearing that was in apparent violation of the regulations. The Court, however, held that the regulations created no liberty interest, because the prison administrator could order transfers at his sole discretion. To be sure, the regulations specified criteria for the hearing. But the hearing result was deemed to be a purely advisory recommendation to the prison administrator, since the administrator could affirm or reverse any recommendation, and the regulations did not specify criteria for the administrator's review. Any doubts about this somewhat odd interpretation were resolved by the Hawaii Supreme Court, which had interpreted the regulation in precisely this fashion.[205] Thus, once a state court has interpreted the statute, *Wakinekona* brings the Court back to its *Bishop* approach.[206]

Moreover, Court review of agency discretion is also subject to legislative declarations that apparent statutory limits on agency discretion—through, say, specified decisionmaking criteria—are advisory.

203. *See* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *supra* note 180, at Supp. 128. A subsidiary problem is that the Court's approach puts great weight on the distinction between substantive provisions, which are within the plenary control of the state, and procedural provisions, which are subject to federal requirements. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 432-33 (1981) (distinguishing 120-day limit on Fair Employment Practices Act claims from a grant of immunity to state officials, because "[i]t is a procedural limitation on the claimant's ability to assert his rights, not a substantive element of the FEPA claim"). Articulating this distinction in the due process context does not necessarily present great difficulties, but the Court has not yet made the attempt.

204. 103 S. Ct. 1741 (1983).

205. *Id.* at 1747-48 (citing Louo v. Ariyoshi, 63 Hawaii 138, 621 P.2d 976 (1981)). As for the procedural violation in the hearing, Justice Blackmun held that it was irrelevant since there was no liberty interest for the procedures to protect. *Id.* at 1748. This aspect of *Wakinekona* is discussed *infra* in text accompanying notes 390-405.

206. *See supra* notes 143-47 and accompanying text.

While the legislature could simply eliminate the criteria, such an approach has its costs, most notably the loss of control over the agency, and a simple declaration may be deemed preferable. The negation of due process implications is disturbing, however, because it again allows a state the power to establish any procedures it wishes, free of constitutional restraint.

Finally, administrative agencies themselves interpret statutes. When an agency fails to provide certain procedural rights, it can argue that it is interpreting the criteria and procedures prescribed in its statute as purely advisory in nature. It is not at all obvious why the Supreme Court should not defer to such agency interpretation of state statutes. If a state court would defer, the federal courts would seem obligated to do so, since they are supposed to interpret state statutes in accordance with state law.[207] Even without a state court interpretation, it would seem that the federal courts should defer to state agency interpretations as a matter of federal law. Where federal agencies are concerned, the federal doctrine of *Gray v. Powell*[208] provides that agency interpretations will be upheld if they have a rational basis, even though the court might have reached a different interpretation on its own. There would seem to be even more persuasive arguments for deferring to state agency interpretations: the agency has the additional argument of federalism on its side, and the court lacks any general power to construe the statute. The Supreme Court's unwillingness to adopt this deferential stance undoubtedly derives from a lurking sense that there are constitutional values involved. But it is difficult to locate where these values lurk if state interpretation of the statute can preclude the creation of a property or liberty interest, thus rendering the due process clause inapplicable.

II

THE NATURE AND LIMITS OF PROCEDURAL DUE PROCESS

The procedural due process cases of the post-*Roth* (or perhaps the post-*Goldberg*) era, although not impressive examples of legal reasoning, generally represent serious efforts to deal with a complex legal issue: the relationship between procedural due process and the activities of an administrative state. Prior to the 1950's, the Supreme Court tended to separate the two, insulating traditional common law issues

207. *See* Fox Film Corp. v. Muller, 296 U.S. 207, 210-11 (1935) (Supreme Court lacks jurisdiction to review state interpretation of state law); P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *supra* note 180, at 439-83.

208. 314 U.S. 402, 413 (1941); *see also* Udall v. Tallman, 380 U.S. 1, 16-18 (1965); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1944). *See generally* Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

from definitive determination by administrative agencies, and otherwise leaving agency rulemaking and adjudication free from due process control.

The loyalty-security cases, however hesitant their tone, represent the Court's first comprehensive effort to adapt procedural due process doctrine to administrative actions. The rationale of these cases was significant but imprecise, as became apparent when courts began to apply it to the broader range of actions implicated by the welfare rights movement. In response to this imprecision, *Roth* and its successors have sought to limit the breadth of the due process clause's application, and ultimately have come to grapple with the crucial issue of administrative discretion. This is a necessary and important issue, and the results the Court has reached—while often debatable—are rarely beyond the bounds of reasonable opinion.

The difficulty with these cases lies in the rationale by which the Court reached its results. They take garden-variety constitutional issues and, in the process of rationalizing fairly unsurprising results, create a jurisprudential Armageddon. Of course, genuine controversy exists over the results in these cases, but that controversy is much more limited in scope. Decisions about whether notice and a hearing are required before a university can refuse to renew a probationary teacher's contract, or before a prison can transfer its inmates to another prison in the state, should produce minor variations in procedural due process doctrine, not shake it to its very foundations.

This Part first explores why the *Roth* approach turned out to be so much more controversial and ambiguous than its purpose would suggest. It then advances an alternative rationale, based on more established due process concepts, that avoids the difficulties *Roth* created. Finally, it responds to *Roth*'s true concern, namely the potential sweep of *Goldberg*'s extension of due process into the administrative realm. It proposes an alternative limit, based on general administrative law concepts, that achieves a similar result within the framework of the due process tradition, and that does so without traversing the conceptual wilderness through which *Roth* and its progeny have wandered.

A. Beyond the Roth *Analysis*

1. Beyond Liberty and Property

It is perhaps useful to begin this discussion with a definition of procedural due process. The ultimate definition, of course, is what all of the cases and commentaries are striving for; but the concept must have some agreed-upon core, however debatable its boundaries and operation. Presumably, that core is the notion of "procedure," which is

generally viewed as referring to governmental methods of adjudication.[209] To say that procedural due process is required, therefore, means that some set of standards must be imposed on those adjudicatory methods.

Binding legal rules that do not involve adjudication methods are generally referred to as substantive law;[210] in fact, the term probably means little more than "nonprocedural." Standards imposed on such legal rules by the due process clause are therefore known as substantive due process.[211] Because the term "due process" has been used for both purposes—and because it has such vague and awesome general connotations—it may be helpful to restate the procedural due process right as a right to fair procedures in government adjudications.[212]

The *Roth* opinion's starting point is that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."[213] This statement actually contains two distinct premises, each of which was relatively new with *Roth*: first, that some type of individual interest must be present before the due process clause is applicable; and second, that this interest can be described by the terms "liberty" and "property."

The opinion treats both premises as self-evident, but they are in fact problematic. First, there is a basic ambiguity in the way the terms "liberty" and "property" are used in the *Roth* opinion: their generalized invocation, without more, could have at least two entirely different meanings. The terms could refer to a federally defined standard, which would mean that federal courts will apply the clause only to those interests they themselves regard as liberty or property. Alterna-

209. *See* Hanna v. Plumer, 380 U.S. 460, 464 (1965); Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1940) (procedure consists of "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them"); Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (procedure is "the manner and the means by which a right to recover . . . is enforced").

210. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring) (substantive law includes "primary decisions respecting human conduct"); Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 446 (1946).

211. "Substantive due process" is a highly charged term, often leveled at one's opponents as the ultimate condemnation of their views. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159. It thus has a tendency to expand beyond its original constitutional contours to cover a multitude of legal sins. Most notably, it sometimes refers to the use of nontextual standards, even by the proponents of such standards, *see* L. TRIBE, *supra* note 4, at 525-26; Tushnet, *supra* note 4, at 279; Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 487 (1977). For the distinction between procedural and substantive due process, see *infra* text accompanying notes 485-87.

212. The term "fair" here has no greater content than the term "due." It is simply more neutral, permitting attention to be directed to the fact that adjudicatory methods are at issue.

213. Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

tively, the terms could refer to a state-defined standard, which would mean that federal courts will apply the clause only to those interests that state courts recognize as within these concepts.[214]

One might expect that this ambiguity would have been resolved when the *Roth* opinion discussed the general meaning of liberty and property, and applied both of these concepts to Roth's claim. With respect to liberty, it was. Justice Stewart unquestionably referred to a federal standard in his discussion of stigma and opportunity.[215] With respect to property, however, the ambiguity was carefully preserved. The crucial sentences read: "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."[216] Again, this fails to specify whether the term "property" refers to a federal standard that serves to characterize state law, or to a state standard that derives its content from state law.[217] Given the contrasting treatment of liberty, however, it seems likely that a state-law standard was intended.[218]

If the Court was relying on the state-standard approach, it must

214. Both of these views are theoretically, if not functionally, distinct from the view, adopted in Justice Rehnquist's *Arnett v. Kennedy* opinion, that the state has control over the nature of the procedures as well as the nature of the interest. *See* discussion *supra* in notes 135-41 and accompanying text.

215. *See supra* text accompanying note 149.

216. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Perhaps the statement that an individual must have "a legitimate claim of entitlement" for a property interest to exist, *id.*, was intended to establish a federal standard, *see* Simon, *supra* note 5, at 182-84. But this phrase is just as ambiguous as the sentence it is supposedly explaining, since it does not say whether state or federal law establishes the legitimacy of the entitlement. As Professor Tribe notes, any effort to ground the concept on the justifiable expectations of the individual is inevitably circular, *see* L. TRIBE, *supra* note 4, at 525-26, since the justifiability of the expectation depends on the applicable law.

217. *Roth*'s companion case, Perry v. Sindermann, 408 U.S. 593 (1972), is equally unhelpful. There, the Court held that Sindermann, also a college professor, could not be dismissed without a hearing if he could prove his allegation that his university had a de facto tenure system under which he qualified. But the opinion was perfectly ambiguous about whether the de facto tenure qualified as property because the state would recognize it as such, or because it was being so interpreted by the Supreme Court. One crucial sentence reads: "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Id.* at 601. This formulation might have helped had the Court specified the type of hearing to which it was referring. If the hearing was in state court under state law, then the state standard was intended. If it was in federal court under the due process clause (or in state court under the federal due process clause, for that matter), then the federal standard was necessarily intended. Unfortunately, the opinion provides no further clue.

218. Whatever Justice Stewart intended, subsequent cases have read *Roth*'s seminal language both ways. The cases of the mid-1970's, most notably *Paul v. Davis*, *Meachum v. Fano*, and *Bishop v. Wood*, adopt the state-standard approach. *See supra* notes 143-72 and accompanying text. More recent cases, such as *Vitek v. Jones*, *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, and *Memphis Light, Gas & Water Division v. Craft*, adopt the federal-standard approach. *See supra* notes 179-202 and accompanying text.

have concluded that state law contains definitions of liberty and property. The most obvious place to look for such definitions is the common law. But common law does not define liberty and property in any useful way. Instead, the decisions define legal causes of action. Once a cause of action has been established, the liberty or property label attaches automatically, to the extent that such labels are employed at all.[219] Nor can it be asserted that concepts of liberty or property serve as the origin of common law causes of action. The common law is a far more complex system than that, deriving its provisions from social policy, tradition, and elaborated analogies.[220]

Moreover, whatever limited control the terms "liberty" and "property" exerted over legal issues has been largely eliminated by the decline of legal formalism. The legal realist movement rejected such doctrinal formulas in favor of social policy analysis,[221] while those who defend the integrity of the doctrine regard it as composed of principles that go well beyond mere terminology.[222] Thus, it is now commonplace to acknowledge that property is simply a label for whatever "bundle of sticks" the individual has been granted.[223]

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219. To cite just one example, common law courts had to decide whether the real owner of a stolen note (payable to bearer) should be the maker of the note or a good faith purchaser. This would seem to be a classic case in which the conceptual framework of property rights would be invoked. But the leading decision, Miller v. Race, 1 Burr. 452, 97 Eng. Rep. 398 (1758), makes no reference to property rights. Instead, the author of the opinion, Lord Mansfield, argues by analogy to goods and cash, and invokes considerations of trade custom and social policy. This approach was typical. *See generally* Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954).

220. There are some situations in which common law courts use the terms liberty or property as a conceptual device for deciding legal issues. For example, when English courts granted buyers who had paid for undelivered goods the right to replevy those goods, they characterized this right by saying that title, the property right in the goods, had passed to the buyer. *See* C. BLACKBURN, A TREATISE ON THE EFFECT OF THE CONTRACT OF SALE 188-89 (1845); W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 355-56 (3d ed. 1923); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 210 (2d ed. 1898); Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. 159, 182-83 (1938). It was subsequently decided that the risk of loss also passed to the buyer in this situation since the goods were the buyer's property. Tarling v. Baxter, 6 B&C 360, 108 Eng. Rep. 484 (K.B. 1827). This rule was followed by Williston in drafting the UNIF. SALES ACT § 22 (superseded generally by the Uniform Commercial Code in 1962); *see also* Lott v. Delmar, 2 N.J. 229, 232, 66 A.2d 25, 26 (1949); Skinner v. James Griffiths & Sons, 80 Wash. 291, 141 P. 693 (1914). Apparently, use of the term "property" did determine the risk of loss issue. But the basic right in question, the right to replevy, was not derived from the concept of property; rather, it created "property" rights, and was apparently articulated to effectuate a social policy derived from other sources.

221. *See, e.g.*, Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Llewellyn, *supra* note 220; Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

222. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY (rev. ed. 1978); R. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS (1975); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16-19 (1959).

223. *See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82 (1980); Cohen, *supra* note 221, at 11-14; RESTATEMENT OF PROPERTY, *Introduction* to ch. 1, at 3 (1936):

> The word "property" is used sometimes to denote the thing with respect to which legal

As remote as the concepts of liberty and property are from the articulation of common law causes of action or their codified equivalents, they are even more remote from state administrative statutes. Because such statutes create new types of legal relationships, even current common law concepts are often inapplicable, to say nothing of archaic ones. Consequently, the Court's efforts to characterize the rights created by these statutes as liberty or property have been notably strained. For example, in *Vitek v. Jones*,[224] the Court described a prisoner's statutory right to avoid transfer to a mental hospital as a liberty interest.[225] That such a right was granted is perhaps significant, but it is difficult to perceive its connection with the common law concept of liberty.

Similarly, in *Goss v. Lopez*,[226] the Court treated a child's right to a free public education as a property interest.[227] There is something extremely unhelpful about such a description, however, since the right in question has few of the indicia that real or personal property possess at common law. It is not alienable, devisable, or descendible, and cannot be altered by the owner, or saved for later use. Indeed, Justice White, writing for the Court, seemed aware that the property designation was meaningless. The central statement in his property interest analysis was: "Having chosen to extend the right to an education to people of

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relations between persons exist and sometimes to denote the legal relations. The former of these two usages . . . does not occur in this Restatement. . . . The word "property" is used in this Restatement to denote legal relations between persons with respect to a thing.

Common law courts have become quite comfortable with this discourse, as have statutory drafters. When the rules for replevying paid-for goods and for passing risk of loss were codified in the Uniform Commercial Code, for example, Karl Llewellyn, the principal draftsman and a leading legal realist, simply eliminated the concept of title. U.C.C. §§ 2-401, -509 (1977); *cf. id.* § 9-202 (title eliminated as operative concept in secured transactions). *See generally* Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 YALE L.J. 821, 824-27 (1950). This enabled the Code to separate the two issues, retaining the buyer's right to replevy after seller's bankruptcy for one set of social policy reasons, U.C.C. §§ 2-501, -502 (1977), but eliminating the buyer's risk of loss before delivery for a different set of policy reasons, *id.* § 2-509.

Interestingly, Justice Stewart made a legal error in Fuentes v. Shevin, 407 U.S. 67 (1972), when he pointed out that the buyers lacked title to the goods. *Id.* at 84, 86. Since the transactions were governed by Pennsylvania's and Florida's versions of the Code, title was irrelevant to the determination of the buyer's rights. U.C.C. § 9-202 (1977). Under Article 9 of the Code, there is not the slightest doubt that a buyer in a conditional sales contract possesses rights in the collateral. *Id.* § 9-201; *see also id.* §§ 9-506, -507. Justice Stewart's nostalgic belief in the continued relevance of the property concept was only a minor dictum in *Fuentes*, but it became a central feature of *Roth* and of the Court's entire theory of due process.

224. 445 U.S. 480 (1980).

225. *Id.* at 488 ("We have repeatedly held that state statutes may create liberty interests . . . ."); *id.* at 491-94 (apart from state law, prisoner retained a "residuum of liberty").

226. 419 U.S. 565 (1975).

227. *Id.* at 574 ("[T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest . . . ."). The Court also found a liberty interest present. *Id.* at 574-75.

appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."[228] In effect, then, the imposition of due process protection had nothing to do with the characterization of the right to education as property.

Perhaps the most convoluted opinion of all is *Logan v. Zimmerman Brush Co.*,[229] where the plaintiff was deprived of a state-created cause of action by the challenged administrative rules. True to *Roth*, the Court held that a state law cause of action is a property interest, thus rendering due process protection applicable.[230] In reality, all the Court needed to say was that the existence of a state law cause of action satisfied the individual interest requirement it perceived in the due process clause. To hold that the cause of action is a property right and that the property right then triggers the protection adds nothing useful to the analysis, since it is the cause of action that creates the property right in the first place.[231] Even the state-law standard requires nothing more than the assertion that a federal cause of action under the due process clause exists only if there is an underlying state law cause of action. Liberty and property are simply not useful concepts in this context.[232]

228. *Id.* at 574 (citation omitted).

229. 455 U.S. 422 (1982).

230. *Id.* at 428-33.

231. There are common law cases declaring that a cause of action is property or its equivalent, bnt their reasoning proceeds in precisely the opposite direction. These cases hold that this right is the equivalent of tangible property in certain transactions between private parties. *See, e.g.*, Union Collection Co. v. Buckman, 150 Cal. 159, 163-64, 88 P. 708, 710 (1907) (promise not to sue is sufficient consideration to support contract); Palmer v. Dehn, 29 Tenn. App. 597, 600, 198 S.W.2d 827, 828 (1947) (same); RESTATEMENT OF CONTRACTS §§ 175-176 (1932) (assignment of legal rights); 1 S. WILLISTON & W. JAEGER, WILLISTON ON CONTRACTS § 135B, at 573-86 (3d ed. 1957). In other words, common law uses the existence of a right to trial procedures as an indication that a property-type right exists, as opposed to the Supreme Court's approaeh of using the property concept to determine whether there is a right to trial procedures.

232. In his dissent in Vail v. Board of Educ., 706 F.2d 1435 (7th Cir. 1983), *aff'd by an equally divided Court*, 104 S. Ct. 2144 (1984), Judge Posner may have succeeded in outdoing *Logan*. A school athletic director's two-year employment contract is not property, he argued, because the common law distinguished contract rights from property rights, and the framers, following this distinction, intended to protect only the latter. The difficulty, of course, is to dctermine what a property right is, particularly in this rarefied form. Judge Posuer suggested that "[w]e infer the existence of a property right from the remedies the law gives to protect it. A right protectcd by an injunction, by specific performance or by criminal penalties is a property right." *Id.* at 1453 (Posner, J., dissenting). This is plainly incorrect as a description of existing law. To take just one example, an employer can get a negative injunction against a breaching employee under certain circumstances, *see, e.g.*, Lumley v. Waguer, 42 Eng. Rep. 687 (1852), but we might hesitatc to say that it has a property interest in the other. If Judge Posner nonetheless wants to limit due process protection in the administrative context to cases where state law would grant equitable relief, why not simply base the due process requirement on the available remedy, instead of inferring the existence of property from the remedy and then holding that this property satisfies the due process requirement? Again, the term "property" is unnecessary, and it turns out to be so vacuous that it simply disappears from the analysis.

It is possible, however, that *Roth* was referring to a federal standard for the underlying interest, and it is clear that a number of more recent procedural due process cases do so. That would seem to restore meaning to the terms liberty and property; even if state law creates only causes of action, federal law might employ the two terms to determine whether such causes of action merit due process protection. The difficulty here is determining the source of the federal definitions of those terms. They cannot really come from an analogy to common law, since common law, as previously indicated, does not provide adequate definitions of the terms. Nor can they be derived from other provisions of the Constitution. Outside of the due process clauses themselves, the terms "liberty" and "property" do not appear anywhere else in the Constitution, except for the reference to liberty in the preamble,[233] to the property of the United States in article IV,[234] and to private property in the closely related and equally mysterious just compensation clause.[235]

There appear to be two remaining sources from which federal standards for liberty and property could be derived. The first is general jurisprudence, a realm in which these terms enjoy a primacy they lack in the workaday world of common law. The second is the due process clause itself. Perhaps Justice Stewart had some jurisprudential notion in mind when he conceded in *Roth* that " '[l]iberty' and 'property' are broad and majestic terms."[236] The difficulty is that their jurisprudential meaning is substantially too broad and majestic. By simply invoking these terms, the Court was plunging itself into a prodigious, age-old

233. U.S. CONST. preamble (Constitution established to "secure the Blessings of Liberty to ourselves and our Posterity"). It would require great daring to derive any specific meaning from this phrase.

234. *Id.* art. IV, § 3, cl. 2 (Congress shall have power to make rules "respecting the Territory or other Property belonging to the United States"). To the extent that this conveys any specific information, it is obviously tied to a context quite different from the property rights of an individual. For example, United States property that is within the boundaries of individual states may not be taxed by those states, Van Brocklin v. Tennessee, 117 U.S. 151 (1886), an attribute which unfortunately does not apply to the property of individuals. One recent property clause case, Kleppe v. New Mexico, 426 U.S. 529 (1976), is worth noting, however. In *Kleppe*, the Court unanimously held that the clause grants Congress the power to protect the wild horse population on federal land. Justice Marshall, writing for the Court, reached the conclusion by analyzing the nature of the government's role with respect to these lands. *Id.* at 539-41; *see also infra* text accompanying notes 465-73 (proper governmental role central consideration for due process analysis). There is no suggestion in the opinion that the case turns on whether wild horses are "property."

235. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). The just compensation cases have at least as uncertain a boundary between the protected and the unprotected realm as the due process cases. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). *See generally* Freeman, *Give and Take: Distributing Local Environmental Control Through Land-Use Regulation*, 60 MINN. L. REV. 883 (1976); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970).

236. Board of Regents v. Roth, 408 U.S. 564, 571 (1972).

debate about the nature of civil government, of man, and possibly the universe-at-large. From a purely strategic viewpoint, this seems like an unpromising way to determine whether a probationary college teacher is entitled to a nonrenewal hearing.

Even if the Court felt that there was some necessity to wander into the jurisprudential realm, it is unclear where the path would lead. The one major philosopher who could be regarded as central to our constitutional tradition is John Locke.[237] Locke has much to say about the structure of our government, but, as Professor Mashaw points out, his general theory of private property sheds little light on the issue of procedural due process.[238] The *Second Treatise of Government* does contain a definition of property rights, which Locke regarded as resulting from the individual's labor.[239] How one would apply this definition to a government job or benefit is a fascinating question. It would appear that Locke's definition directly contradicts the Court's reasonable expectations test, since expectations would receive little protection under a labor-value regime. In any event, the Court has not invoked Locke to support its theory of property.

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237. *See* M. WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 4-8, 61-69, 213-21 (1978); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 282-91 (1969). White also emphasizes the influence of Burlamaqui, who followed Locke's general approach. M. WHITE, *supra*, at 36-41.

238. Mashaw, *supra* note 4, at 908-09. Precisely what implications Locke derived from the nature and distribution of property is a matter of some uncertainty. *See* J. GOUGH, JOHN LOCKE'S POLITICAL PHILOSOPHY 80-103 (2d ed. 1973); C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 197-220 (1962); M. WHITE, *supra* note 237, at 53-60. In any event, it seems clear that Locke treated the property right as a limit on the general lawmaking power of the government. J. LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 138-140 (1690). That view translates into the modern doctrine of substantive due process. Locke tells us why the state may take a portion of the property of all its members, *see id.* § 139 (regulation), and § 140 (taxation), but says nothing about the manner in which it may take a particular person's property. He does, however, derive a requirement that the state act generally from natural-rights considerations, and this is of procedural significance. *See infra* note 341.

239. *See* J. LOCKE, *supra* note 238, §§ 28-33. Locke's notion that one obtains property rights in a previously unowned good by virtue of one's labor, if taken at face value, might suggest the right-privilege distinction, with a further distinction between privileges that have been used to build businesses or reputations and those that have not. *See supra* text accompanying notes 40-42. But the nation's largest social welfare program, Aid to Families with Dependent Children (AFDC), is designed to assist parents in bringing up their children, *see* 42 U.S.C. §§ 601-615 (1982), a task which they must perform in order to remain eligible. In contrast, licenses to operate a business might go to an owner of capital, who then contributes no labor of his or her own. The reason government jobs pose a particularly difficult problem for this analysis is that the employee, absent the most egregious cause for dismissal, always adds his or her own labor. Professor Macpherson argues that Locke regarded his theory of labor as relevant only prior to the introduction of money, the development of a market economy, and the consequent alienability of goods and labor. C. MACPHERSON, *supra* note 238, at 203-20. But government benefits are not really part of the market economy since they cannot be traded. Thus, Locke's translation of his labor theory of property into a market theory (in Macpherson's view) would not work in this context, and the problem of applying his concept of property to administrative situations would remain.

One could speculate at length about the assistance that other philosophers could provide in defining liberty or property. Rousseau offers a definition of property,[240] as does Proudhon.[241] Mill discusses liberty at length,[242] as do Hobbes,[243] Nietschze,[244] and dozens of other major philosophers. But there is nothing to suggest that any of these thinkers, even Mill, can be looked to as authoritative in any general sense. Their relationship to the Constitution is necessarily based on argument, not external evidence. Moreover, those arguments necessarily relate to the due process clause alone, since the claim that the entire Constitution can be interpreted through any one philosophy is too implausible to be sustained. Thus, the effort to invoke any particular philosophic system in defining liberty and property inevitably leads to the same problem of imposing the entire debate regarding man, meaning, and the state on due process doctrine. It leads, moreover, to the approach that the Court has apparently been trying to avoid; namely, that the due process clause itself creates certain liberty or property interests. For if there is no generally accepted system of constitutional jurisprudence to provide the necessary definitions, their source can only be the fourteenth amendment's "cryptic and abstract"[245] language.

With respect to property, the Court has refused to articulate any constitutionally based standards apart from the notion that property is not created by the Constitution. That is the reason the Court's effort to establish federally required procedures in property cases keeps collapsing back into the procedural nihilism of Justice Rehnquist's opinion in *Arnett v. Kennedy*.[246] As *Bishop v. Wood*[247] made clear, federal requirements could be negated if state law were interpreted to have created no property rights. Subsequent cases, such as *Memphis Light, Gas & Water Division v. Craft*,[248] attempted to reestablish the due process clause's independence from state law by developing a federal approach to state statutory interpretation, one that identified certain provisions as creating a legitimate claim of entitlement. *Olim v. Wakinekona*[249] suggests, however, that this approach can be vitiated by a previous state interpretation, whether legislative or judicial. Thus, as long as the

240. J. ROUSSEAU, *Discourse on the Origin and Foundation of Inequality Among Mankind*, in SOCIAL CONTRACT AND DISCOURSE ON THE ORIGIN OF INEQUALITY 149 (L. Crocke ed. 1967).

241. P. PROUDHON, WHAT IS PROPERTY? 11-41 (B. Tucker trans. 1966) ("Property is robbery.").

242. J.S. MILL, ON LIBERTY (1859).

243. T. HOBBES, LEVIATHAN ch. XXI (1651).

244. F. NIETZSCHE, BEYOND GOOD AND EVIL §§ 26-44, at 39-55 (R. Hollingdale trans. 1973).

245. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

246. 416 U.S. 134 (1974).

247. 426 U.S. 341 (1976).

248. 436 U.S. 1 (1978).

249. 103 S. Ct. 1741 (1983).

Court insists that due process protection requires a property interest and that state law is the only standard for property, it is virtually committed to accepting the state's control over the content of due process protection.

With respect to liberty, the Court has articulated an independently derived definition. It has held that state actions—administrative actions in particular—that invade personal security or impose a stigma implicate the liberty interest. This approach, which originated with *Board of Regents v. Roth*[250] and *Morrissey v. Brewer*,[251] avoids the collapse of procedural protection in those circumstances where it is used, but it raises the same question as the Court's circuitous treatment of state law causes of action. If the Court has decided to create a right to avoid certain types of stigma or restraint, what value is served by characterizing these rights as liberty? The term is nothing more than a label for rights that the Court has decided to recognize and protect, useful only if it has some independent force. It is, moreover, a confusing label, for it has been used in due process doctrine to explain a multitude of sins, most notably the doctrine of substantive due process. *Roth*'s identification of specific factors is preferable to reliance on the general term liberty precisely because it excludes some of the "liberties" that have previously been found in the fourteenth amendment.[252]

2. *Beyond Textual Literalism*

In short, the second premise of the *Roth* decision seems difficult to maintain. The terms "liberty" and "property" simply fail to define the individual interest that triggers due process protection. There is, however, an argument for the use of the terms "liberty" and "property" that is independent of their usefulness: the argument that the text of the due process clause includes them. And as Justice Stewart said in *Roth*, perhaps inadvertently, "the words 'liberty' and 'property' in the Due Process Clause of the Fourteenth Amendment *must* be given some meaning."[253]

One may well concede that every constitutional phrase must be

250. 408 U.S. 564 (1972).

251. 408 U.S. 471 (1972).

252. *See* Board of Regents v. Roth, 408 U.S. 564, 572-75 (1972). Using the term liberty for the concept of stigma partially vitiates this advantage. The primary link between stigma and liberty is that stigma affects one's employment opportunities. But the recognition of a general right to employment opportunity, particularly when characterized as "liberty," leads directly to the liberty of contract notion. *See* Shapiro, *The Constitution and Economic Rights*, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 74 (M. Harmon ed. 1978).

253. Board of Regents v. Roth, 408 U.S. 564, 572 (1972) (emphasis added). Professor Monaghan reads this sentence as indicating that Justice Stewart was adopting a federal standard for property. Monaghan, *supra* note 4, at 437 & n.206. But it is not clear why the meaning Justice Stewart referred to could not have been based on state law.

given some meaning, if only in the interest of maintaining the legitimacy of the judicial enterprise. A further argument for treating the Constitution's language as the determinative factor is based on one theory of judicial review, sometimes referred to as interpretivism.[254] Its underlying rationale is that modern courts should implement the intent of the Framers, as revealed in the constitutional text or other sources. Even if one accepts the theory—and it is a source of serious controversy[255]—it hardly compels reliance on the literal words of a provision like the due process clause. The clause was enacted twice, each time with little, if any, discussion or debate.[256] While this does not necessarily suggest that the Framers were unaware of its meaning, it should caution against overinterpretation of the specific language. One might look to the general understanding of the guarantee at the time of its enactment, although even that is a matter of uncertainty. In all likelihood, the major external referent was chapter 39 of the Magna Carta, which would suggest that the emphasis was on the concept of due process, not on liberty or property.[257]

As soon as one moves away from a strict interpretivist approach, a literal reading of the terms liberty and property becomes decidedly untenable. There have been at least two major changes since 1791 or 1868 that preclude any direct translation of prior liberty and property ideas into modern legal doctrine. The first is the jurisprudential change in the concept of rights; the second is the historical change in the nature of government.

When the framers used the terms "liberty" or "property," they

254. *See generally* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); L. LUSKY, BY WHAT RIGHT? (1975); Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261 (1981).

255. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH 73-110 (1962); J. ELY, DEMOCRACY AND DISTRUST 11-41 (1980); Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

256. *See* R. MOTT, *supra* note 1, at 159-61, 164-67.

257. *See* R. BERGER, *supra* note 254, at 195-200; A. HOWARD, *supra* note 15, at 298-302; R. MOTT, *supra* note 1, at 159. The Magna Carta's introductory phrase was that "[n]o free man shall be taken, imprisoned, disseised, outlawed, banished or in any way destroyed, nor will We proceed against or prosecute him." A. HOWARD, *supra* note 15, at 388 (translation of the Magna Carta). The concern here seems to be on the nature of the state's adverse action, not the interest of the individual.

The use of the words "life, liberty, or property" in the due process clause, which do not appear in the Magna Carta, may well owe its origin to Locke's natural rights philosophy, *see id.* at 17 n.16, but this would hardly aid the Court's approach, *see supra* text accompanying notes 237-39. In any event, the evidence suggests that the dominant influence on the clause was the Magna Carta. This seems reasonable because chapter 39 of the Magna Carta describes a right closely related to our concept of procedural due process (the accepted core of the due process clause), while Locke has nothing to say about procedure.

probably had in mind some definitive set of interests fixed by natural law.[258] But modern courts and modern jurisprudence, as suggested above, tend to treat these terms as legal conclusions, rather than as independent arguments. As a result, their literal use now results in the abolition of fixed restraints, and gives the states extensive power to control the scope of due process protection. A natural rights approach would do exactly the reverse; it would suggest a rather vigorous federal standard that places absolute limits on state power. Of course, we have lost faith in the existence of such natural-law rights, probably as a result of the substantive due process doctrine, but we cannot conclude that this change in attitude about liberty and property requires an equivalent change in our attitudes about due process. That syllogism would hold only if the primary concern of the clause were liberty and property, rather than fair procedures.

Beginning from the notion that the clause guarantees fair procedures, the logical approach would be to interpret the terms liberty and property by seeking some concept that fulfills the same function now as liberty and property did previously. Presumably, that concept would be the dominant view about the proper type of interaction between government and individuals. Those views, which are in some sense "natural" to this society, represent society's general sense of the fixed limits on state power.

Second, adoption of the fifth and fourteenth amendments preceded the development of the administrative state.[259] When these amendments were drafted, adjudications by states—to which due process clearly applied—were carried out almost exclusively by courts. The words "life, liberty, or property" were sufficient to include the entire range of issues that courts adjudicated; their effect, therefore, was to describe, not to exclude.

Today, most adjudications are carried out by administrative agencies rather than courts. And these agencies perform many functions that courts did not and probably could not fulfill, most notably the dis-

258. *See* M. WHITE, *supra* note 237, at 213-28; R. MOTT, *supra* note 1, at 149, 159-61; G. WOOD, *supra* note 237, at 282-91.

259. The Interstate Commerce Commission, generally regarded as the first modern administrative agency, was created in 1887. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887) (codified at 49 U.S.C. §§ 1-11917 (1982)). The executive branch had carried out administrative functions before this time, and separate organizations, such as the Patent Office and the Comptroller of the Currency, existed to carry out specific functions. For the pre-1887 history of administrative law in the United States, see generally J. DICKINSON, *supra* note 33; E. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928); L. JAFFE, *supra* note 191. What is significant for present purposes, however, is that the concept of administrative law as a separate area of legal doctrine did not take shape until at least the late 19th century. *See* Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614 (1927).

tribution of benefits.[260] A literal reading of the terms "liberty" and "property" in this modern context excludes many administrative adjudications from the scope of due process protection. Again, this makes sense only if some independent significance attaches to the fact that these adjudications involve issues that are not readily described in terms of traditional common law interests. If one focuses instead on the concept of procedural fairness, the fact is that due process originally applied to all government adjudications; the only adjudications were court decisions about "life, liberty, or property," as those terms were understood at the time. Consequently, a strong argument can be made to preserve that inclusive effect. Instead of reading "life, liberty, or property" as referring to a particular group of interests, it could be read as referring to the entire, now-expanded range of government adjudications.[261]

In fact, the combined effect of modern jurisprudence and the administrative state is so apparent that those commentators who want to read the phrase as specifying a limited set of interests have found it necessary to refer back to preexisting legal standards. Professor Williams recommends reliance on the scope of liberty or property interests as they were understood in 1925.[262] That solves the problem posed by modern jurisprudence, but it still leaves the difficulties engendered by the advent of administrative agencies. As previously noted, the right-privilege distinction was already showing strain by 1925, because it did not produce acceptable results where regulatory programs such as licensing or deportation were involved.[263] Professor Easterbrook suggests we go back even further, to the scope of interest that existed in 1791 or 1868.[264] That solves the problem of the administra-

260. The major limitation on courts is the case or controversy requirement of article III. *See* Muskrat v. United States, 219 U.S. 346 (1911); Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 180, at 85-149.

261. *Cf.* J. ELY, *supra* note 255, at 16-19 (due process should apply to all cognizable interests); Newman, *The Process of Prescribing "Due Process"*, 49 CALIF. L. REV. 215, 216-18 (1961) (same).

262. *See* Williams, *supra* note 5, at 21 (referring to "classical liberty or property"). Professor Williams would recognize infringements of classical property when the state establishes a monopoly by foreclosing private market substitutes, or when it forces the user of the private market to pay twice for the same benefit. *Id.* at 21-27. A similar approach, focusing mainly on the monopoly issue, is proposed in Terrell, *supra* note 5, at 901-12.

263. *See supra* text accompanying notes 40-41. Of course, the strain became much more serious during the loyalty-security crisis.

264. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85. Professor Easterbrook also suggests that the due process clause was not intended to constrain the legislature since, at the time the Constitution was drafted, English jurists had interpreted the Magna Carta's due process provision as not binding on Parliament. *Id.* at 95-100. But there was no judicial review of legislation at all in 18th-century England. *See* Shaftsbury's Case, 6 Howell St. Tr. 1269 (K.B. 1677); Streater's Case, 5 Howell St. Tr. 366, 387 (1653) ("[W]hat the parliament does, we cannot dispute or judge . . . ."); 1 W. BLACKSTONE, *supra* note 17, at *161 n.15 ("It is a fundamental principle with English lawyers that Parliament can do every thing but make a woman a man, and a man a

tive state as well. Even so, this use of an extinct legal standard probably underestimates the tendency of a common law court in any era to look beyond liberty and property language to underlying policy when it created causes of action.[265]

But the real issue is one of values. Should the inevitably ambiguous language of the constitutional text be read to represent a fixed set of protections, whose content remains constant even when the surrounding society changes? Or should it be read to create an open-ended principle, capable of expanding so that its relative scope remains constant as those changes occur? If one adopts the former view, one will read "life, liberty, or property" as words of limitation: that no interest should be granted constitutional protection unless the framers would have regarded it as falling within those terms. If one adopts the latter view, however, the same phrase becomes one of inclusion: that as large a proportion of government actions should be granted protection as was granted protection at the time the due process clause was enacted.

The text of the due process clause itself does not inform us which interpretation is correct. It does not compel a particular definition of "liberty" or "property." Rather, it simply poses the issue for us, leaving us free to make the type of choices that all moral action requires.

3. Beyond the Underlying Rights Standard

The unpersuasive nature of *Roth*'s second premise—that "liberty" and "property" define a meaningful set of individual interests—naturally casts some doubt on its first premise—that the notion of an individual interest limits the applicability of the due process clause. Some minimal level of individual interest is required to confer standing on the plaintiff, of course, at least in a federal action. Article III as presently interpreted prohibits federal courts from deciding a case unless a definable interest of the moving party is at stake.[266] But in declaring that an individual interest is necessary for due process purposes, *Roth*

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woman."). The general view is that the Constitution changed at least this aspect of the English law. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). It hardly seems reasonable to treat the due process clause differently from other clauses, such as free speech or free exercise, simply because it happened to have a direct English forebear. In any event, whatever the fifth amendment may have meant at the time, it is inconceivable that the framers of the 14th amendment wanted to exempt the legislatures of the southern states from its control. *See* R. BERGER, *supra* note 254, at 169-80; Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

265. *See* R. DWORKIN, *supra* note 222, at 14-130; Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707, 716-24, 730-35 (1978).

266. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Linda R.S. v. Richard D., 410 U.S. 614 (1973). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 180, at 150-83 & Supp. 52-82.

could hardly have been restating the standing requirement. Instead, the Court must have been saying that once a plaintiff has standing, some additional interest must be identified, some underlying right that will support the imposition of due process requirements.

But why is this so? If one cannot rely on liberty and property to give content to the underlying rights concept, its link to the constitutional text disappears. So does its potential for restricting the open-ended character of due process decisions by means of the certainty of its limiting effect. Of course, it might be possible to identify some other underlying rights, and thus reinfuse this notion with preclusive force. But it seems like a large expenditure of effort to reconstruct an abstract principle without its main support.

Nonetheless, the effort has been made. Dean Ely suggests that the individual interest or underlying rights notion should be reinterpreted to include any significant injury suffered by the individual.[267] However, since that virtually restates the standing requirement, its real effect is to drain "underlying rights" of any content or significance. Ely virtually concedes this; the major question is why he felt the need to cast the argument in terms of underlying rights in the first place. Professor Van Alstyne makes a similar effort, although his solution leads in a somewhat different direction. He proposes that we treat "freedom from arbitrary adjudicative procedures as a substantive element of one's liberty."[268] The idea of freedom from arbitrary action seems promising, but it is circuitous to relate that idea to the introductory phrase about life, liberty, or property. One would ordinarily think of the idea as a description, or at least a paraphrase, of the term "due process"—that is, of the essence of the clause's guarantee. Van Alstyne rejects this more direct approach, however. In his view, it is tantamount to rephrasing the clause to provide that citizens shall not be deprived of "life, liberty, or property, or of due process of law, without due process of law."[269] That argument, however, reflects the skewing effect of the underlying rights notion. It implies that some underlying right must be found, and that any standard of due process must be stated in terms of such a right. The more logical rewording of the clause to reflect Professor Van Alstyne's view is that government may not take certain types of actions—described as deprivations of life, liberty, or property—in an arbitrary manner, with arbitrary defined as the lack of due process protection.

Another effort to locate underlying rights apart from liberty and property is derived from the dignitary theory of due process. This the-

267. *See* J. ELY, *supra* note 255, at 18-19.
268. Van Alstyne, *supra* note 211, at 487 (emphasis omitted).
269. *Id.* at 451.

ory holds that procedures are valuable in their own right, apart from the interests they protect, because they indicate a basic governmental respect for individuals. When Professor Kadish articulated this idea in the 1950's, he saw it as a basis for determining the content of due process itself.[270] While various scholars have continued to advance this approach,[271] the theory has also been enlisted as another interest of the individual that can be used to expand the scope of procedural protection beyond the Court's liberty and property analysis.[272]

In reality, this latter notion is simply another product of the general obsession with underlying rights. In its pure form, the dignitary theory deals with the purpose and significance of procedural protection itself. To translate it into the idea that there exists an individual interest in "dignity" is to separate it from its due process moorings and reduce it to a psychological observation of questionable validity. Some of our society's most "dignified" members, such as corporate presidents or cabinet secretaries, are entitled to no procedural protection; conversely, the dreary realities of local court procedures are often a continuing affront to the dignity of those involved in them.[273] In fact, the dignitary theory has very little to do with the notion of the individual's interest in "dignity." Properly conceived, it is a theory about the stance that government should take toward the people it rules.

The problem with the underlying rights standard, however, goes beyond the difficulty of defining it. There is an archaic quality about the whole idea; its implicit assumptions belong, at the most basic level, to a style of legal thinking that has been largely abandoned. The essence of the procedural due process enterprise, after all, is to identify those procedural protections to which individuals have a constitutional right. The insistence on finding an underlying right springs from the idea that such protections must be attached to some substantive interest. But this seems compelling only if one starts from the assumption that all rights are contained within the individual. That assumption

270. *See* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 347-48 (1957).

271. *E.g.*, Michelman, *supra* note 4; Pincoffs, *Due Process, Fraternity, and a Kantian Injunction*, 18 NOMOS: DUE PROCESS 172-81 (1977).

272. *See, e.g.*, L. TRIBE, *supra* note 4, at 502-03; Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 144-48 (1978); *cf.* Monaghan, *supra* note 4, at 433 (liberty "should be read to embrace . . . *any* governmental conduct which so invades a decent respect for a person's personal integrity that, if not fairly justified, the result would outrage public sensibility") (footnote omitted) (emphasis in original).

273. *See, e.g.*, M. FEELEY, THE PROCESS IS THE PUNISHMENT (1979); *see also* F. KAFKA, THE TRIAL (1937). In addition, there are numerous other ways, unrelated to due process, in which the government can make its citizens feel undignified, such as segregating them on the basis of their race, *see* Plessy v. Ferguson, 163 U.S. 537 (1896), or compelling them to sit in school classrooms where they do not understand the language spoken, *see* Lau v. Nichols, 414 U.S. 563 (1974).

excludes purely procedural protections that unlike the ownership of objects or the freedom to move about at will, do not seem so contained.

If one starts instead from the assumption that rights usually represent relationships between human beings, or between human beings and government, the need to find underlying rights within individuals simply dissolves. It is perfectly sensible to place limits on the government's behavior toward individuals, quite apart from any independent rights those individuals may possess. We may want to say, for example, that the government may not operate segregated golf courses or coffee shops,[274] even though we recognize no independent right to public facilities of this nature. Similarly, we may want to say that the government must provide notice and a hearing before it takes certain types of actions, regardless of the existence or nonexistence of an independent right. We might even want the government to provide notice and a hearing before it takes any action at all. That may not be required by our common understanding of due process and it may not be advisable, but there is nothing illogical or incomprehensible about it.

The notion that rights must be contained within the individual has no modern jurisprudential basis. At best, it is a restatement of the formalist view that people have certain natural-law rights independent of the social order. It may be related to the view that Professor Macpherson has labeled "possessive individualism"—the seventeenth-century notion that the individual should be regarded "neither as moral whole, nor as part of a larger social whole, but as an owner of himself."[275] But the realist tradition, the methodology of which has been described by Professor Summers as our "dominant general theory about law," definitively rejects any notion of inherent rights.[276] Like positivism generally,[277] it treats rights as products of the social order, that is, of

274. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Holmes v. City of Atlanta, 350 U.S. 879 (1955).

275. C. MACPHERSON, *supra* note 238, at 3. Even according to this approach, it is not inconceivable that purely procedural rights would exist. Although all rights would ultimately derive from self-contained individuals, social interaction might generate procedural protections under the right circumstances. In any case, and whether or not Professor Macpherson's interpretation is correct, his view seems similar to the Court's unstated assumptions.

276. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861 (1981). Professor Summers' characterization applies to realist methodology, rather than the realist program in its entirety. For the realists' rejection of inherent rights, see, *e.g.*, J. FRANK, COURTS ON TRIAL 9-13 (1949); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

277. While the Court's use of the state standard is often described as "positivist," positivism does not yield the proposition that the due process clause creates ouly subsidiary rights and not indepeudent ones. *See supra* note 141.

relationships between the government and its citizens.[278]

Recently, there has been the inevitable reaction to positivism, with some of the leading thinkers of our day attempting to derive a system of rights from arguments about human thought and human nature.[279] But nothing in these systems precludes rights that are defined exclusively in terms of the way government treats individuals. Indeed, Professors Fuller, Rawls, and Fried, three of the leading proponents of the "rights" approach, all derive their catalogue of substantive rights from general notions about the manner in which people should be treated.[280] All three recognize some purely procedural rights, typically in the form of rule obedience, that can be derived directly from the moral system they articulate.[281] Even Professor Nozick recognizes the relational character of procedural rights, and agrees that such rights exist independent of substantive entitlements.[282] This is quite remarkable, because Nozick is a true natural rights philosopher, who treats liberty and property as inherent and fundamental.[283]

The Court's view that procedural protection must be attached to

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278. On legal positivism, see generally 1 J. AUSTIN, LECTURES ON JURISPRUDENCE 182-90 (R. Campbell 3d ed. 1869); H.L.A. HART, *supra* note 141, at 97-107.

279. *See, e.g.*, C. FRIED, RIGHT AND WRONG 9-13, 81-86 (1978); L. FULLER, THE MORALITY OF LAW 3-32 (rev. ed. 1969); R. NOZICK, ANARCHY, STATE AND UTOPIA 28-33 (1974); J. RAWLS, A THEORY OF JUSTICE §§ 3-4 (1971).

280. *See* C. FRIED, *supra* note 279, at 28-29, 81-86 (rights are the obverse of wrongs, which are intentional actions that treat others in ways that deny their personal status); L. FULLER, *supra* note 279, at 96-106 (certain rights, and particularly due process rights, are derived from the nature of rational lawmaking); J. RAWLS, *supra* note 279, §§ 3, 11, 32 (liberty rights are derived from principles of equal treatment, based on rational choices that people would make).

281. *See* C. FRIED, *supra* note 279, at 138; L. FULLER, *supra* note 279, at 81-91; J. RAWLS, *supra* note 279, § 38. Rawls justifies the rule-obedience principle by explaining its relationship to liberty. *Id.* at 241-43. For Rawls, however, liberty is "a certain system of public rules defining rights and duties." *Id.* § 32, at 202. His moral rule, from which his theory is derived, is not that particular liberties (i.e., a certain structure of institutions) are required, but that a certain methodology (equality) be used in determining these liberties. *Id.* §§ 11, 31. It should be noted that Rawls uses the term "pure procedural justice" for this methodology, *id.* § 14, not for an independent right to adjudicative procedure.

282. R. NOZICK, *supra* note 279, at 101-08. The argument is that it is wrong to punish an innocent person by using an unreliable procedure because it violates the innocent person's liberty. (A reliable procedure does not do so, even if it produces the wrong result.) Guilty people have no right to reliable procedures since they deserve the punishment they receive. But if the decisionmaker does not know whether the person is innocent or guilty, he or she must use reliable procedures to avoid violating the person's rights. What makes Nozick "modern," and therefore allies him with Fuller, Fried, and Rawls, is his recognition of the problem of imperfect knowledge or uncertainty. It is precisely this problem that forges the link between the right to an accurate decision and the right to procedural protection.

283. *Id.* at ix, 10-12. Nozick's focus on inherent individual rights is so uncompromising that he rejects all forms of distributive justice, equality of opportunity, public taxation, and the entirety of the administrative state, *see id.* at 167-74, 235-38, yet he argues that "[a]n unreliable [i.e. inaccurate] punisher violates no right of the guilty person; but still he may not punish him. . . . [M]any procedural rights stem not from rights of the person acted upon, but rather from moral considerations about the person or persons doing the acting." *Id.* at 107. Nozick seems to qualify this

some underlying right is thus based on a conception of rights that is at odds with modern legal and philosophic thought. Nothing supports the Court's position other than the natural rights philosophy of the *Lochner v. New York* era that modern doctrine has so definitively rejected. The Court realizes this difficulty, which is why it has been so hesitant to establish independent federal definitions of "liberty" and "property." But because it insists on the form, if not the content, of the underlying rights concept, it has continued to search for some method of defining those mythological entities. The only obvious place to find them, once the search begins, is positive state law, which has the previously noted effect of undermining the federal nature of the due process guarantee.

Abandoning the notion of inherent rights, however, resolves this particular problem. Rights can be defined in terms of interpersonal relationships without being separately contained in, or owned by, any of the participants in those relationships. Such rights, including the right to procedural protection, can be found either in positive law or in social principles, depending on one's view. Fortunately, there is no need to choose a view at this stage of the analysis, because the right to procedural protection is grounded in the concept of due process, which is incontrovertibly both a positive enactment and a generally accepted social principle.

The individual interest or underlying rights idea, therefore, can simply be abandoned. This is hardly an extreme position, since it constitutes the general state of procedural due process doctrine between the time the right-privilege distinction fell into desuetude and the articulation of the liberty-property approach in *Roth*. Nor does it mean that the importance of the individual's interest need be entirely ignored. Courts might continue to treat that interest, in appropriate circumstances, as one element in determining the extent of procedural protection that would be imposed. What courts would not do, however, is give the individual's interest a preliminary and preclusive role in determining the applicability of the due process clause. Finally, eliminating the underlying rights notion does not mean that the phrase "life, liberty, or property" must be read out of the constitutional text. It may simply mean that the phrase should be read as characterizing the nature of the government's interaction with the individual, rather than the nature of the nonprocedural right that triggers procedural protection.

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statement at the beginning of the following paragraph, but by the end of the paragraph he restates it. *Id.* at 107-08.

B. The Standard of Procedural Fairness

1. The Basis of the Standard

The *Roth* liberty-property approach, though heavily criticized, is so familiar as the foundation of due process doctrine that the possibility of its elimination may produce a sense of vertigo. It is not difficult, however, to articulate the requirements for an alternative theory. The starting point should be the prevailing modern view that rights are derived from relationships between people, or between people and government, rather than from inquiries into the inherent qualities of either. The fourteenth amendment, at least if one accepts the state action concept in its present form, is exclusively directed toward relations between people and the government.[284] Thus, the basic enterprise of interpreting "procedural due process" is to determine the procedures that the government must employ in dealing with individuals.

Despite the agonies of the past decade, a consensus exists about the purpose of these procedures: to ensure accurate decisionmaking in government adjudications.[285] An accurate decision is defined as one that finds the facts as they actually are and applies the law to those facts in accordance with prevailing doctrine.[286] Underlying this con-

284. The current doctrine is that due process applies only to government actions, specifically to government actions possessing some undefined quality of affirmativeness. *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (law authorizing warehouseman to exercise lien against bailor, without notice or hearing, does not constitute state action). Most of the leading state action cases involve the equal protection clause, *see, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), but the definition of state action is presumably the same for both clauses.

285. *See, e.g.*, L. TRIBE, *supra* note 4, at 503-04; Grey, *Procedural Fairness and Substantive Rights*, 18 NOMOS: DUE PROCESS 182-84 (1977); Kadish, *supra* note 270, at 346; Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974); Newman, *supra* note 261, at 219-20; Scanlon, *Due Process*, 18 NOMOS: DUE PROCESS 98-100 (1977). To quote Professor Michelman, one of the leading proponents of the dignitary theory: "An obvious purpose of formal explanatory procedures is vindication of the private claims of individuals to have what belongs to them under the law." Michelman, *supra* note 4, at 127 (footnote omitted).

286. Some commentators deny that accuracy is a workable criterion, preferring the more general notion of "fairness." But their definition of fairness generally includes accuracy considerations. *See, e.g.*, 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 10:4, at 317-21 (2d ed. 1978). *See generally* J. MASHAW, SOCIAL SECURITY HEARINGS AND APPEALS (1978). Many others believe that the clause is designed to serve additional goals, *see supra* notes 270-72, although the Court continues to insist that accurate decisionmaking is the only one, *see, e.g.*, Olim v. Wakinekona, 103 S. Ct. 1741, 1748 (1983) (guarantee of procedural protection not designed to vindicate substantive right would be "needless formality"); Harris v. Rivera, 454 U.S. 339 (1981) (facially inconsistent bench trial verdicts, without any explanation by judge, do not create sufficient risk of error to violate due process); Mathews v. Eldridge, 424 U.S. 319 (1976) (granting procedural protection requires consideration of the extent of individual interest in underlying right, or risk of error in adjudication). At least one commentator believes that the clause serves fewer goals. *See* Easterbrook, *supra* note 264 (due process imposes no limits on legislature in designing adjudicative pro-

cern for accuracy is a notion that inaccurate determinations are unfair to individuals. While accuracy may also be viewed as an ingredient of sound policymaking or efficient operations, our current view of the Constitution is that it is not directed toward matters such as these.[287] Instead, it concerns what Deans Choper and Ely have described as the failures of representational democracy,[288] or what others have described as the set of values that are to be protected from any operation, unsuccessful or otherwise, of the representational process.[289] The concern, therefore, must be that an inaccurate decision impinges on some basic value, the constitutional significance of which is defined either independently, or in terms of other values, or in terms of a democracy's inability to protect it.

This basic value is essentially the rule of law—that is, the treatment of individuals in accordance with legal standards. An accuracy requirement imposes standards on the decisionmaker, both as a finder of fact and as an interpreter of law. It thus limits the individual discretion of state agents. The danger of unfettered discretion is that individuals can be subjected to personalized tyranny, no matter how democratic the system as a whole may be. State agents may demand bribes, seek unreasonable obeisance, take revenge, or act on the basis of caprice or inadvertence. It is the one-to-one interaction between the state agent and the individual that generates the danger. Such interactions call forth emotions that would otherwise be absent: antipathy based on the individual's appearance or personality traits, antagonism based on the individual's general attitude or particular interaction with the agent, and—perhaps the greatest danger in a mass bureaucracy—annoyance based upon the mere necessity of having to deal with yet another individual. These one-to-one interactions, moreover, create the opportunity for the state agent to act upon whatever emotions are called forth. They generally occur in the obscure and dusty corners of

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cedures). In any event, the common element of almost all of these disparate views is that due process guarantees that the government will employ procedures sufficient to ensure that its decisions achieve a minimum standard of accuracy.

287. Some commentators have argued that the Court's instrumentalist view of due process reduces the concept from a right to a policy consideration. *See, e.g.*, Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49 (1976); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1524-27 (1975). On one level, that is probably true. There is, nonetheless, a difference between recognizing accurate decisionmaking as a right, even if that recognition is based on a utilitarian basis, and treating it as a mere matter of good policy.

288. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 60-128 (1980); *id.* at 64-65 ("Individual rights were . . . designated in the Constitution for those who could not be expected to prevail through orthodox democratic procedures . . . ."); J. ELY, *supra* note 255, at 4-12 & *passim.*

289. *See, e.g.*, A. BICKEL, *supra* note 255, at 4-10 & *passim*; Wechsler, *supra* note 222, *passim.*

the bureaucratic state, far away from public scrutiny, and often insulated from internal review by their perceived insignificance.

Procedure is our traditional method for ensuring that the decision in question is accurate, thus protecting individuals from the potential oppressions of direct interaction with state agents.[290] The explanation for the special status that the Constitution confers on this protection, therefore, is simply that the danger of such oppression is too great and its consequences too severe to leave the matter to the political process.

Under the Choper and Ely model,[291] the Constitution establishes a representational democracy as the basic safeguard for individual rights, and then specifically protects the rights that such a system might undervalue or transgress. Protection against individualized oppression is certainly such a right. Relatively few individuals have any real access to the political process; it is only large groups or powerful individuals that can influence the legislature or the executive. Therefore, as long as the state oppresses people one at a time, their only serious protection lies in the judiciary's ability to impose due process requirements on state decisions.[292]

Having identified the generally accepted purpose of due process protection, the next question is whether identifiable limits on due process protection exist, particularly in relation to administrative decisionmaking. The Court's adoption of the liberty-property approach was almost certainly motivated by a desire to contain the genie *Goldberg* had released.[293] Eliminating the underlying rights test as a trigger for due process protection necessarily raises that concern again. The problem is to describe a boundary that is both workable and close to society's intuitive consensus about the appropriate level of due process protection. There is, of course, no need for the boundary to follow the precise contour of existing decisions; indeed, no consistent rationale could do so.[294]

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290. *See* Kadish, *supra* note 270, at 340 ("[P]rocedural limitations proceed from historical insights, that the manner in which governmental power is exercised upon the individual, even in an area of legitimate governmental concern, requires limitations.") (footnote omitted).

291. *See* J. CHOPER, *supra* note 288, *passim*; J. ELY, *supra* note 255, *passim.*

292. Professor Easterbroook maintains that "[t]here is no logical reason why legislatures would underestimate the value of process" when they are designing legislation. Easterbrook, *supra* note 264, at 117. Even if this is true, due process rights are primarily designed to protect people against administrators, not legislators. The legislature may have no reason to undervalue procedural concerns rather than substantive ones, but if it happens to do so, the impact on individuals will be qualitatively different. A law with inadequate procedures will enable state administrators to oppress individuals in a way that would not be possible through the enactment of any generalized nonprocedural law. Therefore, the due process clause must operate to forbid the legislature from enacting laws that give administrators power of that kind.

293. *See supra* notes 86-90 and accompanying text.

294. *See* Sinolla, *supra* note 5, at 88-94. Professor Sinolla argues that courts must distinguish between protected and unprotected interests, presumably because due process, like other constitu-

2. *The Content of the Standard*

With these considerations in mind, it is now possible to explore what we mean by due process or fair procedure. In the loyalty-security cases of the 1950's, the Supreme Court began to articulate a workable due process doctrine. Subsequent developments have obscured the basic theory of those cases, which are cited in the post-*Roth* decisions largely for their unintended implications about the individual interest issue.[295] But the cases in fact dealt directly with the meaning of fair procedure and established two important principles. The first may be called the principle of rule obedience: that government decisionmakers must follow preestablished rules in adjudicative processes. The second is the principle of minimum procedures: that certain minimum adjudicatory procedures must be followed in various situations. If the government violated either of these principles, its action was deemed arbitrary, and therefore a violation of the due process clause.

a. The Rule-Obedience Principle

The rule-obedience principle simply establishes our basic concept of legality. Suppose a decisionmaker announces: "I recognize that the rules, that is, the law, grant you a particular benefit, but I decline to apply those rules in deciding your particular case." As Professor Smolla has pointed out,[296] such a decision is obviously improper—lawless one might say. By definition it violates the substantive rule that has been ignored. It also violates the principle of procedural due process; it is the very antithesis of accurate decisionmaking, since accuracy is the proper application of the law to the case at hand. Nothing leaves a state agent as much room for venality, hatred, caprice, or carelessness as the power to ignore the applicable rules. And from a dignitary perspective, the failure to follow applicable rules subjects individuals to a totally arbitrary regime, thereby denying them any possible control over their fate. Therefore, even if the state provides no cause of action for the decisionmaker's violation of a substantive law, the federal Con-

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tional rights, must be contained within some recognizable boundaries. But categorizing types of interests is not the only way to establish such boundaries. Experience indicates that limiting due process protection based on the nature of some underlying right is unsatisfactory. *See supra* Part II, Section *A*. An alternative approach is to base the boundaries on the nature of the governmental action.

295. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 702-08 (1976) (distinguishing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), Wieman v. Updegraff, 344 U.S. 183 (1952), and Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886 (1961)); Board of Regents v. Roth, 408 U.S. 564, 571-77 (1972) (citing Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) and *Wieman*); Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (citing Speiser v. Randall, 357 U.S. 513 (1958), *Slochower*, and *Joint Anti-Fascist Refugee Committee*).

296. *See* Smolla, *supra* note 61, at 497-500.

stitution does.[297]

Despite its intuitive appearance, the rule-obedience principle has a counterintuitive element. If government is not obligated to enact rules, as it obviously is not, why should it be obligated to obey those rules it chose to enact? One answer described, but not advanced, by Professors Stewart and Sunstein is simply the common understanding of the word "rules": it would mislead people to declare rules if they did not carry with them the obligation of obedience.[298] More important, since people might learn to be wary, such rules would also confer on the government's actions a legitimacy to which they were not entitled.[299]

A second answer is that the counterintuitive element results from a perception that rules generally contract the power of state officials by placing limits on their actions. In the modern state, however, this notion is often incorrect. Rules frequently expand official power, creating governmental functions that did not previously exist. It seems appropriate, therefore, to require obedience to the limiting principles that accompany these general grants of power.

Still another answer is that "the government" is a combination of different functional units, not a monolithic entity. In the traditional model of government, one unit—the legislature—makes the rules while another unit—the judiciary—adjudicates. Under this model, there is nothing problematic about permitting the legislature to alter preexisting rules while requiring the judiciary to obey them.[300] While the structural difference between rulemaking and adjudicatory units has disappeared in the modern administrative agency, the functional distinction between the two activities remains.[301] Requiring administrative agencies to abide by their own rules, therefore, preserves the appropriate separation of functions.

The most basic answer, however, is the identified purpose of pro-

297. *See* Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561 (1984) (interpreting the guarantee clause as a constitutional requirement that states follow their own rules when dealing with individuals).

298. Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1258-60 (1982). The authors' basis for questioning this principle, which they characterize as either "legislative candor" or "honoring expectations," is that neither is definitively linked with recognized constitutional values. In fact, those themes can be found, but primarily in the context of adjudication rather than rulemaking. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (entitlements); Vitarelli v. Seaton, 359 U.S. 535 (1959) (candor). *See infra* notes 336-49 and accompanying text (discussing the distinction between rulemaking and adjudication for due process purposes).

299. I am indebted to Professor Paul Mishkin for this idea.

300. Of course, the legislature might circumvent the constitutional provision by adjudicating cases, but this is just what the bill of attainder clause prevents. U.S. CONST. art. I, § 9, cl. 3.

301. This explanation, by distinguishing the levels of government, demonstrates that the rule-obedience principle is applied only in adjudicatory contexts. *See infra* text accompanying note 330.

cedural due process: to provide people with protection when state officials act directly upon them as individuals. Due process applies, therefore, only when the state acts in this way—not when the state chooses not to act. And when it applies, it governs only the manner by which the state brings its force to bear. The failure to follow preexisting rules is an arbitrary use of that force, one that allows precisely the oppressive action that the clause is designed to prevent. Therefore, because the legitimacy of state power is conditioned upon a norm that governs the legitimate exercise of power, it is hardly surprising that the rule-obedience principle takes effect only when that power is exercised.

The rule-obedience principle tends to be overlooked because it is not typically a demanding requirement. Since it governs the way in which a state applies its own laws, primarily a question for the state to resolve, federal review is necessarily based upon a standard of minimum rationality.[302] Either the state must concede that it is not following its own rules, or the interpretation of the rule the state claims to be following must be patently irrational. The rule-obedience principle is, therefore, essentially equivalent to the minimum rationality requirement of equal protection.[303]

Of course, due process, like equal protection, imposes requirements beyond mere rationality in certain situations. The basic due process situation that demands heightened scrutiny is the application of the criminal laws. Just as the minimum-procedures principle operates more stringently in criminal cases as a matter of explicit constitutional provisions, the rule-obedience principle operates more stringently as a matter of judicially articulated doctrine. The major aspect of that doctrine is the void-for-vagueness notion,[304] which is simply a special case

302. *Cf.* Smolla, *supra* note 5, at 107-20 (analyzing Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), as a minimum rationality decision).

303. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 438-42 (1982) (Blackmun, J., concurring). For a nondoctrinal expression of the same relationship, see J. RAWLS, *supra* note 279, § 38, at 239. Equal protection requires that similar cases be treated in a similar manner, which means that the state must apply a rule to everyone who falls within its scope. And in the absence of a suspect classification or fundamental interest, the equal protection standard of review is minimum rationality. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297 (1976); Railway Express Agency v. New York, 336 U.S. 106 (1949); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. *But see* Note, *supra* note 297, at 577-79 (rule-obedience principle requires federal court to review state interpretations of state law where state interpretations result in neglect of constitutionally imposed duties). This suggests that a basic requirement of rationality underlies both the due process and the equal protection clauses, a requirement demanded by our basic sense of fair and just behavior by the state.

304. *See, e.g.*, Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Coates v.City of Cincinnati, 402 U.S. 611 (1971); Lanzetta v. New Jersey, 306 U.S. 451 (1939). *See generally* Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956); Note, *Standing to Raise Constitutional Jus Tertii*, 88 HARV. L. REV. 423

of rule obedience. Viewed as a structural standard for drafting general legislation, vagueness fits awkwardly into our constitutional framework.[305] But as Professors Amsterdam and Foote have suggested, the doctrine can be viewed as a restraint on executive discretion, since it forbids the vague grant of authority that would permit officials to enforce the criminal law selectively.[306] In other words, rules must be stated with clarity sufficient to permit a more definitive judgment about whether the officials are following them. The doctrine is pointless unless administrators are under an affirmative obligation to follow these rules. But once that obligation exists, the doctrine's additional requirements become a means of applying the rule-obedience principle with something beyond the minimal rationality standard.

Numerous cases extending into the post-*Roth* era affirm the principle of rule obedience.[307] Other cases rely on or reflect the principle, even though they do not state it as such, *Logan v. Zimmerman Brush Co.*[308] being the most notable example. Recently, however, the Court has called this principle into question with respect to internal agency

(1974); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (Professor Anthony Amsterdam's student note) [hereinafter cited as Note, *Void-for-Vagueness Doctrine*].

305. Apart from the vagueness doctrine, there are virtually no constraints on the manner in which legislation is phrased. The Court's previous invalidation of statutes containing irrebutable presumptions was an attempt at such a constraint, but this approach has been repudiated. *See infra* note 380; *cf.* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976) (argument for imposition of procedural standard on lawmaking process that could include vagueness concept). The cases invoke the procedural due process notion that a vague law fails to give a person notice of what the state forbids. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). But this is obviously a very different use of the term "notice" from that found in procedural due process cases, where notice refers to specific information about an upcoming adjudication. Any notice requirement for general laws would involve constructive notice only, since individuals are expected to know the law. *See* Texaco, Inc. v. Short, 454 U.S. 516, 532 (1982); North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925).

306. *See* Foote, *supra* note 304; Note, *Void-for-Vagueness Doctrine*, *supra* note 304. This rationale was explicitly adopted by the Court. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 168-70 (1972); Cox v. Louisiana, 379 U.S. 536 (1965).

307. *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 235 (1974); Yellin v. United States, 374 U.S. 109, 143-44 (1963); Kelly v. Railroad Retirement Bd., 625 F.2d 486, 491-92 (3d Cir. 1980); Mathews v. Walter, 512 F.2d 941, 946 (D.C. Cir. 1975); United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969); Nader v. Bork, 366 F. Supp. 104, 108 (D.D.C. 1973). *See generally* Berger, *supra* note 62.

308. 455 U.S. 422, 424-43 (1982). *Logan* involved a state agency that was required to process claims within a fixed time period. The agency refused to do so, and the state court held that "failure to comply deprived the [agency] of jurisdiction," *id.* at 427, thereby requiring it to dismiss the claim. The Court based its unanimous reversal on the rationale that the claimant had been deprived of property (her cause of action) without due process. But there is no denial of due process in setting a time limit upon individual claims. Merely reciting the claimant's right to a hearing, as the Court did, *id.* at 433-37, is not quite sufficient. On the one hand, the claimant is not entitled to a hearing on an untimely claim; on the other hand, she is entitled to a hearing on whether the claim was untimely, which the state court provided. The real problem with the state's action was that the agency failed to follow the applicable rule that hearings must be provided.

rules[309] and rules that are purely procedural in nature.[310] As will be discussed below,[311] these cases are more properly regarded as involving the scope of the rule-obedience principle. None of them really challenges the constitutional notion that an agency must follow prevailing law in adjudicating individual cases, though these cases do contain some fairly ominous language.

b. The Minimum-Procedures Principle

The second principle that emerges from the loyalty-security cases is that a state must provide certain minimum procedures in various adjudicatory contexts. These procedures are generally identified as notice, a hearing, and an impartial decisionmaker. The connection between them and the due process goal of accurate decisionmaking is virtually self-evident, since the trial-type interaction that these procedures establish reflects our basic model of decisional accuracy.[312]

Any substantive requirement for accurate decisionmaking would require us to decide how much accuracy we want, but setting acceptable accuracy levels is a daunting task—one for which courts are notably ill suited. Procedure eliminates this problem, at least in the nonadministrative realm, because we have a general consensus about the proper amount of procedure—specifically those procedures associated with civil and criminal trials—that substitutes for the absence of consensus about accuracy levels.

There are, of course, numerous other grounds on which the imposition of minimum procedures can be justified. While accurate decisionmaking has been characterized, quite properly, as "instrumental,"[313] it is not the only instrumental justification. Procedures might be imposed for heuristic purposes, either because they are themselves instructive or because they provide the individual with sufficient information to alter future behavior. This might be particularly useful in certain contexts such as school suspensions. Procedures might also be employed to reconcile people to unfavorable decisions, thus serving the very instrumental purpose of keeping the decisionmaker alive. In

309. Schweiker v. Hansen, 450 U.S. 785, 789-90 (1981) (per curiam) (violation of precatory rule in agency manual does not invalidate agency action); United States v. Caceres, 440 U.S. 741, 753-55 (1979) (violation of internal rule that does not affect propriety of agency action does not require exclusion of evidence in criminal proceeding).

310. Olim v. Wakinekona, 103 S. Ct. 1741 (1983); Board of Curators v. Horowitz, 435 U.S. 78, 92 n.8 (1978).

311. *See infra* text accompanying notes 388-410.

312. Indeed, the trial model is so basic that the notion of accurate decisionmaking is probably derived from its provisions, rather than the reverse. Other models are possible, of course, as Professor Mashaw has suggested, *see generally* J. MASHAW, BUREAUCRATIC JUSTICE (1983); Mashaw, *supra* note 285, and some of these may have better claims to accuracy in certain situations.

313. L. TRIBE, *supra* note 4, at 501-03.

this context, they might be viewed as an alternative to compromise,[314] thus freeing decisionmakers to act more definitively and speak more resoundingly in certain situations.

Minimum procedures might also have noninstrumental or inherent justifications. The most common is the dignitary theory that these procedures indicate respect for human beings, and a commitment to treat people as ends rather than means. There is also the notion that Professor Rawls refers to as pure procedural justice: the use of procedures to reach a decision may be the most reliable way to define fairness in that situation, particularly if we have no external standard for the fairness of the result.[315]

c. *The Due Process Cause of Action*

The two principles of rule obedience and minimum procedures establish the basic content of "procedural due process" or, more precisely, the elements of a due process cause of action. Since both are necessary, denial of either will constitute a constitutional violation. To state the cause of action, the plaintiff must allege that he or she was denied the protection that these principles afford: that the government failed to follow applicable rules, or to provide minimum procedures in a situation where such procedures are required. According to our general consensus, that is what we mean when we say that the person was denied due process of law.

The current obsession with defining liberty and property has been so intense that the Court has, in a few cases, actually forgotten that the denial of due process rights is a necessary element of a due process cause of action. The two most notable examples are *Paul v. Davis*[316] and *Parratt v. Taylor*.[317]

Justice Rehnquist's concern in *Paul* was essentially a "floodgates of litigation" problem. He saw the plaintiff's case as standing for the proposition that a person could maintain a due process claim over the commission of any common law tort by a government official. But that was not the nature of the plaintiff's claim in *Paul*. He was not complaining that the officials had defamed him by characterizing him as an active shoplifter; rather, he was complaining that they had denied him notice and a hearing on the accuracy of their characterization. In other words, he was claiming a deprivation of due process rights, not the

314. *See* Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U.L. REV. 750, 779-85 (1964) (compromise as method of reconciliation); Eisenberg, *Private Ordering through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 646-49 (1976) (same).

315. J. RAWLS, *supra* note 279, § 14.

316. 424 U.S. 693 (1976).

317. 451 U.S. 527 (1981).

commission of a common law tort.[318] By overlooking the plaintiff's allegation of a procedural defect, Justice Rehnquist raised the possibility that all tort law claims could be actionable under the fourteenth amendment. His solution to this imaginary problem was an extremely odd definition of liberty. That would have been unnecessary had he realized that tort law claims by themselves are not actionable under the fourteenth amendment; whatever the interest involved, they fail to satisfy another element of a due process cause of action—a denial of procedures.

The possibility that had seemed so troubling to Justice Rehnquist in *Paul* was actually presented to the Court in *Parratt.* Prison officials had negligently lost the hobby kit that a prisoner had ordered, and the prisoner sued for deprivation of property without due process of law. The hobby kit was undoubtedly property, Justice Rehnquist's opinion held,[319] but state law tort remedies provided all the process that was due. Consequently, no federal remedy was required.[320] But although the plaintiff did allege a loss of property, he did not allege a deprivation of due process rights, and thus failed to state a federal cause of action. The plaintiff did not want to claim that he was entitled to a hearing prior to the negligent action of the prison officials, presumably for the simple reason that such a hearing would be impossible for anyone to provide.[321] In any case, negligent loss of property does not entail the

318. *See* Monaghan, *supra* note 4, at 427-28. Professor Smolla defends the *Paul* decision, arguing that the acceptance of plaintiff's due process claim would have enabled him to avoid the carefully balanced rules of common law defamation cases. Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies:* Parratt v. Taylor *and* Logan v. Zimmerman Brush Co., 1982 U. ILL. L. REV. 831, 836-44. But since the claims are different, the balances are different. Truth is a complete defense to common law defamation, but the truth of the government's position is not a defense to a due process claim. A state could not justify denying criminal defendants their right to trial with an offer of proof that the defendants were really guilty. To challenge the denial of a hearing, the plaintiff need only prove that he or she has a colorable claim. The further proof of a winning claim is necessary only to challenge the result of the hearing, which is not what Paul was doing. In other words, the state could have defended against the plaintiff's due process claim only by proving that his factual assertions were not colorable, although it could have defended against his defamation claim by proving that its assertions were true.

319. *Parratt,* 451 U.S. at 536. The basis for the conclusion is actually not clear. If Justice Rehnquist were following the *Roth* approach, he would first be required to determine whether state law regarded tangible objects ordered and paid for by a prisoner as property. Presumably the state would be free not to do so.

320. *Id.* at 544.

321. *Id.* at 543. Justice Rehnquist presaged the problem presented by *Parratt* in his *Paul* opinion, when he stated that if the plaintiff's claim were granted, "it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under § 1983." Paul v. Davis, 424 U.S. 693, 698 (1976). By including the words "negligently" and "mistakenly," Justice Rehnquist went right past the crucial issue. His hypothetical case is indeed one that we would not want to recognize as a due process violation, but that is precisely because the actions are negligent and mistaken in the sense of being accidental. The state obviously cannot provide a

kind of particularized oppression that is the gravamen of a due process violation. Nor could the plaintiff have alleged the inadequacy of subsequent remedies, having brought his federal suit before pursuing any other remedy. Because the Court treated the individual interest as a precondition, and the only precondition, it found itself grappling with the merits of a case that should have been dismissed on other grounds.

Of course, since *Parratt*'s result is equivalent to a dismissal, and since that result is virtually unassailable, the question may seem academic, at best. But there is an important difference between a dismissal and a decision on the merits. A dismissal means that a state official's negligent action does not implicate the due process clause because there has been no subsequent failure to provide required procedural protection. The Court's decision on the merits means that negligent action does involve the due process clause, if the action is taken with respect to "liberty" or "property," but that the subsequent procedures satisfy the clause's requirements. The difference is that the Court's approach will tend to restrict the individual's right to due process in accordance with the state's ability to provide a remedy. Given the Court's self-imposed dilemma that any negligent state action can implicate due process, this restrictive tendency is likely to be a powerful one.[322]

This is precisely what happened this past Term in *Hudson v. Palmer*,[323] where the Court extended *Parratt* to cases of intentional tort. At issue was an individual's claim that prison officers had intentionally and maliciously destroyed his personal property, thereby violating the

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prior hearing in such circumstances. By contrast, the state's action in naming the plaintiff in *Paul* was hardly accidental. It was, in fact, purposeful, although possibly incorrect. If one removes the crucial words "negligently" or "mistakenly" from Justice Rehnquist's hypothetical and replaces them with purposeful action, one gets quite a different result:

> [I]t would [indeed] be difficult to see why the survivors of an innocent [person] . . . shot by a policeman [who had been ordered to gun down unsavory characters] or . . . killed by a sheriff driving a government vehicle [because they were jaywalking] would not have claims equally cognizable under § 1983.

See Screws v. United States, 325 U.S. 91, 106 (1945) (police officer who deliberately beat person to death violated person's due process rights).

322. Judge Posner's dissent in a recent due process case demonstrates the point. Vail v. Board of Educ., 706 F.2d 1435, 1449 (7th Cir. 1983) (Posner, J., dissenting), *aff'd by an equally divided Court*, 104 S. Ct. 2144 (1984). Dissenting from the Seventh Circuit's holding that a fired school athletic director was entitled to damages for violation of his due process rights, Judge Posner states: "[S]ince the right Vail was allegedly deprived of is just a right to a particular remedy—damages—he cannot complain that he has been deprived of that right unless the state fails to provide him with a remedy." *Id.* at 1453 (Posner, J., dissenting). But the law does not really create rights to remedies; rather, it creates rights to something else and provides remedies for the violation of these rights. Here, Vail was complaining that the state had violated his right to a predetermination hearing, not his right to any particular remedy for breach of contract, as Judge Posner suggests. *Id.* at 1452-53 (Posner, J., dissenting). The mere fact that the trial court granted money damages does not alter the nature of the right.

323. 104 S. Ct. 3194 (1984).

due process clause.[324] The Court held that post-deprivation remedies were adequate because the "State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct."[325] To be sure, the Court conceded, the individual prison officers could anticipate and control their behavior, unlike the absent-minded behavior of the *Parratt* officers, but the "controlling inquiry is solely whether the State is in a position to provide for predeprivation process."[326]

Unlike *Parratt*, which reaches a reasonable conclusion by an unjustifiable route, *Hudson* seems simply wrong in its result. It is unclear from the opinion who possesses the mysterious quality of being "the state," but it is presumably various rulemakers, most notably the legislature. Now suppose a trial judge—not "the state" by this hypothesis—greets a criminal defendant by saying, "You look guilty as hell. I'm going to convict you without a trial." Presumably, this violates the due process clause, even though "the state" may have no more control over its errant judges than its errant wardens.

Whether "the state" is really at fault in this case is an interesting question, albeit a metaphysical one. Whether the judge's improper behavior can be prevented is more interesting because it is substantially less metaphysical. But it is unclear why either question should affect a person's right to be protected against particular kinds of action by state officials. There is nothing impractical about describing the behavior of the judge, or the prison officials in *Hudson*, as a violation of the due process clause. The claim is not that the prisoner was deprived of property, but that he was deprived of due process in particular circumstances. If the federal court finds that the clause has been violated—and it would base the determination on the oppressiveness of the behavior[327]—the state would pay damages for violating a constitutional right. The way for the state to avoid such violations in the future

324. Since the case was decided against the petitioner on the pleadings, his allegations had to be taken as true. The Court also held that prisoners have no fourth amendment rights against searches of their cells. *Id.* at 3200.

325. *Id.* at 3203.

326. *Id.* at 3204. The Court was unanimous on the point. The fourth amendment holding drew a dissent from four justices. *Id.* at 3207 (Stevens, J., concurring in part and dissenting in part).

327. The Court might conclude that summary seizure of a prisoner's property is justified because of a "paramount interest in institutional security." *Hudson*, 104 S. Ct. at 3201; *see also* North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (summary seizure and destruction of spoiled food justified by the state's interest in protecting human health). How this issue should be resolved is a difficult policy question that implicates one's ideas about punishment, rehabilitation, and governmental fairness. The point is that this is the question that the Court should have discussed. As it was, the necessity of balancing the rights of prisoners against the needs and objectives of penal institutions was discussed only in the fourth amendment section of the opinion. *See Hudson*, 104 S. Ct. at 3198-99.

would be by providing some sort of procedural protection before its agents destroy a prisoner's property, not by providing a subsequent remedy once the property is destroyed. If the state cannot control its prison officers, then it is in continuing violation of the Constitution.

In *Hudson*, as in *Parratt*, the Court has difficulty because it has forgotten what due process is about. There is nothing objectionable about the result in *Parratt*; a post-deprivation hearing is perfectly satisfactory, not because it remedies a due process violation, but because there is no due process violation unless that hearing is denied. But in *Hudson* there was a violation: a prisoner was singled out and subjected to unconstrained, oppressive behavior by state agents. Having lost sight of the essential factor that distinguishes the cases, the *Hudson* Court was able to echo *Parratt* by going directly from the fact that the prisoners lost their property to the fact that the state provided post-deprivation hearings. But neither opinion considered whether the prisoners had been denied due process of law.

3. *Specificity as a Limit on the Standard*

Even if the standard of procedural fairness, as embodied in the principles of rule obedience and minimum procedures, is a necessary component of a due process cause of action, it may not be a sufficient component. In addition, a due process theory must possess identifiable limits. This is not the misplaced concern of *Paul* and *Parratt* that all tort law might be subsumed under the due process clause, but the legitimate concern that due process analysis might be applied to the entire range of administrative actions. It was precisely this concern, of course, that started the Court down the garden path of defining liberty and property interests. That choice was unfortunate, but the Court's conceptual agonies do not obviate the need for a limiting principle.

By focusing on the content of procedural due process, it is possible to generate a workable limiting principle. What makes a particular use of the due process clause "procedural," after all, is that it imposes standards on the means of government adjudication. Procedural due process, then, is necessarily limited to adjudicatory contexts. Instead of determining whether the individual can assert a liberty or property interest, it is only necessary to determine the nature of the government's action about which the individual is complaining. If the action is adjudicatory, the due process clause applies. That does not mean that governmental rules that must be obeyed necessarily exist, or that minimum procedures must be required; rather, it means that due process doctrine is the proper mode of analysis and that any decision to impose, or not impose, due process standards must be made by assessing the proper scope of those two basic principles.

a. Adjudication as a Limit

The same textual arguments that cast doubt on the preclusive use of the terms "liberty" and "property" lend support to the use of adjudication as a limit. Such a limit is consistent with the view that the ambit of the clause should expand as the role of government expands. In 1791 and 1868, the phrase "life, liberty, or property" was sufficient to encompass all government adjudications.[328] Consequently, one could reject the notion that it defines some limited set of individual interests, and conclude that it refers to the same totality. The fourteenth amendment version of the clause would then read: "nor shall any state take particular kinds of actions—namely adjudications—without due process of law." To be sure, there is something about the language that seems to imply an individual interest consideration. But our conceptualization of rights has changed from individual possessions to interpersonal relations, and that change would account for the change in tone from the original text to the modern interpretation. Again, the question is whether we want to retain the clause's eighteenth- and nineteenth-century scope, or whether we want to treat it as an expanding principle, translating its original concept of rights into our modern one.[329]

Limiting procedural due process protection to adjudicatory action is certainly consistent with the modern concept of rights. This is reflected in the current law regarding rule obedience and minimum procedures. There is no due process requirement that the government follow its own rules, unless it is performing an adjudicative function. Obviously a legislature's or an agency's rulemaking activities are not bound by the rules that it has previously promulgated. It can always change its own rules, subject to the restrictions on ex post facto actions.[330]

In fact, there is no due process requirement that administrative rulemakers follow rules promulgated by their structural superiors. Suppose, for example, that a state legislature duly instructs the welfare department to establish free medical clinics in rural areas and the department refuses to do so, in apparent violation of state law. Rural residents may have a state law cause of action, but they have no federal cause of action for violation of due process. It is only when the government's failure to follow its rules involves adjudication that a due process claim exists. Suppose the legislation declares that every rural resident is eligible for free medical services, and a determination were

328. *See supra* text accompanying notes 259-60.

329. *See supra* text accompanying note 265.

330. *See* SEC v. Chenery Corp., 332 U.S. 194, 202 (1947); FCC v. WOKO, Inc., 329 U.S. 223, 228 (1946); Leedom v. International Bhd. of Elec. Workers, 278 F.2d 237, 243-44 (D.C. Cir. 1960).

made that someone was not a "rural resident." That person would state a federal claim by alleging that the government had failed to follow its own rules for defining rural residents.

Similarly, there is no due process requirement that minimum procedures attend all governmental actions. Efforts have been made to articulate procedural standards for nonadjudicatory functions, such as legislation[331] or rulemaking,[332] but only the minimum procedures for adjudication have been recognized as part of established due process doctrine. Indeed, those minimum procedures for adjudications—notice, a hearing, and an impartial decisionmaker—have become so closely associated with procedural due process that they can serve as a limiting principle in their own right. As long as these requirements are imposed, the decision is likely to be regarded as a procedural, rather than a substantive, use of the due process clause.

b. The Definition of Adjudication

Procedural due process, then, is limited by its nature to adjudicatory contexts. In order for the limitation to be precise, however, "adjudication" must be defined with greater specificity. A century ago the definition would have been an intuitive and unchallenged one. Adjudication was what courts did, as compared with rulemaking, which was what legislatures did.[333] Legal doctrine both reflected and maintained this definition. The adjudicatory character of court activities was preserved by rules regarding standing, mootness, ripeness, and case or controversy.[334] Other doctrines maintained the nonadjudicatory character of legislative action, the most notable being the bill of attainder clause, which prohibits the legislature from imposing punishments on individuals.[335]

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331. *See, e.g.*, Linde, *supra* note 305, at 238-50.

332. *See, e.g.*, Sinaiko, *Due Process Rights of Participation in Administrative Rulemaking*, 63 CALIF. L. REV. 886 (1975).

333. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856):

> [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.

334. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312 (1974) (decision must affect plaintiff's current concern); Sierra Club v. Morton, 405 U.S. 727 (1972) (decision must affect plaintiff's individual concerns); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (decision must affect plaintiff's actual concerns); United States v. Johnson, 319 U.S. 302 (1943) (decision must affect plaintiff's genuine concerns). *See generally*, P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 180, at 85-214.

335. U.S. CONST. art. I, § 9, cl. 3; *see also* United States v. Brown, 381 U.S. 437, 442 (1965): "[T]he Bill of Attainder Clause was intended . . . as an implementation of the separation of powers, a general safeguard against the legislative exercise of the judicial function, or more simply—trial by legislature." The Court went on to observe that the clause "reflected the Framers' belief

The growth of the administrative state complicated this situation, for it produced governmental agencies that both made rules and conducted adjudications. As a result, the distinction between these two basic modes of governmental action could no longer be based on the nature of the actor, and a more theoretical solution became necessary. *Londoner v. City of Denver*[336] and *Bi-Metallic Investment Co. v. State Board of Equalization*[337] provided the solution: rules are governmental actions affecting relatively large groups of people, whereas adjudications are applications of the law or determinations of fact concerning specific individuals. Moreover, the cases explicitly linked this distinction to the imposition of due process requirements.[338] *Londoner* found that the absence of minimum procedures in assessing taxes against specified individuals violated due process, while the failure of the government to follow its own rules in deciding to build a road did not.[339] *Bi-Metallic* clarified this distinction, holding that an across-the-board tax increase, even if based on what purported to be a factual determination, was not subject to the notice and hearing requirements of the due process clause.[340]

While *Londoner* and *Bi-Metallic* are not necessarily binding prece-

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that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *Id.* at 445; *see also* U.S. CONST. art. I, § 10, cl. 1 (prohibiting state legislatures from enacting ex post facto laws or impairing obligations of contract). A legislature is permitted to punish for contempt, which is a quasi-judicial act. But courts have increasingly required that any such punishment conform to the judicial model. *See, e.g.*, Groppi v. Leslie, 404 U.S. 496 (1972); *cf.* Watkins v. United States, 354 U.S. 178 (1957) (legislature may not punish for contempt unless individual has notice of his or her legal obligations).

336. 210 U.S. 373 (1908).

337. 239 U.S. 441 (1915).

338. *See supra* notes 26-33 and accompanying text.

339. *Londoner*, 210 U.S. at 378-79, 385-86.

340. *Bi-Metallic*, 239 U.S. at 445-46. An alternative test was advanced by Justice Holmes in Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908):

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

It is difficult to find cases that follow the *Prentis* test, however. The problem is not so much that legislation can be retrospective in certain cases, *see, e.g.*, Flemming v. Nestor, 363 U.S. 603 (1960); De Veau v Braisted, 363 U.S. 144 (1960); Carpenter v. Pennsylvania, 58 U.S. (17 How.) 456 (1854), but that adjudication is so often prospective. Whenever a judicial decision states or implies a new rule, it operates just as prospectively as legislation. *See, e.g.*, NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). The only way to avoid this conclusion is to view the courts as discovering existing laws, rather than creating new ones. Justice Holmes was apparently somewhat dubious of that approach even in *Prentis*, when he referred to "laws supposed already to exist." 211 U.S. at 226. Some 20 years later, in Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928), he definitively rejected the notion that court-declared rules are based on "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." *Id.* at 533 (Holmes, J., dissenting).

dent today, the distinction they articulate between rulemaking and adjudication has been carried forward into modern administrative law.[341] In *United States v. Florida East Coast Railway*,[342] the Court emphasized the general applicability of an Interstate Commerce Commission ratesetting regulation in holding that the Administrative Procedures Act (APA) and the Interstate Commerce Act required only the quasi-legislative procedures of informal rulemaking, rather than the quasi-judicial procedures of rulemaking on the record.[343] Justice Rehnquist's opinion for the Court explicitly analogized this quasi-legislative/quasi-judicial distinction to the rulemaking/adjudication distinction *Londoner* and *Bi-Metallic* made in interpreting the due process clause.[344] Similarly, a number of decisions, most recently *Heckler v. Campbell*,[345] have held that an agency can use informal rulemaking to foreclose an issue from individual adjudication if, and only if, its rules are general ones. As Justice Powell wrote in *Campbell*: "the regulations afford claimants ample opportunity both to present evidence relating to their own abilities and to offer evidence that the [general rules] do not apply to them."[346] Informal rulemaking foreclosed only a "gen-

341. The distinction figures prominently in modern zoning cases. *See, e.g.*, Horn v. County of Ventura, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979); West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973); Kahn, *In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions*, 6 HASTINGS CONST. L.Q. 1011 (1979); Note, Arnel Development Co. v. City of Costa Mesa: *Rezoning by Initiative and Landowners' Due Process Rights*, 70 CALIF. L. REV. 1107 (1982); Comment, *The Case for a Procedural Due Process Limitation on the Zoning Referendum:* City of Eastlake *Revisited*, 7 ECOLOGY L.Q. 51 (1978). *Contra* Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980); Hall Paving Co. v. Hall County, 237 Ga. 14, 226 S.E.2d 728 (1976).

The state decisions in this area are generally based on statute or state administrative law rather than due process. However, the Supreme Court almost reached the due process issue in City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976), a challenge to a city charter provision that required proposed land use changes for individual parcels to be ratified by referendum. Chief Justice Burger's opinion for the Court answered the charge that the referendum was an unconstitutional delegation of legislative power. The people, he held, were the source of legislative power, so that delegation standards did not apply to them. As the dissents by Justices Powell and Stevens pointed out, this formalist analysis misses the basic point, which is whether the action taken comported with due process. Both dissents argued that it did not, precisely because it determined the rights of a single property owner. *Id.* at 680 (Powell, J., dissenting); *id.* at 690-93 (Stevens, J., dissenting).

342. 410 U.S. 224 (1973).

343. *Id.* at 245-46.

344. *Id.* at 244-45. This reasoning was reaffirmed in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 542 (1978).

345. 103 S. Ct. 1952 (1983) (agency may rely on guidelines to determine whether alternative jobs for people with particular kinds of disabilities exist in a national economy); *see also* Federal Power Comm'n v. Texaco, Inc., 377 U.S. 33 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); American Airlines v. CAB, 359 F.2d 624 (D.C. Cir.) (en banc), *cert. denied*, 385 U.S. 843 (1966).

346. *Campbell*, 103 S. Ct. at 1957-58 (footnote omitted).

eral factual issue" which was "not unique to each claimant."[347] Although the APA does define certain actions that have only a generalized impact on individuals as "adjudications,"[348] the operative distinction between rulemaking and adjudication, in terms of required procedures, tends to follow the general-specific dichotomy.[349]

The force of the general-specific distinction is that it reflects the values that underlie procedural due process: action against specified individuals carries with it the potential for particularized abuse. This potential is due to both the nature of the interaction, which permits illegitimate motives to arise, and the lack of other protections for the individual. In other words, the theoretical definition of adjudication that is needed in the modern administrative state is fully congruent with due process concepts. The central purpose of procedural due process—to provide protection against individualized oppression by the government—thus constitutes the limiting principle for the clause's operation by informing the definition of adjudication.[350]

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347. *Id.* at 1958.

348. One reason is that the APA uses adjudication as a residual category to describe everything that is not defined as rulemaking. *See* 5 U.S.C. § 551(6)-(7) (1982). The APA defines a rule as "an agency statement of general or particular applicability." 5 U.S.C. § 551(4) (1982). This phrase is probably intended to permit rules to apply to particular situations or groups of parties, but not to allow them to supplant adjudication in determining the rights of individuals. *See* Federal Power Comm'n v. Texaco, Inc., 377 U.S. 33 (1964) (agency may make rules affecting rates of independent producers as a group, at least when it provides waiver procedure for particular applicants); 2 K. DAVIS, *supra* note 286, at 10-15; Schwartz, *Administrative Terminology and the Administrative Procedures Act*, 48 MICH. L. REV. 57, 68-69 (1949); *cf.* Heckler v. Campbell, 103 S. Ct. 1952 (1983) (agency may make rules generally affecting applicants for Social Security benefits, provided it gives applicants opportunity for individualized hearing on issues particular to them).

349. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). The agency determination in *Overton Park* was quite specific with respect to a thing—the public property of the park—but its effect on individuals was only general. Under the APA, the agency's action is properly characterized as adjudication. It is notable, however, that the Court declined to impose any procedural requirements on the decision, despite its lack of sympathy for the result. *Id.* at 417. This suggests that the generality of the effect was a determinative feature. Other illustrations are the cases involving ex parte contacts in rulemaking. Forbidding such contacts is an adjudication-related idea reminiscent of, and perhaps an aspect of, due process. In deciding challenges to rulemaking proceedings on the ground that ex parte contact occurred, the courts have tended to distinguish between proceedings that determined the rights of particular persons and those that were more general in effect, without relying on the APA characterization of the proceeding in question. *See, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9, 61 (D.C. Cir.) (MacKinnon, J., concurring), *cert. denied*, 434 U.S. 829 (1977); Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977); Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959).

350. The idea that legislative enactments, i.e., "laws," must be general in effect is an extremely common one in jurisprudential literature. *See, e.g.*, J. AUSTIN, *supra* note 278, at 94-98; 1 W. BLACKSTONE, *supra* note 17, at *44; L. FULLER, *supra* note 279, at 46-49; J. GRAY, THE NATURE AND SOURCES OF THE LAW 161-62 (2d ed. 1921); J. LOCKE, *supra* note 238, §§ 137-138. Sometimes, the idea is presented in terms of a formalist view that a specific enactment is simply not a law; but other authors, including Blackstone, Locke, and Fuller, include the notion that law must not specify individuals.

This link between the general-specific distinction and the requirements of the due process clause, which Professor Tribe has recently noted,[351] is found in a number of modern Supreme Court opinions.[352] In fact, the Court relied upon it in the midst of its conceptual miseries over the liberty-property standard. *Texaco, Inc. v. Short*[353] involved a challenge to an Indiana statute under which a severed mineral interest reverts to the owner of the surface estate unless it is either used or a statement of claim is filed. Owners of mineral rights that had reverted under the statute alleged that they had been deprived of property without the constitutionally required notice, since the statute operated automatically in the absence of affirmative action by the owner.

The *Texaco* Court, through Justice Stevens, began with the obligatory quotation from *Roth* that independent sources such as state law, and not the Constitution, create property rights.[354] But the Court then proceeded to do precisely what Justice Stewart failed to do in *Roth*—apply the standard of procedural fairness to the facts presented by the case. The standard used was derived from the idea that procedural due process applies only in the adjudicatory context:

> Appellants also rely on a series of cases that have required specific notice and an opportunity to be heard before a driver's license is suspended for failure to post security after an accident, before property is seized pursuant to a prejudgment replevin order, or before service is terminated by a public utility for failure to tender payment of amounts due. In each of those cases, however, the property interest was taken only after a specific determination that the deprivation was proper. In the instant case, the State of Indiana has enacted a rule of law uniformly affecting all citizens that establishes the circumstances in which a property interest will lapse through the inaction of its owner. None of the cases cited by appellants suggests that an individual must be given advance notice before such a rule of law may operate.[355]

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351. L. TRIBE, *supra* note 4, at 503-04.

352. *See, e.g.*, United States v. Florida E. Coast Ry., 410 U.S. 224, 244-46 (1973) (dictum); Bowles v. Willingham, 321 U.S. 503, 516-21 (1944) (dictum); Southern Ry. v. Virginia, 290 U.S. 190 (1933).

353. 454 U.S. 516 (1982).

354. *Id.* at 525 (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

355. *Id.* at 536-37 (footnotes omitted) (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978), Fuentes v. Shevin, 407 U.S. 67 (1972), and Bell v. Burson, 402 U.S. 535 (1971)). The Court did not cite *Londoner* or *Bi-Metallic*. Instead, the opinion gives the impression that it developed the general-specific distinction anew, while struggling to distinguish the looming presence of the recent due process cases.

Justice Brennan, writing for the four dissenters, argued that the property rights of the landowners could not be altered retrospectively without individualized notice to them. Unlike Justice Stevens, he seems to regard any vested property rights as existing independently of state law. This may be a reaction against the inclinations of the Burger Court majority. Conceivably, it explains Justice Brennan's somewhat curious revival of the public right-private right dichotomy in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). *See supra* note 25.

c. Confusion in Application of the Standard

Despite the familiarity of the general-specific distinction, the Court, and specifically Justice Stevens, seems to have lost track of it several times in recent years. The source of the confusion is the same as that in *Paul*, *Parratt*, and *Hudson*: the Court's treatment of the liberty-property concept—at best one element of the due process cause of action and arguably a subsidiary element—as the paramount consideration.

For example, in *Hampton v. Mow Sun Wong*,[356] the Court held that the Civil Service Commission's blanket exclusion of aliens from federal civil service positions violated the due process clause, possibly for lack of adequate procedures.[357] Justice Stevens reasoned that "ineligibility for employment in a major sector of the economy . . . is of sufficient significance to be characterized as a deprivation of an interest in liberty."[358] But characterization of the exclusion's effect seems irrelevant, because it was established by a general rule. From a due process point of view, the rule is no more objectionable than one that excludes college dropouts, convicted felons, or any other general class of persons from the civil service. What troubled the Court was that this particular exclusion "would violate the Equal Protection Clause if adopted by a State."[359] This was not the minimum rationality aspect of equal protection, which it shares with due process, but the heightened scrutiny that applies when a suspect classification is involved. The Court may well want to read this aspect of equal protection doctrine into the fifth amendment, but it cannot fairly characterize its reading as procedural due process. Nondiscrimination against aliens is a limit on the state's general actions, not one related to its methods for making factual or legal determinations about individuals.

O'Bannon v. Town Court Nursing Center[360] involved a claim by nursing home residents that they had a right to a hearing before the federal government could revoke the home's authority to accept Medi-

356. 426 U.S. 88 (1976).

357. *Id.* at 116-17. The opinion uses both procedural and substantive due process discourse, as Justice Rehnquist pointed out in his dissent, *id.* at 119-20 (Rehnquist, J., dissenting), so that its actual basis is somewhat uncertain. Procedural language seems to predominate, however.

358. *Id.* at 102 (citing Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972)). Justice Stevens continued: "By reason of the Fifth Amendment, such a deprivation must be accompanied by due process. It follows that some judicial scrutiny of the deprivation is mandated by the Constitution." *Id.* at 103. The Court may have meant that since no procedural due process protection was provided, a substantive due process analysis of the program was required.

359. *Id.* at 103. Apparently, the Court was unwilling to hold that the fifth amendment's due process clause incorporates the equal protection clause in its entirety, despite the precedent of Bolling v. Sharpe, 347 U.S. 497 (1954). On the relationship between due process and equal protection, see Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979).

360. 447 U.S. 773 (1980).

care and Medicaid payments, effectively requiring transfer of the residents to another home. Justice Stevens held that decertification was only the indirect cause of the residents' transfer, and thus not a deprivation of life, liberty, or property.[361] But the usual legal test by which people are held responsible for the results of their action is foreseeability, not directness,[362] and the transfers were certainly foreseeable. The better reason for not applying the due process clause to decertification is that decertifying the center had only a general effect upon the residents, as opposed to its specific effect upon the center's owner (which was not at issue), or as opposed to an action transferring specified individuals.[363] Indeed, it was probably this notion that Justice Stevens tried to capture with his reference to the indirectness of the governmental action.[364]

Curiously, however, Justice Stevens is also the author of a passage that not only links the general-specific distinction to due process considerations, but that also comes very close to using it as the Court's long-sought limitation on the scope of procedural due process. Dissenting in *Hewitt v. Helms*,[365] he wrote:

> Ordinarily the mere fact that the existence of a general regulation may significantly impair individual liberty raises no question under the Due Process Clause. But the Clause is implicated when the State singles out one person for adverse treatment significantly different from that imposed on the community at large.[366]

That sounds like a major departure from his approach in *Meachum*, and a recognition of the relevance of his *Texaco* opinion to the admin-

361. *Id.* at 787-89.

362. *See, e.g.*, W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 272-300 (5th lawyer's ed. 1984); RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981); RESTATEMENT (SECOND) OF TORTS § 289 (1965).

363. Justice Blackmun proposed the general-specific distinction in his concurring opinion as one possible means of explaining the decision. *O'Bannon*, 447 U.S. at 800-01 (Blackmun, J., concurring) (citing L. TRIBE, *supra* note 4, at 503-04).

364. Martinez v. California, 444 U.S. 277 (1980) provides further evidence of this same confusion. In *Martinez*, the family of a woman murdered by a parolee sued the state officials who had granted the parole. Writing for a unanimous Court, Justice Stevens struggled with the question whether a state law providing absolute immunity for those officials violated due process. He conceded that immunity might have deprived the plaintiff of a property right in a tort cause of action, but found the state's interest in controlling its own tort law paramount to the interest of the plaintiff. *Martinez*, 444 U.S. at 281-82. He also suggested that the property right had been created subject to the limits of the immunity defense. *Id.* at 282 n.5. All he needed to say, however, was that the immunity provision, being a general law, was not subject to procedural due process analysis. It is true, of course, that the parole decision involved the parolee in particular. But there was no particularized state action with respect to the plaintiff; the murderer could hardly be regarded as an agent of the state. The immunity provision was a general rule applying to a broad class of plaintiffs.

365. 459 U.S. 460 (1983).

366. *Id.* at 485 (Stevens, J., dissenting) (footnote omitted).

istrative due process cases. However, the very next sentence reads, "For an essential attribute of the liberty protected by the Constitution is the right to the same kind of treatment as the State provides to other similarly situated persons."[367] Thus, Justice Stevens immediately demoted the principle he articulated from a means of escaping the liberty-property debate to one additional argument to be invoked in continuing that debate. One can only marvel at the fascination which this dysfunctional concept has exercised over the post-*Roth* Court. Justice Stevens in particular is deeply immersed in it. He seems incapable of perceiving that the right to fair treatment is best viewed, not as "an essential attribute of the liberty protected by the Constitution," but as an essential attribute of the due process that the Constitution guarantees.[368]

4. The Definitional Difficulties of the Specificity Concept

Like every legal dichotomy, the general-specific distinction is not without its difficulties. First, there is the universal difficulty of fixing the boundary between the two parts of the dichotomy. Once that is achieved, there remains the possibility that general rulemaking can be equivalent to particularized adjudication in certain circumstances, most notably when a purportedly general rule applies to a very small number of individuals. There is also the possibility that certain types of general rules, although not equivalent to adjudication, can affect due process rights by altering the nature of all adjudications in a given area. In essence, the task is to establish a boundary between general and specific action that is both sufficiently clear to be usable, and sufficiently fixed to withstand attempts at circumvention.

a. Defining the Boundary

The notion of general and specific action is fairly abstract. One way to fix the boundary between the two is to translate the distinction into operational terms. Professor Davis' dichotomy between legislative and adjudicative facts, now a fixture in administrative law, represents perhaps the leading effort to do so. Davis defines adjudicative facts as those that "answer the questions of who did what, where, when, how, why, with what motive or intent," and legislative facts as those that "do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discre-

367. *Id.* (Stevens, J., dissenting) (footnote omitted).

368. In *Hewitt*, Justice Stevens did not even refer to his opinion in *Texaco*, which he had written just six weeks before. He seemed unaware that there was a conceptual connection between the two opinions, possibly because one involved the "liberty" interest, and the other involved the "property" interest.

tion."[369] While these definitions work well in certain circumstances, the dichotomy has been criticized because it does not really yield a workable distinction.[370]

In any event, this dichotomy presents several problems in the present context. First, it focuses on the nature of the facts, rather than the nature of the government action. While this does not create the same conceptual problems presented by focusing on individual interest, it does shift attention away from the modern view of rights as relationships, and toward the assessment of inherent characteristics. Second, this dichotomy has no real connection with the policy arguments for distinguishing general and specific action. Actions that affect a large group, which has full access to the political process, can be based on adjudicative facts, for example. Finally, Professor Davis' distinction provides little guidance in cases where the state claims the power to act in a purely discretionary manner, without reference to facts.

A different operational principle can be generated by considering the nature of the government's action in reaching adjudicatory decisions. Such decisions generally involve two components: finding facts about an individual, and applying the law on the basis of those facts. In a true adjudication of the sort that we would generally want to subject to due process requirements, the facts found must have direct and demonstrable consequences for the individual. Absent such consequences, the purpose underlying accurate decisionmaking disappears, since there can be no oppressiveness toward individuals when there are no particular consequences for them. Thus, no procedural protection is generally required when a person appears in a legislative hearing, even if a general statute is passed based on facts derived from that person's direct experience. The issue would arise only if the testimony had some adverse consequences for that person, as the loyalty-security hearings did.[371] As another example, the most extensive factfinding activity of the federal government is the census, but since it has no direct effect on individuals, there is no due process right to insist on an accu-

369. 2 K. DAVIS, *supra* note 286, at 413. For cases employing this distinction, see, *e.g.*, American Bancorp., Inc. v. Board of Governors of Fed. Reserve Sys., 509 F.2d 29 (8th Cir. 1974); WBEN, Inc. v. United States, 396 F.2d 601, 617-20 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968); SEC v. Frank, 388 F.2d 486, 491-92 (2d Cir. 1968).

370. *See, e.g.*, Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 115 (1972); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 521-25 (1970); Nathanson, Book Review, 70 YALE L.J. 1210 (1961) (reviewing K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958)).

371. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957); *cf.* Jenkins v. McKeithen, 395 U.S. 411 (1969) (publication of findings regarding racketeering). Obviously, the adverse consequences must be specific to the person; they could not involve the person's profession, for example.

rate assessment of oneself. On the other hand, a right to accuracy exists if the government is making factual assessments about an individual in order to grant benefits or impose burdens, or if the government action will have significant collateral consequences.[372]

The second aspect of adjudiction is the application of the law to a specified individual on the basis of the facts that have been found. According to the rule-obedience principle, the law to be applied must be valid, and it must cover the case under consideration. Thus, due process requires that the individual have the opportunity to challenge the law on substantive grounds, although it does not provide any substantive grounds of its own force. In addition, it requires the opportunity to argue that the established facts do not justify the application of the legal consequences in question.

General action, to which due process protection is not applicable, can now be operationally defined as action that neither makes factual determinations about a particular individual that have direct consequences for that individual, nor determines how the law is to be applied to a particular individual. If these elements are present, however, the action is an adjudication and must be analyzed in due process terms. Many adjudications involve both these elements; in others, however, the facts will be stipulated or the validity and applicability of the law conceded, so that one element of adjudication will operate separately.

b. Avoiding Particularized Rulemaking

This operational distinction between general and specific action may begin to break down as the group to which a general rule relates becomes increasingly small. At some point, such a rule effectively applies the law to an individual, even if it purports to be achieving a more generalized effect. Once that point is reached, there is a danger that the action was motivated by a desire to punish that one individual. This possibility is unquestionably a real problem for procedural due process analysis. But the Court's underlying rights approach provides no solution at all; it simply abandons the individual to the legislative will.

Restating the scope of procedural due process in terms of the general-specific distinction suggests a possible solution to the problem. When the affected group is sufficiently small and the danger of im-

372. This consideration merges into the general concept of standing. People usually have no right to complain about factfinding regarding themselves, or anything else for that matter, unless it has some particularized effect on them. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 508-10 (1975); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83, 103-06 (1968).

proper governmental action sufficiently great, the due process clause may be read to impose certain limits on general action.

One limit is that the state may not engage in subterfuges to circumvent constitutional rights. For example, a regulation denying an exemption from securities filing requirements to companies that are in reorganization proceedings may involve an acceptably large group at a time of economic stress, but may be equivalent to specification when reorganizations are rare.[373] Courts should be capable of seeing through such "individual action . . . masquerading as a general rule."[374] Among the indicia they can use are the facts that one person, or a very small number of people, actually fall within the affected group; that the rulemaker had or should have had sufficient information to realize this; and that the terms of the law are facially arbitrary.[375]

Another limit, more widely applicable but obviously more debatable, would be that any general action directed against a sufficiently small number of individuals must be justified by a demonstration that it is consistent with some broader pattern of administrative decisionmaking. A requirement of this sort would generally differ from the adjudicatory requirements of notice and a hearing. Most likely, it would consist of a general plan or designation of a hierarchical decisionmaking structure. This would reduce the danger of individual oppression, in accord with the primary policy underlying due process.

The problem is that the essence of the general-specific distinction is to impose due process standards on adjudications, not on rulemaking. But the suggested limit need not be seen as substantive due process. Rather, it emanates from, and is designed to protect, procedural due process rights. In effect, it would impose the requirement of regu-

373. *Cf.* Philadelphia Co. v. SEC, 175 F.2d 808 (D.C. Cir. 1948) (hearing required before revocation of exemption that SEC knew applied to only one company). In Law Motor Freight, Inc. v. CAB, 364 F.2d 139 (1st Cir. 1966), *cert. denied*, 387 U.S. 905 (1967), the court held a single air freight forwarder's territory could be expanded by rulemaking. But the court was careful to state that the CAB "has declared new ground rules available to the air carrying industry . . . even though the occasion was the application of one company for pickup and delivery tariffs." *Id.* at 142-43. Perhaps more important, the party singled out was benefited, and particularized benefits can be conferred on individuals without violating due process. The plaintiffs in the suit were the applicant's competitors, and they were affected generally, not specifically, by the CAB's new rule.

374. American Airlines v. CAB, 359 F.2d 624, 631 (D.C. Cir.) (en banc), *cert. denied*, 385 U.S. 843 (1966).

375. *See* McFarland v. American Sugar Ref. Co., 241 U.S. 79, 85 (1916) (Holmes, J.) (invalidating law because plaintiff was "the only one to whom the act could apply and . . . the statute was passed in view of the plaintiff's conduct, to meet it"); Anaconda Co. v. Ruckelshaus, 352 F. Supp. 697, 702-04 (D. Colo. 1972), *rev'd*, 482 F.2d 1301 (10th Cir. 1973). In *Anaconda*, the district court concluded that an agency action, although couched in general terms, was sufficiently specific to require due process protection. The court then held that cross-examination was part of the required protection. It was on this latter point that the court of appeals reversed, 482 F.2d at 1307, although it also questioned the specificity finding on factual grounds, *id.* at 1306.

lar decisionmaking to reduce the risks connected with rules involving small numbers of people, not because such regular decisionmaking is itself required by the due process clause.[376]

c. Presumptions and Procedural Fairness

The general-specific distinction also breaks down when rulemaking alters the nature of adjudications subject to the rulemaking authority. This alteration can occur directly. In *Goldberg v. Kelly*,[377] for example, the government had adopted general rules that granted a subsequent hearing but denied a prior one.[378] A more subtle approach is to establish a factual presumption, as a matter of general law, essentially short-circuiting the factfinding stage of the adjudication process. Both types of actions take advantage of the government's control of the substantive law to achieve procedural effects. The first operates against the form of the adjudication, while the second operates against its underlying content.

These cases cannot be resolved by refining the general-specific distinction, or on any other definitional basis. The answer necessarily rests on the independent determination of what procedural fairness means: the content of the principle of rule obedience and, more significantly, the extent of minimum procedures. Once this determination is made, due process can be treated like any other constitutional right. A general rule that reduces procedural protection below the established minimum is invalid, just as a general rule that prohibits protected speech would be. Both answers are totally unsatisfying because they leave open the only important question: what is the required minimum of procedural protection, or what is protected speech? But that is precisely the point: the problem posed by general rules governing adjudication is to give content to our notion of procedural fairness. No particular difficulty is created because the primary focus of the guarantee involved is specific governmental action as opposed to some other

376. This is hardly an unprecedented technique. The first amendment is generally thought to require regular decisionmaking when free speech is threatened. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152-59 (1969); Freedman v. Maryland, 380 U.S. 51, 57-61 (1965); *cf.* Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518 (1970) (regular decisionmaking required by Court when free speech rights are affected). A general plan or regular decisionmaking is also required in administrative inspection cases to satisfy the fourth amendment's probable cause requirement. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594 (1981); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); United States v. Biswell, 406 U.S. 311 (1972); *cf.* FTC v. Texaco, Inc., 555 F.2d 862 (D.C. Cir.) (administrative subpoena), *cert. denied*, 431 U.S. 974 (1977). The fourth amendment example is particularly relevant because the purpose is exactly the same: to protect against the risks associated with action against specific individuals in cases where the state purports to be acting on a nonspecific basis.

377. 397 U.S. 254 (1970).

378. *See supra* text accompanying notes 86, 99.

area of law. Whatever due process governs, it shares with all other constitutional rights the power to invalidate governmental acts of any kind that conflict with the protections it provides.

While this principle does not seem difficult, its application can be complex, particularly when presumptions are concerned. A rule that alters procedural protections is obviously subject to due process scrutiny, but one that creates presumptions may be less distinguishable from general substantive enactments. In the early 1970's, a majority of the Supreme Court thought that any legislative use of presumptions, at least in their irrebuttable form, was unconstitutional.[379] This approach was abandoned because it proved difficult to distinguish presumptions from categorizations, and invalidating categorization would have been tantamount to declaring that the passage of laws violated the Constitution.[380]

Cleveland Board of Education v. LaFleur[381] provides an example of the irrebuttable presumption doctrine. There, the Court struck down an administrative regulation that required pregnant schoolteachers to take maternity leave in the fifth month of pregnancy. Justice Stewart's opinion for the Court conceded that the school could require maternity leave for physically unfit teachers,[382] but held that schools could not irrebuttably presume that a teacher in her fifth month was unfit. The due process clause required that the school make a specific factual determination of fitness. The problem with the Court's analysis is that it would also prohibit a school from presuming that a teacher without a college degree was untrained. What *LaFleur* must mean, unless it is simply incorrect, is that the pregnant teachers have an independent constitutional right not to be dismissed for being pregnant,[383] but that the state may overcome that right by making a factual showing that a particular teacher's pregnancy has rendered her physically unfit.[384]

379. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

380. *See* Weinberger v. Salfi, 422 U.S. 749 (1975). The irrebuttable presumptions doctrine was heavily criticized by commentators. *See* Mashaw, *supra* note 4, at 896-98; Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975).

381. 414 U.S. 632 (1974).

382. *Id.* at 643-44.

383. Presumably this right would be found in the equal protection clause. *See, e.g.*, Arizona Governing Comm. v. Norris, 103 S. Ct. 3492 (1983) (invalidating state pension plan which pays women lower benefits than men when both have made equal contributions); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (invalidating law requiring wives, but not husbands, to prove spouse's dependency). *LaFleur* does not articulate this rationale, however.

384. *See* Bell v. Bursou, 402 U.S. 535 (1971), which declares itself to be a procedural due process case, and is sometimes treated as such, *see* Monaghan, *supra* note 4, at 407-08, but which is

The flaw in Justice Stewart's analysis in *LaFleur* is that he overlooked the need to find an independent basis for the right involved before due process protection would be appropriate.[385] This is exactly the opposite of *Roth*, where he insisted on an independent legal interest when existing doctrine did not require one. It appears that Justice Stewart simply reversed the usual notion about general and specific governmental action. In *LaFleur* he assumed that the due process clause had some established, intrinsic relevance to rulemaking so that no independent right was required, while in *Roth* he assumed that it had no such relevance to adjudication, thus requiring an independent right in such cases.[386]

Rejecting Justice Stewart's view that irrebuttable presumptions are inherently problematic does not mean that presumptions can confer more power on the government than it would otherwise have. Rather, use of a presumption simply has no effect on the validity of the underlying action. If the state may constitutionally dismiss all teachers who are five months pregnant, it may do so by presuming them to be physically unfit, since there are probably no constitutional constraints on the format or wording of legislation. If it may not dismiss such teachers directly, it may not do so by creating the presumption. Certainly, if the regulation had declared that all black teachers were physically unfit, the Court would have experienced little difficulty in looking through the presumption and invalidating the regulation.

Presumptions that infringe upon procedural due process rights can be treated in precisely the same way. If a procedural due process protection applies, the state may not presume it away. If such protection does not apply, the state may presume whatever it wishes, at least as far

really another example of the irrebuttable presumptions approach. There, the Court invalidated a law suspending the registration and driver's license of uninsured motorists involved in accidents unless they posted security to cover the damages claimed against them. The Court's problem with the statute was that "not all motorists, but rather only motorists involved in accidents, are required to post security under penalty of loss of the license," *Bell*, 402 U.S. at 539, and that there was no consideration of "whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee," *id.* at 540. In essence, the case holds that the state may not presume that the claim is a colorable one, at least if it applies the presumption to motorists involved in accidents. Since such motorists are a general group, the decision is substantive due process to the extent that it relies on the due process clause at all.

385. Justice Stewart was also the author of Vlandis v. Kline, 412 U.S. 441 (1973), another leading irrebuttable presumption decision.

386. Justice Rehnquist was more consistent, steadfastly refusing to grant relief in either rulemaking or adjudication cases. In his opinion for the Court in Weinberger v. Salfi, 422 U.S. 749, 772-73 (1975), he observed "the very section . . . which authorizes an action such as this" also places various limits on it, all of which could be regarded as irrebuttable presumptions. This sounds much like his *Arnett v. Kennedy* opinion, which was the product of the same Term. *See supra* notes 135-41 and accompanying text. *Salfi* is more persuasive because general conditions in a general law are truly indistinguishable from the law itself, while conditions that affect individual adjudications of rights under that law strike at the heart of procedural due process.

as the procedural component of the due process clause is concerned. This is established doctrine from a number of pre-1970's cases, where the Court invalidated presumptions by holding that they were so irrational that they operated solely to eliminate procedural protection.[387]

As with rules affecting small groups of people, close questions will arise. But the Court's current approach results in greater confusion in other areas of procedural due process doctrine, without providing any compensatory illumination for the question of presumptions. The real answer to the presumption problem necessarily depends upon the way in which procedural fairness is defined.

At the present level of generality, two observations may be made. First, if the facts from which the conclusion is presumed are procedural facts—facts which result from the state's interaction with a specified individual—the result is a complete elimination of due process protection. For example, if the school board presumes that any teacher who receives a pink slip from the principal is physically unfit, there are clearly no constraints on the principal's behavior, not even obedience to applicable rules. Such a presumption is valid only if the situation is one where no procedural protection is required.

Second, if general facts are presumed, the state must actually act on that presumption. The presumption is simply a roundabout way of stating a general law, and all noncriminal laws are procedurally valid, assuming that they do not prescribe procedures. But the presumption cannot declare a particular rule and then give state agents the unfettered power to find that rule inapplicable to particular individuals. That reestablishes the arbitrary power that due process is intended to forbid; in essence, it is nothing more than an effort to circumvent the requirements of the clause. Viewed from this perspective, it is the rebuttable presumption, not the irrebuttable one, that creates due process difficulties. The legislature, because it is either clever or perverse, may validly declare that snowmobiles may only be driven by careful people, and then irrebuttably presume that everyone is careful. But if it wishes to make the presumption rebuttable, it must provide a procedure for establishing carelessness that comports with due process requirements. To leave that determination to the sole discretion of an administrator would improperly circumvent the procedural requirements for such a finding.

387. *See, e.g.*, Leary v. United States, 395 U.S. 6, 32-54 (1969) (invalidating presumption that possession of marijuana indicates knowledge that it was imported illegally); Tot v. United States, 319 U.S. 463 (1943) (invalidating presumption that person previously convicted of violent crime who possessed firearm had received it in interstate or foreign commerce); *cf.* McFarland v. American Sugar Ref. Co., 241 U.S. 79, 86 (1916) (Holmes, J.) ("[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.").

III
THE EXTENT OF DUE PROCESS PROTECTION IN ADMINISTRATIVE LAW

All of these considerations bring us to what is—or at least should be—the starting point of procedural due process analysis. A claim of procedural unfairness represents the central element in a federal due process cause of action. This claim relates primarily to the manner in which the government carries out adjudications, adjudications being defined as actions taken with respect to specified individuals. In that context, procedural fairness consists of two basic principles: government must follow applicable rules, and it must provide minimum procedures in various situations. The content of these principles will determine the scope of permissible governmental action in adjudications. In addition, it will necessarily place certain limits on general action, where such action resembles or affects the adjudicative process.

The Supreme Court's concern about liberty, property, and individual interest is irrelevant at this preliminary stage of the analysis. It serves only to confuse the nature of procedural due process as that concept is generally understood. This does not mean that the Court's effort to impose limits on the extent to which administrators are subject to due process constraints is necessarily wrong. Whether it is right or wrong is a policy question and constitutes the essence of the contemporary debate about due process guarantees. The point is that this debate should occur within the framework of the analytic considerations discussed in the previous Part; it should be devoted to determining the content of the two principles of procedural fairness—rule obedience and minimum procedures. All of the real issues that the Court raised can be fully debated and assessed as part of that determination. This Part of the Article clarifies the terms of that debate, and suggests an alternative to the Court's present position.

A. The Rule-Obedience and Minimum-Procedures Principles

1. Beyond the Supreme Court's "Needless Formality" and "Process Due" Criteria

a. Rule Obedience

Of the two principles of procedural fairness, the rule-obedience principle is by far the easier to define. There may be a statutory interpretation problem as to whether a particular pronouncement is properly understood to be a rule, as opposed to a precatory statement,[388] but

388. *See* Hewitt v. Helms, 459 U.S. 460, 471-72 (1983); Schweiker v. Hansen, 450 U.S. 785 (1981) (per curiam). In *Hansen*, the Court held that a government agent was not obligated to follow the rule in an internal manual governing interview procedure. The Court's rationale was

this is a matter within the government's power to determine. In this context, therefore, the Court's approach is entirely correct, subject to the understanding that rule obedience is itself a federal principle. If the government adopts a general rule, it is bound by that rule in particular adjudications.[389] If it has not adopted a rule, it is bound only by the minimum procedures imposed by the other procedural fairness principle.

The most significant question that has been raised about the content of the rule-obedience principle emerged in *Olim v. Wakinekona*,[390] the interstate prison transfer case.[391] Justice Blackmun's opinion held that Hawaii had created "no liberty interest entitled to protection under the Due Process Clause"[392] because the state had not placed any "substantive limitations" on the prison administrator's discretion.[393] This seems accurate enough as far as the rule-obedience principle is concerned, since there would be no rules to follow.[394] But Hawaii had established a binding rule requiring that certain procedures be followed by the prison administrator's subordinates in the first stage of the transfer process, and these procedures were apparently violated in Wakinekona's case.[395] This was unimportant to Justice Blackmun, however, because the rule was strictly procedural. "Process is not an end in itself," he wrote, "[i]ts constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."[396] In other words, when a constitutionally protected liberty or property interest is not present, the government may disobey its own procedural rules in individual adjudications. The logic of this is difficult to fathom. After all, *Roth*'s definition of "substantive rights" includes any rights created by state law.[397] Even under the state-standard approach, a right that has been definitively created by the state would

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that the manual "is not a regulation. It has no legal force, and it does not bind the [agency]." *Id.* at 789.

389. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954); *supra* notes 62-68 and accompanying text.

390. 103 S. Ct. 1741 (1983).

391. For a general critique of *Wakinekona*, see Smolla, *supra* note 61, at 492-96.

392. *Wakinekona*, 103 S. Ct. at 1747.

393. *Id.*

394. Of course, there remains the question whether minimum procedures are required for interstate prison transfers. Justice Marshall's dissent argued that minimum procedures were in fact required for two reasons: first, the due process clause itself creates a liberty interest affected by qualitative change in confinement conditions; and second, the administrative rules created such an interest. *Id.* at 1748-52 (Marshall, J., dissenting).

395. So the Court of Appeals concluded, at any rate. *See* 664 F.2d 708, 709 (9th Cir. 1981), *rev'd*, 103 S. Ct. 1741 (1983).

396. *Wakinekona*, 103 S. Ct. at 1748.

397. *See supra* notes 110-33 and accompanying text.

thereby qualify as liberty or property. As Professor Smolla points out in his critique of *Wakinekona*, "the procedural entitlements are the positive law of the state."[398] But Justice Blackmun has now declared that certain rights can never qualify as liberty or property, because they are purely procedural in nature—not "procedural" because they are imposed by the due process clause, but procedural because they are state-created rights that relate to the adjudication process.[399]

That purely procedural rights are specifically disfavored in due process analysis is a somewhat peculiar conclusion to derive from a constitutional provision that provides federal protection for the fairness of state adjudications. The due process clause is premised on the idea that there is something special about procedure, something worthy of explicit constitutional protection. That may suggest that procedure is more important than substance, or it may not—but it certainly does not suggest that procedure is less important. If a state chooses to create procedural rights, they should be at least as extensively protected by the due process clause as state-created substantive rights.

Justice Blackmun's opinion does suggest one reason why procedural rights might be disfavored, although he does not relate it to the general concept of due process protection. By themselves, he observes, these rights would be a " 'needless formality,' "[400] which presumably means that they could not affect the outcome. But if Wakinekona had been given the opportunity to be heard by an impartial decisionmaker, the outcome might indeed have been different. He was suing for precisely this opportunity to affect the outcome, an opportunity granted to him by state law.[401] Many due process suits ask for nothing more than such an opportunity, and to interpret them differently is to make the error of the *Paul v. Davis*[402] and *Parratt v. Taylor*[403] decisions.[404] The

398. Smolla, *supra* note 61, at 502.

399. *See also* Board of Curators v. Horowitz, 435 U.S. 78 (1978) (assuming medical student has liberty interest in not being expelled, school procedures afforded all necessary procedural protections). The student, citing Service v. Dulles, 354 U.S. 363 (1957), alleged that the school had violated the due process clause by failing to follow its own rules regarding education of students. *Horowitz*, 435 U.S. at 92 n.8. Justice Rehnquist rejected this claim on both factual and legal grounds. He wrote: "As for the legal conclusion that respondent draws, both *Service* and *Accardi* . . . enunciate principles of federal administrative law rather than of constitutional law binding upon the States." *Id.* That is true, but it does not explain why the principles should not be applied to the states. The statement, although dictum, reflects the same view of procedure as *Wakinekona*.

400. *Wakinekona*, 103 S. Ct. at 1748 (quoting Shango v. Jurich, 681 F.2d 1091, 1100-01 (7th Cir. 1982)).

401. For the view that an opportunity can be something real, see Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 649-51 (1982) (opportunity to prove value of performance should be regarded as sufficient consideration to support contract).

402. 424 U.S. 693 (1976).

403. 451 U.S. 527 (1981).

404. Paul was not asking the Court to prohibit placement of his name on the active shoplifters

absence of a substantive right means only that there is no circumstance under which the individual can compel a different outcome. But that is very different from saying that the opportunity to present one's case can have no possible effect on the outcome, or that the procedures are a "needless formality."[405]

Had the Court focused on the relationship between procedural due process and adjudications it might have come to a different conclusion. This relationship suggests that the due process clause is designed to ensure that the state will act fairly when it deals with particular individuals. To deny one person the benefit of a right, whether substantive or procedural, that has been conferred upon the populace-at-large is the very essence of unfairness. It places in a state administrator's hands the power to oppress, to single out and to punish for unacceptable reasons. The rule-obedience principle protects against this possibility. It seems odd, albeit characteristic, for the Court to read this principle out of the due process clause by declaring that the clause protects only liberty interests, and that state procedural rules do not create such an interest. Liberty may mean many different things, but due process must mean that the state is obligated to follow applicable rules.

Most of the other questions that have arisen with respect to the rule-obedience principle can be resolved by recognizing that the harmless error doctrine applies to this principle, as it applies to most other procedural rules. For example, an irregularity in the process by which a hearing examiner was appointed has been held not to invalidate the examiner's decision. Though the agency failed to follow its own rules, the individual was not denied anything as a result.[406]

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list. Rather, he wanted the Court to require that the police give him a hearing in which he would have the opportunity to prove that his name did not belong there. *See also supra* notes 316-21 and accompanying text.

405. *Cf.* American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538-39 (1970) (holding that failure to follow rules did not render action invalid because rules in question were not "intended primarily to confer important procedural benefits upon individuals"). The rules in question required that certain information be included in ICC applications for the purpose of information gathering and internal decisionmaking. In effect, these rules did not involve adjudication at all, so they fall outside of the due process clause's operation. But Justice Douglas' opinion is relatively clear that rules conferring procedural benefits on individuals, with or without an underlying substantive right, must be followed. *Wakinekona* did not cite *American Farm Lines.*

406. United States v. Tucker Truck Lines, 344 U.S. 33, 35-36 (1952); *see also* Market St. Ry. v. Railroad Comm'n, 324 U.S. 548, 561-62 (1945); 5 U.S.C. § 706 (1982) ("In making the foregoing determinations [including whether agency action is in accordance with law], the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."). *See generally* Berger, *supra* note 62, at 158-71; Newman, *supra* note 261, at 224-25.

Had the examiner been shown to be prejudiced, the result would presumably have been different, even though the only right the individual lost may have been the opportunity to persuade. *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973) (optometry board whose members may gain from reduction of competition may not adjudicate lawfulness of large optical company's

Several recent cases that call into question an agency's obligation to obey its own procedural rules can be interpreted in the same manner. In *United States v. Caceres*,[407] for example, an Internal Revenue agent recorded a number of conversations with Caceres, thereby violating the agency's internal rules governing the authorization of such recordings. After establishing that the recordings did not violate the Constitution and that they would have been authorized if the proper procedure had been followed, the Court held that these recordings should not be excluded as evidence in the criminal prosecution of Caceres.[408] Caceres would have been prejudiced if the recordings had been the sort that would not have been authorized or if he had somehow relied on the IRS rule.[409] As it was, he was "prejudiced" only by the Court's refusal to exclude the recordings, which is hardly the same thing. The decision is thus explicable in harmless error terms. It applies only to an agency's internal rules, whose violation had no actual effect upon the way the individual was treated.

Caceres, however, does contain some broader language that can be viewed as an adumbration of *Wakinekona*.[410] Other ominous language can be found in *Davis v. Scherer*,[411] decided this past Term. There, the Court held that violation of applicable state laws or regulations does not by itself make the state agent's behavior sufficiently unreasonable to defeat the qualified immunity defense. This does not necessarily suggest that such a violation is constitutionally acceptable; the doctrine of official immunity is designed to shield certain state agents who have in fact violated constitutional provisions.[412] But the Court did declare that "[a]ppellee makes no claim that the appellants' violation of the

behavior); Ward v. Village of Monroeville, 409 U.S. 57 (1972) (mayor whose budget is derived from traffic fines may not preside in traffic court); Tumey v. Ohio, 273 U.S. 510, 522 (1927) (mayor whose salary is derived from fees levied against traffic violators cannot preside in traffic court).

407. 440 U.S. 741 (1979).

408. It is significant that Justice Stevens' opinion for the Court limited the holding to its exclusionary rule context. *Id.* at 754-57. He emphasized that the purpose of the exclusionary rule was deterrence. The "[e]xecutive itself has provided for internal sanctions in cases of knowing violations." *Id.* at 756. He also emphasized the good faith of the IRS, *see id.* at 752, 757, a consideration that is presumably irrelevant outside of the exclusionary rule context. Indeed, the entire decision can be read as part of the Burger Court's general distaste for the exclusionary rule. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976); United States v. Calandra, 414 U.S. 338 (1974).

409. *Caceres*, 440 U.S. at 752-55.

410. *Id.* at 754 n.18, 755. This implication is made somewhat more definite by the language of Justice Marshall's dissent, which states its disagreement by declaring the principle that obedience to rules is an aspect of due process. *Id.* at 757-60 (Marshall, J., dissenting). *Wakinekona*, however, did not cite *Caceres*.

411. 104 S. Ct. 3012 (1984).

412. *See, e.g.*, Butz v. Economou, 438 U.S. 478 (1978) (granting qualified immunity to administrator who was alleged to have violated due process and first amendment rights); Stump v. Sparkman, 435 U.S. 349 (1978) (granting absolute immunity to judge who was alleged to have violated due process, equal protection, and eighth amendment rights).

state regulation either is itself actionable under § 1983 or bears upon the [due process] claim . . . that appellee asserts under § 1983."[413] The reason the appellee did not make this claim is that the state had conceded the due process violation; the only issue in the case was the availability of money damages. But there is something in the tone of Justice Powell's opinion that is disconcerting: can there really be a question that the violation of a substantive regulation is actionable under section 1983? Suppose the state in *Roth* had conceded that a professor could be fired only for cause, but responded to the federal due process suit by claiming that it had chosen not to follow this statute or regulation in his particular case. One can characterize this as a violation of either due process or equal protection, but it seems difficult to maintain that no constitutional violation has occurred.[414]

b. Minimum Procedures

The second element of procedural due process, minimum procedures, is more complex. In fact, most procedural due process cases are properly understood as efforts to define the content of this principle. The Court's effort to do so is typically phrased in terms of "what process is due."[415] In other words, once the Court has decided that the due process clause applies, it then turns to the content of the required procedural protection.

In administrative cases, the conceptual framework of the Court's current approach was established by *Mathews v. Eldridge*,[416] which

413. *Davis*, 104 S. Ct. at 3019 (footnote omitted).

414. Other more ominous language can be found in Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900 (1984), where the Court declared that "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment where . . . the relief sought . . . has an important impact directly on the State itself." *Id.* at 917. But the case was presented and analyzed entirely as a state law claim that reached the federal courts through pendent jurisdiction. Constitutional questions were held in abeyance as a matter of judicial restraint. Thus, the Court did not consider the idea that a state agent's violation of state law is itself a violation of the due process clause. That claim, although based on obedience to state law, is purely federal and lies outside the *Pennhurst* rule. Federal jurisdiction would continue to be available under the doctrine of *Ex parte* Young, 209 U.S. 123 (1908), *reaffirmed in Pennhurst*, 104 S. Ct. at 909, which holds that an unconstitutional action is necessarily that of errant state officials rather than of the state itself. To be sure, the Court suggested that the doctrine should be restrictively applied, *Pennhurst*, 104 S. Ct. at 909, 911, but the restrictions would be no more applicable to procedural due process than they would be to any other constitutional provision. Even if they were, an 11th amendment argument goes only to the jurisdiction of the federal courts, not to the constitutional status of the cause of action.

For a general discussion of the Court's recent tendency to undermine the rule-obedience principle, at least in the procedural area, see Sinolla, *supra* note 61, at 492-96.

415. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *see also* Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 12 (1979); Ingraham v. Wright, 430 U.S. 651, 674 (1977); Goss v. Lopez, 419 U.S. 565, 577 (1975).

416. 424 U.S. 319 (1976).

concerned the procedures required before the termination of social security disability benefits. The Court held that an assessment based on written submissions satisfied the due process clause, and that an oral hearing was not required. In reaching this determination, the Court identified "three distinct factors" that determine the minimum procedures required by the due process clause:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[417]

The *Mathews* approach is certainly a heroic one. Although Justice Powell stated that the three factors had been dictated by the Court's "prior decisions,"[418] they were largely new to due process adjudication. Like *Roth*, *Mathews* starts from first principles and attempts to construct an entire doctrine by means of logical analysis. And like *Roth*, its ambitions are rivaled only by its difficulties. Its premises are debatable; its methodologies are impractical; and each of its three factors is of questionable relevance.[419]

The basic premise of *Mathews* is that there should be a separate theory for defining minimum procedures in administrative adjudications. The Court has never suggested that the *Mathews* framework be used for determining due process requirements in traditional common law or other nonadministrative cases. In fact, the effort to do so would produce major dislocations in existing doctrine, since it would be very difficult to derive the components of criminal or civil trials from that framework. But there is no obvious reason why the administrative and

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417. *Id.* at 334-35.

418. *Id.* In Goss v. Lopez, 419 U.S. 565 (1965), decided the previous Term, the Court used a more intuitive approach, adjusting the level of protection to its general sense of the competing demands for fairness and government efficiency. *Id.* at 577-84; *see also* Morrissey v. Brewer, 408 U.S. 471, 485-89 (1972). Goldberg v. Kelly, 397 U.S. 254 (1970), also used this approach, but it relied more directly on the requirements in previous due process cases as a model for the requisite procedures. *Id.* at 266-71.

419. The Court seems to recognize this, given the frequency with which it has looked past the cumbersome *Mathews* apparatus and confrouted the real issues involved in determining the content of the minimum-procedures principle. *See, e.g.*, Hewitt v. Helms, 459 U.S. 460, 473-76 (1983); Greenholtz v. Inmates of the Neb. Penal & Correctioual Complex, 442 U.S. 1, 13-16 (1979); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 17-18 (1978); Ingraham v. Wright, 430 U.S. 651, 675-76 (1977). In each of these decisious, the Court skipped from either a citation to *Mathews* or a citation followed by a recitation of the individual interest, administrative burdens, and risk of error involved, to a geueralized discussion of the sort of procedures that seemed necesssary iu each case, often relying on analogies to other cases. In fact, this is almost inevitable since the *Mathews* test cannot generate particular procedural devices. *See infra* notes 420-39 and accompanying text.

the nonadministrative realms should be treated so differently. The former presents unique problems to be sure, so that any doctrine derived from common law would need to be extensively adapted. But abandoning one's only source of precedent seems like an extreme approach. In any event such a decision should be made after careful consideration, and not by tacit assumption as the *Mathews* opinion does.

Even if one accepts the Court's idea that administrative due process demands an entirely new methodology for defining minimum procedures, the *Mathews* framework presents considerable difficulties. Establishing three distinct factors, two of which operate in opposition to each other, seems impressive, but it is unclear how to resolve the inevitable conflicts between them. The Court's frequent answer is to "balance" or "weigh" the various factors. This reliance upon "weight," which is a useful approach for dealing with bananas, leaves something to be desired where factors such as those in *Mathews* are concerned. The economist's solution would be cost-benefit analysis, but the task of assigning monetary values to these factors is not a promising one, and the Court has not had the temerity to attempt it.

Related to the difficulty with balancing is the difficulty with a continuously varying range of procedural protections. A continuum is generally constructed from a large number of precisely defined, incrementally different values. But the balancing process proposed by *Mathews* cannot really generate such a set of values. First, it is unlikely that a one-to-one relationship can be established between each value in the *Mathews* balance and a particular level of procedural protection. The same balance might lead to a requirement of cross-examination in one situation and a requirement that counsel be permitted in another. Even if that problem were solved, it would still be unclear whether the two requirements could be placed in strict ordinal succession. Gross orderings, as between a criminal trial and a school suspension hearing, are relatively easy, but the task becomes quite challenging when minor variations in essentially distinct requirements are involved.

The impracticality of *Mathews* methodology alone is enough to cast considerable doubt on the value of its three criteria. But apart from this, the criteria themselves focus on subsidiary issues rather than the essence of the due process guarantee.

The most notable of the criteria is the individual interest standard—the very same consideration that serves as a precondition for applicability of the clause under current doctrine. There is no logical inconsistency, to be sure, in using this consideration once to decide whether due process applies, and again to decide how much process is due. But as a practical rule of constitutional decisionmaking, the dupli-

cation is awkward. To the extent that individual interest is really used at this "process due" stage, it seems otiose at the applicability level.

Even in the more modest role that *Mathews* assigns to it, individual interest does not seem particularly relevant. There is a surface plausibility about the notion that the degree of process due should vary with the level of impact on the individual, but that notion is not really part of our procedural due process tradition. Indeed, a persuasive case can be made for an exactly opposite view: that whenever the government acts against an individual, it must act fairly. The purpose of the due process clause is to establish a uniform standard of fair adjudication, not to create a market in which degrees of fairness can be exchanged for levels of injury.

In nonadministrative cases, procedural requirements are generally based on the nature of the adjudication in question, and they tend to be relatively insensitive to the magnitude of the individual interest at stake.[420] Criminal procedure is essentially the same for any prosecution, whether petty larceny or murder is involved. Civil procedure is similarly constant regardless of the number of zeros that appear in plaintiff's claim. To be sure, there are variations at the extremities. Small-claims cases dispense with many procedures that would otherwise be required,[421] misdemeanors may be tried without a jury,[422] and specialized protections are often required in capital cases.[423] Nonetheless, the basic principle is that the level of procedural protection is constant over the entire range represented by each major type of common law adjudication.

Individual interest does play a role in common law procedure, however: it may determine the time at which required protections

420. As a practical matter, of course, judges will treat civil cases where $10 million is at stake differently from cases where $10,000 is at stake. These differences are a question of judicial management, however, not due process theory. For better or worse, we have no theory in civil law by which required procedures can be varied according to the size of the claim. This does not preclude the creation of such a theory in the administrative realm. But the presumptions against this theory are, first, that it is discontinuous with the civil trial model; and second, that it has no judicial antecedent to rely on.

421. *See, e.g.*, CAL. CIV. PROC. CODE §§ 116, 117 (West 1982); N.Y. CITY CIV. CT. ACT §§ 1801-1814 (McKinney 1963 & Supp. 1982).

422. *See, e.g.*, Cheff v. Schackenberg, 384 U.S. 373, 378-80 (1966); United States v. Cain, 454 F.2d 1285 (7th Cir. 1972) (construing 16 U.S.C. § 707 (1982)); Pacific Tel. & Tel. Co. v. Superior Court, 265 Cal. App. 2d 370, 72 Cal. Rptr. 177 (1968) (construing CAL. CIV. PROC. CODE §§ 1209-1222 (West 1982)).

423. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion) (death penalty may not be imposed if limitations are placed on the scope of mitigating evidence); Furman v. Georgia, 408 U.S. 238 (1972) (death penalty may not be imposed if jury is given unfettered discretion to impose it); Hopt v. People, 110 U.S. 574 (1884) (death penalty may not be imposed if defendant is absent from courtroom); Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

should be made available. Typically, the state does not act until the requirements of due process have been met. But this may take a long time, and there is frequently a danger that intervening action by one party will alter the subject matter of the lawsuit in some irremediable way. To protect the court's power to grant meaningful relief at the end of the adjudication process, civil law establishes various pretrial remedies, such as preliminary injunction, attachment, garnishment, and replevy.[424] The question then arises whether the individual is entitled to procedural protection before the state employs any of these pretrial devices, or whether the state may act first and provide procedural protection only for the final resolution of the issue.

In answering this question, the law generally looks to the individual's interest. This consideration is appropriate because the issue is not the basic fairness of an adjudication, but the practical burden that will be imposed by attempts to preserve the status quo. If the burden is overwhelming, a pretrial remedy will be denied. If the burden does not exceed acceptable levels, the court will take precautions against irremediable change in the subject matter of the suit.[425] In either case there is no question that a civil trial, fully comporting with due process, is required for the final determination. Due process requirements thus remain constant. All that varies with the individual's interest is the

424. *See, e.g.*, C. DRAKE, A TREATISE ON THE LAW OF SUITS BY ATTACHMENT IN THE UNITED STATES §§ 9-37 (7th ed. 1891); *id.* § 38, at 28 ("Attachments are generally authorized against absent, absconding, concealed and non-resident debtors."); G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.1 (1965) (replevy); *id.* at 1213 ("[T]he buyer in default is not the ideal custodian of the goods."); J. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS § 4, at 7 (4th ed. 1905) ("The sole object of an interlocutory injunction is to preserve the subject in controversy in its then condition, and, without determining any question of right, merely to prevent . . . the doing of any act whereby the right in controversy may be materially injured or endangered."); J. ROOD, A TREATISE ON THE LAW OF GARNISHMENT §§ 14-43 (1896); *id.* §7, at 11 ("[T]he paramount purpose [is] to secure to the plaintiff satisfaction of whatever judgment he may recover in his suit."); S. RIESENFELD, CREDITOR'S REMEDIES AND DEBTOR'S PROTECTION 244-74 (1975).

Another purpose of pretrial remedies is to obtain jurisdiction over the defendant. *See* J. ROOD, *supra*, § 7, at 10-11; Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962). This purpose has limited relevance in administrative due process since jurisdiction is rarely an issue.

425. J. HIGH, *supra* note 424, § 13, at 19-20 (Where "the act complained of is likely to result in irreparable injury to complainant, and the balance of inconvenience preponderates in his favor, the injunction will be granted. But where . . . it appears that greater danger is likely to result from granting than from withholding the relief, . . . the injunction will be refused."); J. ROOD, *supra* note 424, §§ 82-107 (exemptions from garnishment); *id.* § 87, at 119:

> The policy of the law . . . was to secure to those who toil with their hands . . . a sufficient amount of the fruits of their labor to supply them and their families with the necessities of life and a few of the conveniencies of modern civilization, free from the merciless grasp of their less needy creditors.

For recent versions of the same calculation, see Southern Monorail Co. v. Robbins & Meyers, Inc., 666 F.2d 185 (5th Cir. 1982); Reinders Bros. v. Rain Bird E. Sales Corp., 627 F.2d 44 (7th Cir. 1980).

distribution of these requirements over the time span of the adjudication process.

This was precisely the manner in which the individual interest notion was first used as a decisive factor in the constitutional doctrine of procedural due process. Indeed, the cases that first referred to it involved the specific issue of common law pretrial remedies.[426] The common law generally assumes that a person can be made whole for any temporary loss of money.[427] This is why the common law's position on prejudgment remedies against potentially judgment-proof defendants is that the risk of irreparable change is great, while the burden on the defendant is insignificant.

The consumer rights movement of the 1960's challenged this view, pointing out the dislocation, stigma, and privation that could result from the use of prejudgment remedies against individuals without sufficient legal or material resources.[428] In *Sniadach v. Family Finance Corp.*,[429] the Supreme Court adopted the consumer rights perspective. It held that wage garnishment imposed an enormous burden on a working person, and thus could not be utilized as a pretrial device to secure a creditor's potential recovery until procedural protection was provided.[430]

Goldberg v. Kelly[431] presented a fact situation similar to *Sniadach*. Termination of welfare benefits has the potential for imposing severe hardship on the recipients until their eligibility is finally determined.[432] It was therefore natural for the Court to employ an individual interest

426. *See* Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

427. Common law compensation for breach of contract is based on two general principles: first, that "the primary if not the only remedy of the injured party is an action for damages"; and second, that "the general purposes of the law is . . . to give compensation, that is, to put plaintiff in as good a position as he would have been in had the defendant kept his contract." 11 S. WILLISTON & W. JAEGER, *supra* note 231, at 197-98; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 346 (1981) (basic right to money damages for breach); *id.* § 359 (equitable relief not available "if damages would be adequate to protect the expectation interest of the injured party"). These principles imply that money damages can in fact fully compensate the victim of the breach under ordinary circumstances.

428. *See* D. CAPLOWITZ, *supra* note 105, at 116-36, 155-691; W. MAGNUSON & J. CARPER, *supra* note 105, at 88-120; Comment, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743 (1968). The position of the consumer movement was probably part of a more general recognition of this view. *See* U.C.C. § 2-716 comment 1 (1983).

429. 395 U.S. 337 (1969).

430. *Id.* at 340-42; *see id.* at 341-42 ("[A] prejudgment garnishment . . . may as a practical matter drive a wage-earning family to the wall.") (footnote omitted).

431. 397 U.S. 254 (1970); *see also supra* notes 86-90 and accompanying text.

432. *See Goldberg*, 397 U.S. at 264 ("[T]ermination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate . . . .") (emphasis in original).

rationale in requiring procedural protection before termination. *Goldberg* represents an important extension of *Sniadach*, because *Goldberg* is an administrative case. The issue of prior hearings, and thus of the individual's interest, will arise much more frequently in these cases than it does at common law, since government administrators often act unilaterally to alter an individual's status. Nonetheless, even *Goldberg* restricts individual interest to its common law role of determining the timing of a required hearing.

Mathews itself exemplifies the use of individual interest to determine the timing of the hearing, since it was also a prior hearing case. By the time *Mathews* was decided, however, individual interest had come to dominate the Court's due process analysis. This may explain Justice Powell's promotion of individual interest from a consideration affecting the timing of due process protection to a basic factor determining the content of the protection that is required. In doing so, however, he mistook the specific issue in the case for a general principle of due process interpretation.

Mathews' risk of error factor presents a related issue. Since risk of error is akin to accuracy, it would appear to be a central consideration for any theory of due process based on accurate decisionmaking. *Mathews* does not rely on the simple existence of a risk of error, however, but on the computation of differential error rates for different levels of procedural protection. Such a computation, if usable at all, would appear to be as subsidiary as the individual interest factor. "Traditional" due process makes no such computation. It assumes that a serious risk of error is present, and then employs a range of trial-based procedures to protect against it. The more extensive protection of the criminal trial is not based on the idea that errors are more likely, but on the idea that they would be more serious.

In administrative due process, this traditional approach seems the most feasible. Since considerations of accuracy stand behind all the protections due process requires, at least in the Supreme Court's view, they seem like the wrong tool to use for making qualitative distinctions among those protections. A better use for "accuracy" would be to fine-tune the protections that have been designed on the basis of some other factor. Even fine-tuning would require that we set acceptable error levels, arrange procedural devices on an error-prevention scale, and then match the two. Perhaps this could all be avoided by an intuitive judgment. At the very least, however, we would need to determine differential error rates for different situations, which the courts do not appear able to do at the present time. Indeed, one of the principal arguments for relying on minimum procedures to implement the value of accurate decisionmaking is that it does not require determination of

acceptable accuracy levels.[433]

In any event, if there is an administrative case with special features that suggest the traditional approach should be abandoned in favor of the risk-of-error factor, *Mathews* is not that case. *Mathews* concluded that disability determinations, based largely on technical data submitted by health professionals, could be made on a written record without oral argument.[434] But courts regularly grant summary judgment in cases that depend exclusively on documentary evidence.[435] The *Mathews* Court could thus have argued that this procedure was acceptably accurate simply by analogy to nonadministrative law.[436] There was no need to expand this specific principle into a general determinant of the due process guarantee.

The final factor in *Mathews* is "the Government's interest, including the function involved and the fiscal and administrative burdens."[437] *Mathews* placed its emphasis on the issue of burden. This is hardly insignificant, but once again, it seems like a subsidiary issue. Procedure always has its costs; it is difficult to think of a procedural device that imposes greater fiscal and administrative burdens than a criminal trial. Unless cost is to operate as a purely negative principle, the balance should include some countervailing notion of benefit. But benefit cannot be computed in monetary terms because it depends upon our view of procedural fairness, precisely the point at issue. Stated another way, cost operates as a pragmatic constraint; it only comes into play after we have decided what we want or need.

A more central consideration than burden is the effect of due process protection upon the government's substantive policy. Procedural controls limit government discretion. Thus, if a perfectly valid adjudicative action is based on grounds that are difficult or counterproductive to articulate, procedural controls may render the action unsupportable. If the difficulty with articulation is inherent in the administrative scheme as a whole, rather than being attributable to certain decisional

433. *See supra* text accompanying note 312.

434. Mathews v. Eldridge, 424 U.S. 319, 339-49 (1976).

435. *See, e.g.*, Blair Foods Inc. v. Ranchers Cotton Oil, 610 F.2d 665 (9th Cir. 1980); De Luca v. Atlantic Ref. Co., 176 F.2d 421 (2d Cir. 1949), *cert. denied*, 337 U.S. 943 (1950); 6 W. MOORE, MOORE'S FEDERAL PRACTICE 56-167 (2d ed. 1982).

436. The concept of summary judgment already existed in administrative law when *Mathews* was decided, but it involved situations where there was no dispute about the facts, rather than situations where the dispute could be resolved by examination of documents. *See* FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265 (1949); *cf.* Weinberger v. Hynson, Westcott & Dunning Inc., 412 U.S. 609 (1973) (no hearing required when applicant company offers no evidence which on its face meets statutory standard).

437. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Categorizing considerations such as these as an "interest" of the government represents a curious anthropomorphism, probably resulting from the extent to which the individual interest analysis has infected procedural due process doctrine.

grounds, the imposition of procedural controls will not only preclude certain actions, but will discourage the entire program.[438] Moreover, as previously indicated, purely procedural considerations can lead to absolute prohibitions on certain general actions, such as ad hoc rulemaking that affects small groups, or the formulation of presumptive rules.[439] It is this impact on government, not costs and burdens, that raises the essential questions about minimum procedures.

2. *Due Process Archetypes as a Methodology for Determining Minimum Procedures*

The Supreme Court's leading pronouncements on the content of due process principles, *Olim v. Wakinekona*[440] and *Mathews v. Eldridge*,[441] both present substantial difficulties. The difficulty *Wakinekona* created for the rule-obedience principle is readily resolved, however. If the distinction between procedural and substantive rules seems artificial in this context, it can simply be eliminated. The principle would then be that governmental decisionmakers must follow all applicable rules—hardly a disconcerting or extreme position.

The difficulties *Mathews* created for the minimum procedures principle, however, cannot be answered as easily. If the *Mathews* framework is eliminated, the complex task of defining minimum procedures remains. In effect, this is the central question of modern administrative due process cases.

Mathews begins from the premise that an entirely new theory should be developed to determine the minimum procedures to be imposed on administrative agencies. A more promising avenue is to look to the minimum procedures that have been traditionally imposed on common law adjudications, and that are almost universally recognized as legitimate. To be sure, these requirements would need to be adapted to the administrative context, but adaptation seems several degrees easier than innovation. Much has been made of the fact that due process requirements are variable or flexible, a proposition that Chief Justice Burger describes as having been "said so often by this Court and others as not to require citation of authority."[442] But flexibility suggests that one begins with something that is then bent or altered to fit the circumstances. To start anew, abandoning existing standards, breaks the mold rather than bending it.

438. *See, e.g.*, Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942 (1976); Reed, *Firing a Federal Employee: The Impossible Dream*, WASH. MONTHLY, July-Aug. 1977, at 14.

439. *See supra* text accompanying notes 373-79.

440. 103 S. Ct. 1741 (1983).

441. 424 U.S. 319 (1976).

442. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

The first advantage of looking to traditional adjudications is that it suggests a more usable methodology than the *Mathews* balancing approach. Traditional adjudications are governed by the two due process archetypes of criminal and civil trial. These archetypes are applied whenever the government undertakes adjudicative action that fits the basic categories "criminal" or "civil." Thus, all a court needs to do in a due process evaluation of these actions is identify the nature of the action, and the level of protection follows automatically.

Questions will naturally arise about the distinction between these categories, as with any legal taxonomy.[443] But these questions will be less frequent and more readily resolved than questions arising under the *Mathews* framework, which attempts to generate a continuum of procedural protection by balancing three immeasurable factors.

In identifying procedural archetypes for administrative law, the natural starting point is civil trial, since virtually every administrative decision would belong in that category if decided by a court.[444] The main requirements for a civil trial are typically identified as notice, an opportunity for a hearing, and an impartial decisionmaker.[445] The hearing is further described as the opportunity to appear in person, to

443. *See, e.g., In re* Winship, 397 U.S. 358 (1970) (juvenile delinquency adjudication is criminal in nature, contrary to state characterization as civil, and requires proof beyond a reasonable doubt); Burgess v. Samon, 97 U.S. 381 (1878) (tobacco tax is essentially a criminal enactment, despite civil characterization, and therefore cannot be imposed retroactively). *See generally* J. GOLDSTEIN, A. DERSHOWITZ & R. SCHWARTZ, CRIMINAL LAW: THEORY AND PROCESS 253-318 (1974).

444. An administrative agency may be constitutionally prohibited from deciding criminal cases. A few decisions can be read to suggest that an agency may be granted certain aspects of this power. *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944) (agency's price control regulations cannot be challenged as unreasonable during criminal trial stemming from their violation); Falbo v. United States, 320 U.S. 549 (1944) (draft board's determination of nonexempt status not reviewable at criminal trial for noncompliance with induction order). These decisions invoke the adequacy of the agency's procedure as a basis for the holding of constitutionality. *See Yakus*, 321 U.S. at 435-37; *Falbo*, 320 U.S. at 552. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 180, at 341-44. In addition, such decisions come from an era where the reaction against the anti-New Deal Court conspired with the exigencies of war to produce an unusual degree of deference to administrative agencies.

Modern cases not only limit these earlier decisions, *see* McKart v. United States, 395 U.S. 185 (1969) (draft board's decision reviewed to determine if based on a correct interpretation of the statute); United States v. England, 347 F.2d 425 (7th Cir. 1965) (validity of a tax assessment must be submitted to a jury), but tend to move in the opposite direction. They hold that something more than civil trial is required in certain noncriminal cases. *See* Santosky v. Kramer, 455 U.S. 745 (1982) (clear and convincing evidence needed to terminate parental rights for neglect); Addington v. Texas, 441 U.S. 418 (1979) (clear and convincing evidence needed to confine person to mental institution).

445. *See* Goldberg v. Kelly, 397 U.S. 254, 266-71 (1970). *Goldberg*'s lasting doctrinal contribution may well be the clarity with which it specifies the components of due process. For decisions establishing the need for specific elements, see Ward v. Village of Monroeville, 409 U.S. 57, 59-60 (1972) (impartial decisionmaker); Boddie v. Connecticut, 401 U.S. 371, 377-78 (1971) (opportunity for hearing); Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950) (notice).

present evidence, to hear and challenge the opposing evidence, and to be represented by counsel.[446] Generally, the decisionmaker's action must be based solely on the evidence presented at the hearing, and must be accompanied by a statement of the decision.[447] Procedural protection imposed upon administrative action during the right-privilege era and the loyalty-security era almost always corresponded to this paradigm.[448]

The welfare rights movement and related social trends brought a wider variety of administrative actions to the courts than they had previously seen. For many of these actions, requirements analogous to those of civil trials seemed excessively elaborate. Consequently, courts began to vary the requirements, principally by reducing their formality or by eliminating particular features of the hearing requirement.[449]

With this background, the real function of the *Mathews* analysis becomes apparent: its three factors serve as methods for adjusting the requirements of civil trials in particular types of administrative adjudications, rather than as independent grounds by which due process requirements can be derived. Common law uses individual interest to determine the timing of due process protection.[450] In the administrative area, that concern becomes a more important one, because administrative agencies, unlike private parties, can generally invoke state power unilaterally. The appropriate role for individual interest, therefore, is to determine whether the required notice and a hearing should be shifted to the preliminary stages of the agency's action. The fiscal and administrative burden that procedural protection will impose upon the government is relevant in determining the degree of formality that should be required, and this is, in fact, the way the Court has used it.[451]

446. *See, e.g.*, Goldberg v. Kelly, 397 U.S. at 269-70. *See generally* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1277-95 (1975).

447. Goldberg v. Kelly, 397 U.S. at 271.

448. *See, e.g.*, Willner v. Committee on Character & Fitness, 373 U.S. 96, 103-04 (1963) (bar admission); Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903) (The *Japanese Immigrant Case*) (deportation).

449. *See, e.g.*, Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 14-15 (1979) (upholding use of informal hearing based on decisionmaker's examination of record and interview of inmate, rather than introduction of evidence); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18-19 (1978) (prescribing informal pretermination meeting with responsible employee); Wolff v. McDonnell, 418 U.S. 539, 566-68 (1974) (eliminating right to cross examination in prison disciplinary hearing, and making right to present evidence optional with authorities); Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (allowing decisionmaker to have had some prior involvement in case). The rules of evidence and the requirement of a jury have always been treated as inapplicable to administrative determinations. *See supra* note 21.

450. *See supra* text accompanying notes 424-30.

451. *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18 (1978); Ingraham v. Wright, 430 U.S. 651, 680-81 (1977); Mathews v. Eldridge, 424 U.S. 319, 347-48 (1976); Wolff v. McDonnell, 418 U.S. 539, 561-67 (1974) (burden discussed in terms of prison discipline and safety); Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring).

Often, this burden factor will operate in conjunction with individual interest, since a preliminary hearing creates the greatest potential burden.[452] Thus, *Mathews* can be usefully regarded as establishing the factors by which the civil trial archetype can be adapted to administrative situations.

A case now pending before the Supreme Court, *Loudermill v. Cleveland Board of Education*,[453] illustrates this use of *Mathews*. The case involves two public employees who were summarily discharged, one for not disclosing a prior felony conviction on his initial application form, and the other for failing an eyesight examination. Both were given post-termination hearings, pursuant to statute, but claimed that the lack of an informal, pretermination hearing violated their due process rights. In deciding whether such a pretermination hearing should be required, the *Mathews* factors—individual interest, governmental burden, and possible error of risk—are precisely the things one might reasonably consider. These considerations seem too abstract to penetrate the procedural device of a hearing, but they seem quite practical for determining when that hearing should be held.

On the merits, the Sixth Circuit seems correct in concluding that a pretermination hearing is indicated in these circumstances. Even a temporary dismissal from employment represents a serious disruption of a person's life, for which backpay and reinstatement provide only partial recompense. And the burden of such a hearing seems relatively minor, since the government must provide a hearing at some point, and since there was no indication that either employee presented an immediate danger.[454] Interestingly, however, the most useful consideration seems to be precisely the one that was overlooked in *Mathews*: a reference back to judicial analogy. The agency's case for the dismissal of both employees turned on what are essentially "paper" records, rather than on subjective judgments by their supervisors. These cases are thus equivalent to summary judgment proceedings, where the moving party presents documentary evidence and the defendant must either refute it or demonstrate that there is a material issue of fact to be resolved. The value of the analogy is that it not only resolves the issue of pretermina-

452. All the cases cited *supra* in note 451 except *Wolff* were prior hearing cases. In *Wolff*, the timing of the hearing to withhold good time credit was irrelevant provided it occurred before the credits were to take effect.

Risk of error is presumably relevant to the formality issue as well, although it is not easy to cite cases where this notion has served, or should have served, as an operative principle.

453. 721 F.2d 550 (6th Cir. 1983), *cert. granted*, 104 S. Ct. 2384 (1984).

454. *See Loudermill*, 721 F.2d at 562. One employee worked as a security guard, the other as a bus mechanic. The security guard, who had the felony conviction, might have been deemed to present a danger, but he was dismissed for dishonesty in filling out the application form, not because of the conviction, which had occurred 12 years before the application. *Id.* at 553.

tion hearing, but suggests precisely what the nature of that hearing should be—a brief, informal proceeding in which the employees would be required to demonstrate that the agency's evidence is not conclusive.[455]

Although most of the procedural protections that the courts have prescribed can be regarded as adaptations of the civil trial archetype, one case, *Goss v. Lopez*,[456] represents such an extensive adaptation that it deserves to be recognized as a qualitatively different model. In *Goss*, the due process requirements imposed on short-term school suspensions were simply "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[457] Professor Eisenberg characterizes this as the consultative process.[458] It differs from more trial-related versions of administrative due process in that lawyers do not appear at the hearing, witnesses are not called, and records are not kept. Moreover, the decisionmaker is not limited to the facts and arguments presented at the hearing.[459] What remains is a direct interchange between the private person and the government decisionmaker, with the opportunity for the private person to present legal arguments and tell his or her version of the facts.

The Supreme Court has not applied this consultative archetype as extensively as it might have, perhaps because of *Mathews*' overarching influence. Justice Rehnquist's opinion in *Hewitt v. Helms*,[460] however, may be regarded as a tacit recognition of the *Goss* analysis. In fixing the due process requirements for administrative segregation of a prisoner, he held that the prisoner must "receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding."[461] Unfortunately, Justice Rehnquist attempted to derive these requirements from *Mathews*,[462] and never cited *Goss*. Explicit recognition of *Goss* would have made the analysis clearer. It might also have provided a solution for some of the other

455. One might use the risk-of-error idea to reach this same conclusion but it is much more vague. The court used it to argue that a pretermination hearing was needed, since both employees ultimately made quite colorable claims, and one was reinstated. *Id.* at 553-54, 562. One might also argue that the paper record minimized the risk of error, as the Supreme Court argued in *Mathews*.

456. 419 U.S. 565 (1975).

457. *Id.* at 581.

458. *See* Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 414-17 (1978).

459. *Id.* at 414.

460. 459 U.S. 460 (1983).

461. *Id.* at 476.

462. *Id.* at 473-74 (citing Mathews v. Eldridge, 424 U.S. 319, 355 (1976)).

prison cases, such as *Meachum v. Fano*,[463] where the Court's eagerness to deny relief due to the absence of a liberty interest seems to have been motivated, at least in part, by its belief that the opposite decision would necessitate trial-type hearings.[464]

Common law analogies thus suggest that the methodology for determining the content of the minimum-procedures principle in administrative settings is to establish a few basic archetypes of fair procedures, and then adapt them to fit the various situations that arise. The two archetypes that emerge from the existing case law are civil trial, as adapted by the *Mathews* factors, and the consultative process of the *Goss* decision. The advantage of this approach over the *Mathews* framework is apparent. If the three factors identified by *Mathews* were physical characteristics, we would need a computer to utilize its methodology. Since they are in fact immeasureable and subjective, we need a seer. What we have, however, is a judge. In developing rules for judges, broad categories, flexible enough to meet the demands of equity and pragmatism, are preferable to quasi-scientific abstractions. Of course, adaptation still requires subjective judgment, but the basic model of fair procedures will be clear. Moreover, adaptation can proceed incrementally where appropriate, rather than requiring grand reconceptualizations every time another case arises.

3. Governmental Action as an Operative Principle for Determining Minimum Procedures

Determining the content of the minimum-procedures principle obviously requires more than a methodology. It also requires an operative principle that will decide real cases. The *Mathews* criteria—individual interest, governmental burden, and risk of error—are properly regarded as subsidiary considerations for reasons previously discussed. What is needed is a criterion that captures the central concerns of the due process clause.

Here too, traditional due process doctrine provides a useful analogy. The application of the criminal and civil trial archetypes is based on the nature of the government action taken. This governmental-action consideration, to which *Mathews* made a passing reference,[465] can

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463. 427 U.S. 215 (1976).

464. *See* Eisenberg, *supra* note 458, at 419-20 (recommending prescription of consultative process in *Meachum*). Justice Rehnquist's opinion in *Meachum* is virtually explicit on this point: "Holding that [prisoner transfers] are within the reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons. . . . Our holding is that the Due Process Clause does not impose a nationwide rule mandating transfer hearings." 427 U.S. at 228-29 (citations and footnote omitted).

465. *Mathews*, 424 U.S. at 335, 348-49. For other analyses using this perspective, see A. BICKEL, *supra* note 255, at 166-69; Friendly, *supra* note 446, at 1295-1304.

serve as the basic determinant of minimum procedural requirements in the administrative context. The due process guarantee is concerned with the fairness of the government's behavior toward specific individuals; the rule-obedience and minimum-procedures principles are derived from this concern. In giving content to the minimum-procedures principle, there is no reason to shift the focus. When we ask whether certain procedures should be imposed on government administrators, the central inquiry should involve the nature of the action that they have taken.

Utilizing the governmental-action criterion to select due process archetypes is not a particularly difficult task. If the reviewing court finds that the governmental action should be unconstrained, it will obviously not impose any procedures. If it deems constraints appropriate, the civil trial model—our basic archetype of procedural fairness—will generally apply, with whatever adaptations seem advisable. In rare situations, administrative action may be tantamount to punishment,[466] in which case the criminal trial model would apply.

The *Goss v. Lopez*[467] consultative process represents the only qualitatively different archetype.[468] It is also relatively easy to apply, because it was devised for a qualitatively different type of government adjudication. The adjudication in *Goss* involved an ongoing institutional relationship between state officials and private persons. This differs from the usual image of state adjudications as limited interactions, where the participants come together solely for that purpose. In state-run institutions, there is a wide range of interactions between the official and the individual—from casual comments and ordinary instructions to basic determinations about the person's presence there. The middle of this range consists of governmental action that involves some determination of facts or application of law, but not a determination that rises to the level of a major entry or exit decision. For these actions, some sort of procedural protection seems appropriate, and the consultative process provides the most satisfactory solution.[469]

466. *See In re* Gault, 387 U.S. 1, 27-30 (1967) (incarceration in juvenile reformatory); Rubin, *Generalizing the Trial Model of Procedural Due Process: A New Basis for the Right to Treatment*, 17 HARV. C.R.-C.L. L. REV. 61, 81-85 (1982) (commitment to mental institution that merely incarcerates without treating).

467. 419 U.S. 565 (1975).

468. *See supra* text accompanying notes 456-59.

469. The Court's unwillingness to extend this archetype to relevant institutional situations, such as those in *Wakinekona* or *Meachum*, may result from its failure to recognize the nature of the governmental action to which the consultative process applies. This is hardly surprising, of course, since the Court has tended to overlook governmental action as a consideration in its fascination with individual interest, at both the applicability level of *Roth* and the "process due" level of *Mathews*. Another case in which the consultative process would seem particularly applicable is Ingraham v. Wright, 430 U.S. 651 (1977). Justice Powell was aware of this possibility, since *Goss*

The truly difficult issue, therefore, is to determine which governmental actions should be subject to due process requirements. Despite its individual interest language, the Supreme Court seems to be at least partially aware of the crucial nature of this consideration. In most of its decisions, the Court focuses on the scope of the administrator's discretion. Use of the term "discretion," of course, is simply a means of characterizing the nature of a governmental action: Is it the sort of action that is, or should be, left to the administrator's discretion, or is it the sort of action that is bound by rules?[470]

The Court's answer to this question has been to interpret the applicable state law. When state law provides administrators with complete discretion, the Court holds that no minimum procedures are to be imposed. By contrast, when state law limits discretion by establishing decisionmaking criteria, the Court imposes minimum procedures. Often, the Court's liberty and property analysis has meant nothing more than this, since it determines whether such an interest is present by inquiring whether administrative discretion is "unfettered" or constrained.[471]

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involved the same basic situation and dated from only two years before; but he rejected it. *Id.* at 682 n.55. The fact that the Court's use of *Goss* is so context-specific suggests that it does not regard the decision as being of general significance.

470. *See* Shapiro, *supra* note 191, at 1495-1500. Professor Shapiro sees this determination as having been derived from the judiciary's dominant political attitudes toward technocracy and the political process. When technocratic expertise was regarded as the preeminent value, the agency was permitted broad discretion. The notion was that the agency should use its skills rather than be bound by rules (or perhaps, that it should be bound by scientific rules that the agency itself could best discover, rather than by legal rules). With the development of a group politics orientation by the courts, rules began to be imposed. Consistent with this philosophy, however, the rules were procedural in nature.

471. For example, in *Board of Regents v. Roth*, the Court determined that no property interest existed because the state law left "the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials." 408 U.S. 564, 567 (1972). Similarly, in *Meachum v. Fano*, the Court found no property interest because "prison officials have the discretion to transfer prisoners for any number of reasons." 427 U.S. 215, 228 (1976). In *Leis v. Flynt*, the Court concluded that a lawyer did not have a liberty or property interest in appearing *pro hac vice* in Ohio because "the rules of the Ohio Supreme Court expressly consign the authority to approve [such an] appearance to the discretion of the trial court." 439 U.S. 438, 443 (1979). The Court reached a similar conclusion in *Connecticut Board of Pardons v. Dumschat* with respect to pardons because "Connecticut has conferred 'unfettered discretion' on its Board of Pardons." 452 U.S. 458, 466 (1981) (quoting Dumschat v. Board of Pardons, 618 F.2d 216, 219 (2d Cir. 1980), *rev'd on other grounds*, 452 U.S. 458 (1981)); *see also id.* at 467 (Brennan, J., concurring) (no liberty interest because plaintiffs have failed to "show—by reference to statute, regulation, administrative practice, contractual arrangement or other mutual understanding—that particularized standards or criteria guide the State's decisionmakers").

By contrast, the Court found liberty interests in *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex* and *Vitek v. Jones* because Nebraska law established criteria governing parole and transfer to mental hospitals, respectively. Vitek v. Jones, 445 U.S. 480, 489-90 (1980) (distinguishing *Meachum* on the ground that "transfers [there] were discretionary with the prison authorities," while here the statute contains specific criteria); Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 11-12 (1979) (reciting statutory criteria that create

While the Court has focused on administrative discretion, its translation of this factor into liberty and property terms has obscured a basic issue: whether administrative discretion is to be determined by interpreting state law, as the Court has generally done, or by evaluating the administrative action itself, without regard to the underlying law. In other words, are the minimum procedures a conditional requirement dependent on the state's administrative scheme, or are they an absolute, federal requirement for action of the kind in question? This is precisely the same as asking whether the existence of "liberty" and "property" is to be determined according to state or federal law, although the level of analysis is different. Instead of using this determination to decide whether the due process protection is required at all, it is used to determine the content of due process requirements.

Although the effect is largely the same, the resulting analysis becomes substantially more coherent. For example, the real issue in *Hewitt v. Helms*[472] was not whether a prisoner's continued incarceration with the general prison population is a liberty right. And the real issue in *Goss v. Lopez*[473] was not whether a child's continued attendance at school is a property interest. These questions are pure formalism, and counterintuitive formalism at that. The real issue is whether prison administrators should have uncontrolled discretion to place prisoners in seclusion, or whether school officials should have uncontrolled discretion to suspend students. What is at stake is not the meaning of liberty and property, but the meaning of procedural fairness.

To be sure, translating questions about the scope of administrative discretion into discussions of the terms "liberty" and "property," as the Court has done, achieves a certain linguistic economy. It takes a necessary concept with no direct textual reference, and attaches it to a phrase in the text with no other obvious function. But while that seems convenient, it does not work; the phrase and the concept are really unrelated, and one distorts the other. The scope of administrative discretion is part of the general concept of procedural fairness, to be determined in analyzing the constraints on governmental interactions with the individual. The phrase "life, liberty, or property" is best regarded as indicating the clause's concern with adjudicatory decisions—that is, with defining the set of governmental actions to which the clause relates. It thus provides us with no content for analyzing particular actions. That

"expectation" of release). And in *Barry v. Barchi*, the Court found a property interest in a racehorse trainer's license, because "[u]nder New York law, a license may not be revoked or suspended at the discretion of the racing authorities." 443 U.S. 55, 64 n.11 (1979).

472. 459 U.S. 460 (1983).

473. 419 U.S. 565 (1975).

analysis depends upon the principle of procedural fairness, not on the definition of the adjudicatory context in which that principle operates.

Although the conceptual framework of the post-*Roth* cases is unworkable, the issues that the Court has confronted in these cases are real in that they represent a significant question about the way in which our government is structured—a question for which there is no existing political consensus. When magic solutions based on invocations of the terms "liberty" and "property" are abandoned, it becomes clear that the answer depends on one's views about a variety of issues: the proper role of constitutional courts, the proper balance between state and federal power, the degree to which administrative agencies treat individuals unfairly, the causes of such unfairness, the significance of such unfairness, and the ability of courts to provide a cure for it. These issues, obviously difficult to resolve, must be discussed in order to choose between state and federal standards for minimum procedures.

The Court's choice has generally been the state standard, although it has been willing to declare a federal standard where physical restraint, physical punishment, or stigmatizing action is concerned.[474] It has articulated or implied four principal arguments in favor of this standard. First and most explicit is the Court's view that underlying substantive rights—particularly "property" rights—are created by state law.[475] Second is the implicit notion that the federal standard would constitute a form of substantive due process.[476] Third is the Court's view that the federal judiciary should defer to the expertise of administrative decisionmakers, and to the authority of either the states or a coordinate branch of the federal government.[477] The final argument,

474. *See supra* notes 148-58, 215 and accompanying text.

475. *See, e.g.*, Leis v. Flynt, 439 U.S. 438, 441 (1979); Bishop v. Wood, 426 U.S. 341, 344 (1976); Goss v. Lopez, 419 U.S. 565, 572-74 (1975); Board of Regents v. Roth, 408 U.S. 564, 577 (1972). With respect to liberty, see Hewitt v. Helms, 459 U.S. 460, 469-71 (1983) (particular liberty right); Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 12 (1979) (same); Meachum v. Fano, 427 U.S. 215, 226 (1976) (liberty in general); Paul v. Davis, 424 U.S. 693, 709-10 (1976) (same). *See also* Easterbrook, *supra* note 264, at 87-88 (liberty and property); Simon, *supra* note 5, at 171-74 (property).

476. The Court is presumably implying this argument when it states that the Constitution does not create property rights or that the due process clause does not itself create a particular liberty right. The creation of "liberty" and "property" interests that were not subject to reduction by general laws was, in fact, a hallmark of the substantive due process era. *See, e.g.*, Truax v. Corrigan, 257 U.S. 312 (1921) (state anti-injunction statute for labor disputes deprives employers of property by allowing injuries to business); Coppage v. Kansas, 236 U.S. 1 (1915) (state law forbidding "yellow dog" (anti-union) contracts deprives employers of liberty and property rights to make contracts freely), *overruled by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941). Commentators have also advanced this view. *See, e.g.*, Smolla, *supra* note 5, at 98-100; Tushnet, *supra* note 4.

477. *See, e.g.*, Hewitt v. Helms, 459 U.S. 460, 470-74 (1983); Meachum v. Fano, 427 U.S. 215, 228-29 (1976); Bishop v. Wood, 426 U.S. 341, 349-50 (1976); Goss v. Lopez, 419 U.S. 565, 591-99 (1975) (Powell, J., dissenting); Simon, *supra* note 5, at 147-71.

and by far the most complex, is that no guidelines exist for defining a federal standard.[478]

The answer to the substantive rights argument has already been suggested. The argument becomes irrelevant if the basic purpose of procedural due process is to place constitutional limits on administrative adjudication.[479] Under this approach, a federal standard does not displace state substantive law; rather, it concedes the existence of that law, and then imposes standards on its adjudicatory operation. For example, in the case of school suspension, the issue would not be whether the Court should establish a federal definition of the property interest, or defer to a state-created interest; rather, the issue would be whether the Court should impose minimum procedures on school suspensions, given that state-created method of discipline.

It must be recognized, however, that a federal standard for procedural due process imposes the affirmative obligation that states specify criteria for actions that are deemed nondiscretionary in character. This emerges from the limitation of due process to the goal of accurate decisionmaking.[480] If minimum procedures are required, and the purpose of those procedures is to ensure an accurate decision, the requirement can be meaningful only if there are some criteria for accuracy. The federal standard does not require that any particular criteria be selected; it only requires that the state make its criteria explicit. Of course, the state may argue that it has no criteria for a particular decision, but that is precisely what a federal standard forbids. To say that as a matter of federal law a type of administrative action is nondiscretionary means that the state may not leave the administrator free from any possible review.

Requiring states to establish decisionmaking criteria does not impose a definition of property on them. Rather, it limits the discretionary power of state administrators over individuals, which is precisely the point of a federal definition of permissible discretion. Whereas this certainly constitutes a limit on the state's power, only the post-*Roth* Court would regard it as a federalized definition of property.[481]

The second argument, that a federal standard would constitute substantive due process, depends, of course, on one's definition of that

478. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527, 544 (1981); Ingraham v. Wright, 430 U.S. 651, 682 n.55 (1977); Paul v. Davis, 424 U.S. 693, 701 (1976).

479. *See supra* Part II, Section *A*, subsection 3.

480. *See supra* notes 285-92 and accompanying text.

481. In fact, limitation of the way in which the state may implement its substantive law is a quintessential 14th amendment concept. The equal protection clause, under present doctrine, operates in very much the same manner. It does not require the state to create any laws nor does it displace any state rules regarding the validity of those laws. It simply imposes the additional requirement that the laws must operate equally in certain areas or with respect to certain groups.

concept. The Court's opinions suggest that the federal standard is substantive because its requirements are derived from the "Due Process Clause itself."[482] But the direct derivation of legal guidelines from the due process clause cannot be sensibly regarded as inevitably substantive. If it were, there could be no such thing as procedural due process, since the due process clause is the origin of all procedural requirements. The rule-obedience principle is derived from the due process clause itself. It is certainly not an inherent condition of governmental action, since current doctrine does not impose it on the states outside the adjudicatory context.[483] The trial model for the minimum-procedures principle, which the Court has unhesitatingly applied, is also derived from the due process clause. As Professor Grey notes, this derivation can only be achieved by reference to tradition, and the tradition can have no other link to the constitutional text.[484] Even the state standard, which was specifically selected for its lack of content, is necessarily derived from the due process clause. The text of the fourteenth amendment, after all, makes no independent reference to state law.

The federal standard does differ from the state standard in that it has significantly more content. And perhaps this content is difficult to derive from the constitutional text, and thus requires an exercise of judicial discretion. That may make the federal standard undesirably vague, but it does not make it substantive. It is simply incorrect to define "substantive" as equivalent to vagueness or to the need to invoke nontextual principles.[485] To be sure, both vagueness and cavalier treatment of the constitutional text were particular sins of the substantive due process cases in the *Lochner v. New York*[486] era. But their substantive nature was an additional sin, not the same one. It consisted, according to the common interpretation, of using the due process clause to invalidate general economic legislation.[487]

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482. Hewitt v. Helms, 459 U.S. 460, 466 (1983). The Court cannot mean that a federal standard would dictate choices about economic matters. As Professor Shapiro points out, many modern due process cases are as economic in nature as their substantive due process predecessors, no matter what standard they employ. *See* Shapiro, *supra* note 252, at 91-96.

483. *See supra* text accompanying note 330.

484. Grey, *supra* note 255, at 711, 715-17.

485. Nontextually based interpretation is a technique applicable to many constitutional clauses; it may affect the legitimacy of the decision, but it hardly changes its underlying nature. For example, Robinson v. California, 370 U.S. 660 (1962) (punishment for involuntary status is cruel and unusual) may have been a nontextually based eighth amendment decision, but it was an eighth amendment decision nonetheless. *In re* Winship, 397 U.S. 358 (1970) (criminal conviction requires proof beyond reasonable doubt) certainly goes beyond the text, but it would not be called substantive due process by most people.

486. 198 U.S. 45 (1905).

487. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955); L. TRIBE, *supra* note 4, at 434-42. The distinction between general nontextual interpretation and substantive review is well illustrated by a recent case, Santosky v. Kramer, 455 U.S. 745 (1983). In *Santosky*, the Court

There are, however, certain cases in which the federal standard is substantive in that it does affect general rulemaking. In situations where minimum procedures are required, due process demands that the legislature may not empower administrators to act in their unfettered discretion—that is, for no reason at all.[488] But this prohibition arises directly from a procedural requirement; every constitutional rule prohibits actions in otherwise distinct fields that would reduce or eliminate the protection it provides. The federal standard for administrative due process, even with this qualification, does not require that any particular rules be adopted. It would only establish that the state cannot vitiate the minimum-procedures requirement by granting an administrator unfettered discretion.

The procedural nature of prohibiting certain general grants of unfettered discretion can be clarified by focusing on the meaning of the federal standard. In the present context, a federal standard determines as a matter of federal law whether or not governmental actions are legitimately discretionary. Since the standard necessarily rests on prevailing legal norms, it establishes that a particular state decision is really based upon articulable criteria. If the state asserts the contrary, according to this view, it is not really declaring as a matter of general law that the decision is to be left to unfettered administrative discretion. Rather, it is attempting to circumvent the requirements of the due process clause. Can a state really provide that welfare benefits are to be distributed, or parental rights terminated, without criteria in the administrator's unfettered discretion? Or would such a rule merely indicate that the state preferred not to articulate its criteria, thus escaping review of particular decisions? The federal standard forbids no substantive result except the latter. It permits a state to declare any generally operative criteria it wants, however irrational or inadvisable, and take its chances with the political process and the other provisions of

required clear and convincing evidence before a state could terminate parental rights on the ground that the child was "permanently neglected." Justice Blackmun began his opinion for the Court by declaring that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment," *id.* at 753, and by citing Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977).

In fact, the statement is unnecessary and the citation concedes too much. *Moore* was a true substantive due process decision. It held that a state may not enact a general law forbidding family members from cohabiting. *Santosky* does not forbid any general law. It does not, for example, prescribe parental rights. All it does is prescribe the manner in which criteria the state chooses to use are to be applied in particular cases. The Court could have reached this result by stating that the nature of a neglect proceeding was sufficiently accusatory and punitive—that is, sufficiently closer to a criminal trial than the average administrative or civil proceeding—to demand a higher standard of proof. That may be a somewhat vague notion, and it certainly requires that something be read into the constitutional text, but it is genuinely procedural nonetheless.

488. *See supra* text accompanying notes 373-79 (prohibition against laws that apply only to specified individuals, or that presume occurrence of procedural events).

the Constitution. What it cannot do is conceal its criteria behind a facade of discretion.

The third argument, involving deference to administrative agencies and separate branches or sovereigns, has a certain force, but it also presents substantial difficulties. Deference to a coordinate branch of government seems singularly inappropriate where procedural due process is concerned. Due process requirements in the federal context originally applied to adjudications carried out by federal courts themselves. The Supreme Court, as the supervisor and reviewer of these courts, could hardly be said to owe them very much deference. Today, the court-like process of adjudication is often carried out by executive agencies—but that shift of responsibility is generally viewed as a basis for added vigilance, not less. The Court cannot believe that the power to adjudicate an individual's status is uniquely committed to federal agencies. It is difficult to see what action of a coordinate branch the Court would find appropriate to review if not its court-like functions.

Deference to the states has become an important theme in constitutional law, but it generates a certain tension when applied to the fourteenth amendment. On purely interpretivist grounds, it is reasonably clear that the framers of the fourteenth amendment did not share the present Court's solicitude for state prerogatives. "Their federalism" was more activist in nature. Convinced that at least one group of states simply could not be trusted to act fairly toward at least one group of its citizens, the framers sought to place at least some state action under the supervision of the federal courts and the federal legislature.[489] The fourteenth amendment is essentially a vehicle for federal control over the states; it is one of the few provisions in the Constitution that establishes such control, and one of an even smaller number that does so beyond the perceived needs of the federal government to maintain its own authority.[490] The protection specified by this amendment, therefore, seems like the last constitutional guarantee to interpret deferentially.

While the argument based on deference to a coordinate federal branch or the states seems weaker in the context of the due process clause, the related argument of deference to administrative agencies is directly applicable to the modern operation of that clause. It raises the policy issues concerning due process in their most direct form. There is

489. Even those who read the history most restrictively concede this much. *See* R. BERGER, *supra* note 254, at 169-80; *Bickel*, *supra* note 264. The doctrinal interpretation is much more expansive. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966).

490. *Cf.* U.S. CONST. art. I, § 10 (prohibiting states from entering into foreign affairs, coining money, and taxing exports); *id.* art. VI, cl. 2 (laws of the United States are supreme law of the land).

unquestionably something disruptive about imposing constitutional requirements on day-to-day administrative action, and something arguably inefficient about it, depending on one's definition of efficiency.

On the other hand, there is a reason why the methods by which state agencies adjudicate state claims are subject to constitutional scrutiny. This reason is the unique potential for oppression when the force of the state is brought to bear on specific individuals. Administrative decisions, being both particularized and obscure, are rarely subject to extralegal constraints, and it therefore seems dangerous to leave them within the exclusive control of a single instrumentality of government.[491]

B. The Federal Standard for Minimum Procedures

The final objection to a federal standard for the minimum procedures principle is the apparent lack of guidelines for formulating such a standard. One possible response is that courts should develop guidelines in the process of deciding cases, and that the way to provide content for the federal standard is to begin applying it. But the Supreme Court could reasonably demand a bit more assurance of success before starting down that path.

In fact, several sources of guidelines have emerged in the twelve troubled years of due process adjudication since *Roth.* A decision that no liberty or property interest is present can be viewed, and is in fact more comprehensible, as a decision that the administrator's action is properly discretionary under a federal standard. Decisions under the state standard can also be translated into federal equivalents whenever the Court bases its interpretation on the administrator's actual behavior rather than on the literal language of the prevailing legislation.[492] Finally, courts can adopt guidelines from other areas, such as state and federal administrative law, that present analogous considerations.

More general guidance in formulating criteria can be obtained from the underlying values that due process serves. The basic value is to avoid the oppressiveness of particularized decisionmaking. This suggests the rough but significant idea that particular action should be allowed only insofar as it is necessary to carry out the state's established goal. A more specific value is that of accurate decisionmaking, which the Court insists should be the exclusive focus of the clause. Ac-

491. As a practical matter, legislators will not grant administrators unfettered discretion in most cases, but a doctrine that makes the scope of due process protection depend totally on state law would permit the possibility. To the extent that this possibility were realized, the essential purpose of procedural protection would be frustrated.

492. *See supra* note 471 (reliance of court on exteut of administrative discretion in deciding whether to apply due process requirements).

ceptance of this view leads to the conclusion that when procedural requirements are imposed, the state must articulate its decisionmaking criteria. Consequently, procedures should be required for all governmental actions where specified decisionmaking criteria seem appropriate.[493]

Accurate decisionmaking has its obvious limits,[494] but one of its strengths is that it makes a federal standard easier to articulate. In determining whether criteria are required, rather than deciding directly whether procedural protection is required, one can call on several general notions of our legal system, especially notions of administrative law. Virtually any legal characterization of an agency decision is relevant to the question of criteria, whereas only procedural determinations shed light on the inherent value of procedures.

Relying on our general legal culture, and particularly on administrative law, to generate guidelines for the minimum-procedures principle has the ancillary benefit of reducing the danger that due process doctrine will disrupt state agencies. It would mean that in many cases the federal standard, like the state standard, would derive its content from state law. The difference is that the federal standard would look to state law in general, rather than to the law that applies to the particular governmental action under review. As with many legal rules, the federal standard demands no more than an acceptable level of behavior; but it defines acceptability itself, rather than leaving that definition to the participants. Thus, control is imposed upon the wayward and the vicious, while preserving the primacy of democratic decisionmaking with respect to overarching social policy considerations.

The guidelines for a federal standard will be discussed below. None of them has been explicitly employed as a federal due process standard. An attempt to do so would require a more extensive undertaking than can be accomplished here, and might well be impossible absent an on-going interaction with the fact patterns of litigated cases. For present purposes, it is sufficient to note that a federally established standard is a possibility and to suggest the general considerations for that standard, without providing bright-line rules. What is important is that such a standard can be derived from familiar, reasonably well-accepted legal principles. This means that a federal standard for the minimum-procedures principle cannot be rejected as being impossible

493. Recognition of the inherent or dignitary values of procedure would yield an entirely different guideline. The emphasis would be on identifying those actions that seem to demand procedure itself, rather than those that seem to demand criteria. Thus, a sensitive but necessarily subjective decision, like placing a child for adoption or pardoning a convicted felon, would be subject to procedural constraints under the dignitary standard, but not under the accurate decisionmaking standard.

494. *See supra* notes 285-92 and accompanying text.

to define. The most controversial policy choice of due process analysis—the extent to which state administrative action should be subject to federally imposed procedural requirements—must be confronted.

The potential guidelines for a federal standard governing the minimum-procedures principle are best explored by considering the various forms of administrative adjudication. For present purposes, four main types of adjudication can be identified: the distribution of benefits, the hiring and firing of government employees, the distribution of burdens, and the regulation of individuals in government-run institutions. There are other types of action, of course, but these categories cover the major ones and take account of the cases decided to date.

1. Government Benefits

As used here, the term benefits refers to any positive consequence distributed by the government: social welfare, licenses, grants, and contracts.[495] In constitutional litigation regarding government benefits, the principal issue has been whether the benefit can be terminated without a prior or subsequent administrative hearing. Of course, the recipient always has the due process right to go to court after a benefit has been terminated to complain that the termination did not comply with applicable law. The recipient may have no cause of action if the benefit is legitimately discretionary, but he or she at least has the right to go to court and obtain that determination.[496]

As far as administrative hearings are concerned, the Supreme Court has looked to the positive law regarding termination of the benefit to determine whether minimum procedures should be imposed. A federal standard would focus instead on the nature of the benefit itself, as determined by the manner in which we expect that benefit to be distributed. Our common understanding is that certain benefits, such as welfare payments or certificates of building occupancy, are distributed according to specific rules. Generally, enabling statutes will spec-

495. Employment could be treated as a benefit, but it is somewhat different, given the impact of the jobholder on government operations. It will therefore be considered separately. *See infra* notes 512-20 and accompanying text.

496. Perhaps court review could be precluded if the administrative agency established its own subsequent hearing procedures, and if those hoary restrictions on the scope of agency adjudication, *see* Crowell v. Benson, 285 U.S. 22 (1932); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); *supra* notes 22-23 and accompanying text, are no longer the law. But absent such a procedure, any prohibition of subsequent judicial review would violate due process. Moreover, under no circumstances could the employee be precluded from bringing suit in federal court on the ground that the agency's hearing procedures were improper. Even the decisions that grant agencies the widest scope in making initial determinations make it clear that some source of judicial review over the agency must be available. Estep v. United States, 327 U.S. 114, 122-25 (1946); Bowles v. Willingham, 321 U.S. 503, 516 (1944); *see* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 180, at 338-44 (H. Hart dialogue).

ify these rules. Benefit termination would thus require minimum procedures, based on the civil trial archetype, to determine whether applicable rules had been obeyed. A legislative or administrative declaration that the distribution of these benefits was entirely discretionary would generally be void as an effort to circumvent the effect of procedural protection, because no state agency really distributes welfare without some eligibility rules that constrain its agents' discretion. A declaration to the contrary would be an effort to avoid due process scrutiny, not an effort to dispense with rules.

A federal standard, therefore, would require the agency to articulate its rules for the distribution of nondiscretionary benefits, and then grant the individual procedural protection to insure that benefit termination occurred in accordance with those rules. Benefits whose distribution was legitimately discretionary, on the other hand, could be terminated without such procedures. Of course, the state might adopt rules to govern the distribution of discretionary benefits, in which case the rule-obedience principle would require the agency to obey its own rules in individual determinations.[497]

The distinction between those benefits that are legitimately discretionary and those that must be constrained by procedural protections and predefined rules has not been established by the case law. Indeed, this is the area where the various permutations of the right-privilege and liberty-property analyses have taken their greatest conceptual toll. The distinction is a common one at the administrative policy level, however, where it is based on the notion of competitive as opposed to eligibility-based distributions.[498]

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497. Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), is sometimes treated as establishing the rule that an unsuccessful bidder for a government contract cannot challenge the result of a preestablished bidding process because it has no legal right to the bid, and thus no standing. *See* Edelman v. Federal Hous. Admin., 382 F.2d 594, 597 (2d Cir. 1967); Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964). But *Lukens* was actually a challenge to a general rule governing the bidding process (specifically, the Secretary of Labor's definition of "locality" for minimum wage requirements as two large sections of the nation). It was not a challenge to the rejection of a particular bid on particularized grounds. The opinion certainly contains broad language, *see* 310 U.S. at 125-28, but most of it is dictum, and the opinion dates from the period when the Supreme Court was uniquely deferential toward administrative agencies. When rejection of individual bidders has been at issue, most courts have simply refused to follow *Lukens*, often citing the intervening passage of the APA. *See* B.K. Instrument, Inc. v. United States, 715 F.2d 713, 720-21 (2d Cir. 1983) (citing cases). Thus, despite the language of *Lukens*, the holdings in the government bidding cases are consistent with the notion that once the government has established rules for the particularized distribution of a benefit, procedural protections are available to ensure that those rules have been followed.

498. *See, e.g.*, S. BREYER & R. STEWART, *supra* note 191, at 359-60; Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 79 (1983); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367, 389-90 (1968); Shapiro, *supra* note 191, at 1500-12. The APA exempts from judicial review "agency action . . . committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1982). Commentators generally regard this as

When the benefit is awarded to a small number of "best" candidates, it is legitimately discretionary. A research grant, a government construction contract, or the placement of a child for adoption would be obvious examples. Decisions to grant such benefits, and thus to terminate them, require complex, subtle determinations that do not lend themselves to predefined rules.[499] As the benefit becomes the sort that is distributed to a group of "eligible" persons, such as social welfare benefits or public education, minimum procedures and predefined rules enforceable by those procedures become almost universal in administrative law, and a federal standard would hold that they are constitutionally required.

Determining eligibility, as opposed to excellence, is not the sort of task that would be hampered by established criteria. Requiring the articulation of rules would not limit the government's power to terminate all benefits after a fixed period of time, to limit the benefit to certain groups of people, or to adopt whatever other general rules it wishes. It would not even limit the government's power to use rules—such as first come, first served, or a lottery—that might be regarded as irrational on other grounds. It would only prohibit the government from not establishing rules at all and declaring the matter to be entirely within the discretion of its administrators. That one general prohibition circumvents the protection that minimum procedures would provide.

Licenses are the most difficult case, because they are awarded on the basis of both excellence and eligibility. Even here, however, most cases can be resolved fairly readily. Licenses involving allocation of a scarce resource, such as a broadcast frequency, or a consciously limited one, such as airline routes, may properly be granted and terminated on

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applying only to certain types of decisions, not to any decision. *See* B. SCHWARTZ, ADMINISTRATIVE LAW 451-54 (1976); Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); Saferstein, *supra. Contra* Davis, *Administrative Arbitrariness Is Not Always Reviewable*, 51 MINN. L. REV. 643 (1967).

499. The cases generally have imposed procedural requirements for eligibility-based benefits, *see, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976) (Social Security benefits); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare beuefits); Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926) (admission to practice before court); B.K. Instrument, Inc. v. United States, 715 F.2d 713 (2d Cir. 1983) (lowest bid in defined bidding procedure); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) (same), but not for excelleuce-based benefits, *see, e.g.*, Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981) (pardon by sovereign); Board of Curators v. Horowitz, 435 U.S. 78 (1978) (favorable academic evaluation in medical school); Apter v. Richardson, 510 F.2d 351 (7th Cir. 1975) (dictum) (research grant); Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969) (renewal of research grant). The notion was well expressed in *Kletschka*:

> Each [research grant] decision involves a determination by the agency [on] the relative merits of the many proposed research projects for which funds are sought. . . . We do not believe it would be practical for the district court to review such a decision, resting on complex and subtle evaluation of the technical merit of plaintiff's project and the professional competence of plaintiff himself.

Id. at 443.

a discretionary basis.[500] As the number of available licenses increases, the argument for discretion weakens, until it disappears altogether for pure eligibility licensing. The horse trainer's license in *Barry v. Barchi*[501] falls clearly into this latter category, since its purpose was to set standards for entry into an occupation. Attorneys are equivalent to horse trainers, at least in this context, so that cases involving bar admission should also be regarded as a nondiscretionary determination, requiring minimum procedures.[502] *Leis v. Flynt*[503] would thus have been decided differently under a federal standard. Permission for an out-of-state lawyer to appear in the state courts is in no sense a scarce resource or a determination based on excellence. It is a question of eligibility, and the federal standard would hold that it is simply impermissible to characterize such a routine matter of judicial administration as discretionary.[504]

Once the availability of a hearing to terminate benefits is determined, the next question is whether the hearing must precede the revocation. Since this question involves the timing of due process rights, the proper consideration is individual interest. License revocations seem likely to disrupt one's business and impose a stigma; termination of social welfare benefits can create temporary but severe hardships on the needy persons who receive them; and exclusion from public education deprives the student of unique learning time. Consequently, prior hearings would be required in all these cases. In contrast, purely monetary losses, such as the termination of a corporation's tax exemption or an economically secure person's benefit, would require hearings only after the government has acted.[505]

In addition to terminating benefits, administrative agencies also make adjudicative decisions—that is, decisions with respect to specified individuals—when they reject applications for these benefits. The question of minimum procedures naturally arises with respect to these

500. The federal government has, however, adopted rules that must be followed in both cases, *see, e.g.*, 47 U.S.C. §§ 307-310 (1982) (broadcast licenses); 49 U.S.C. § 1371 (1976 & Supp. V 1981) (airline routes), and a truly discretionary standard in the former would probably violate the first amendment.

501. 443 U.S. 55 (1979).

502. *See* Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

503. 439 U.S. 438 (1979).

504. Strictly speaking, *Flynt* was not an administrative case since the only branch of government involved was the judiciary. It is, however, a case about judicial administration and thus raises issues analogous to administrative cases. When a judge interprets the law rather than runs the court, the concept of discretion obviously means something quite distinct.

505. *See* Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931) (Brandeis, J.) ("Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."); *see also* Bowles v. Willingham, 321 U.S. 503, 519-21 (1944).

decisions as well. While cases on this issue are less common, it is established doctrine that people have the right to a judicial trial on the claim that an agency improperly rejected their application—that is, rejected it in violation of established rules.[506] The applicant's right to review exists regardless of the merits of his claim.[507]

The open issue is whether an agency must provide some sort of procedural protection before rejecting the application. Since the question is one of timing, inquiry should again focus on the individual's interest. There seems to be a substantial difference between the termination of an existing benefit and the denial of an application for a new one, since the former has disruptive and stigmatizing effects that the latter lacks.[508] In addition, the administrative and financial burden imposed is relevant in this context. Given the obvious expense of providing hearings before any application is rejected, it seems reasonable to require hearings only after the determination is made.

The applicant's interest in receiving deserved benefits without resort to litigation or administrative appeal is not a negligible one, however, and some protection seems desirable. Commentators have devoted considerable attention in recent years to a statement-of-reasons requirement.[509] Even when a hearing is not required, they argue, the government should state the reasons for its action. With respect to discretionary determinations, the notion is problematic. As previously noted, the most serious costs of due process protection are the constraints it places on administrative judgment and the consequent distortions it produces in the state's substantive policies.[510] If the decision is deemed discretionary, by whatever standard, these constraints and distortions should not be imposed. With respect to nondiscretionary determinations regarding applications for benefits, the statement-of-

506. *See, e.g.*, Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) (adjudicating claim that bid on government contract was rejected in violation of bidding procedure, and holding that bidder would be entitled to relief); Neddo v. Housing Auth., 335 F. Supp. 1397 (E.D. Wis. 1971) (granting claim that denial of application for public housing requires hearing); Sumpter v. White Plains Hous. Auth., 29 N.Y.2d 420, 278 N.E.2d 892, 328 N.Y.S.2d 649 (adjudicating claim that denial of application for public housing requires hearing; denying claim on merits and imposing requirement that applicant was entitled to statement of reasons), *cert. denied*, 406 U.S. 928 (1972).

507. Again, an agency might be able to preclude judicial review of its decision, but only by providing the equivalent to civil trial.

508. Judge Friendly has observed that "there is a human difference between losing what one has and not getting what one wants." Friendly, *supra* note 446, at 1296. The question is whether that human difference translates into a legal difference, and if so, by what rationale.

509. *See, e.g.*, Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841, 864-70 (1976); Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. L. REV. 297 (1982); Pincoffs, *supra* note 271; Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976). *Contra* Simon, *supra* note 5, at 158-63.

510. *See supra* text accompanying notes 438-39.

reasons requirement is more appealing, since it imposes substantially lower constraints and costs on the agency than the hearing requirement does.

The reasons requirement need not be regarded as a novel departure from due process precedent. In reality, it represents an adaptation of the trial model's element of notice. "Notice" has two different, although related meanings, both derived from criminal indictments and civil complaints. First, it can mean notice of the time and place of a hearing. Second, and more important, it can refer to an announcement by the opposing party of the basis on which that party will proceed. In private litigation, notice thus allows preparation and increases procedural efficiency. When the government initiates the action, as in criminal prosecutions, it serves the additional function of constraining the government's exercise of power; it compels the state to limit itself to the grounds specified in the notice and to subject itself to challenges on those grounds.[511]

A requirement that the government give reasons for the denial of benefit applications is simply a requirement that the government give notice before taking any action, rather than simply giving notice prior to a hearing. While such notice is not particularly useful for aiding preparation, it does constrain the arbitrary exercise of power. Of course, it does not guarantee that administrative action will be taken for legitimate reasons, but it does mean that administrators must be able to articulate in advance some respectable explanation for that action. In addition, it informs the applicant that the action is nondiscretionary and that there may be a basis for complaint if the stated reason is incorrect. In other words, the interest of an individual applicant is not sufficient to shift the hearing to the time of the application's denial, but it does seem sufficient to shift the notice element to that time. This is what a reasons requirement would achieve.

511. The stated functions of a reasons requirement are those that are linked to the central purpose of the due process clause: to prevent oppression of individuals in their one-to-one interactions with state agents. From a policy perspective, a reasons statement serves additional purposes. *See* S. SUGARMAN, SCHOOL SORTING AND DISCLOSURES 4-1 to 4-2 (National Institute of Education 1982). In addition to the control-of-abnse function, Professor Sugarman discusses the purpose of information in terms of our economic values of individual choice (the marketplace), our political values of government by consent, and the individual's ability to take advantage of available entitlements.

In the benefit-denial context, the individual's ability to take advantage of entitlements is particularly important. Perhaps the person really is eligible, but filled out the form incorrectly; perhaps he or she is ineligible, but could become eligible by modifying some behavior. By not giving reasons, the government risks erroneous denials and denies itself an instrument for altering individual behavior to achieve a social policy objective. But since this failure affects the grantee group generally, rather than being directed against a particular individual, it lies beyond the constitutional ambit of due process and belongs to the realm of social policy, as Professor Sugarman suggests.

2. Public Employment

In cases involving the termination of public employment, the Supreme Court has focused, its liberty-property discourse notwithstanding, on whether the government must demonstrate cause or whether the employment was discretionary, that is, could be terminated at will. This is certainly a relevant consideration; the difficulty in the cases is that the Court has looked to the state's positive law to determine whether cause must be shown. A federal standard would base this determination on the nature of the position, not on a declaration of the legislature or the agency.

In most cases that determination can be made on the basis of three criteria: whether the position is discretionary or ministerial, permanent or temporary, or unusually sensitive. At least two of these criteria are quite familiar in our general legal system. First, policy positions are generally discretionary, while ministerial positions are not. This distinction originated in the common law[512] and it is part of our constitutional doctrine as a result of *Elrod v. Burns*,[513] which held that only policy-level employees can be dismissed on the basis of their political views. Extending the distinction to due process cases might generate a

512. In tort law, for example, judicial decisions and statutory schemes regularly distinguish between ministerial and policy-level state employees in determining whether an action will lie against the state. The Federal Tort Claims Act makes this distinction explicitly, 28 U.S.C. § 2680 (1982) (excluding claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty" from coverage under the Act), as does the *Restatement*, RESTATEMENT (SECOND) OF TORTS § 895(D)(3) (1979); *id.* comment d ("[P]ublic officers are given an immunity from liability in tort when they engage in exercising a 'discretionary function.' "). For common law cases on this point, see Hansen v. City of Saint Paul, 298 Minn. 205, 214 N.W.2d 346 (1974); Jones v. State, 33 N.Y.2d 275, 407 N.E.2d 236, 352 N.Y.S.2d 169 (1973).

An analogous, but less well-developed area of law, involves the judicial implication of a discharge-for-cause provision into employment contracts that, on their face, are terminable at will. Many of the leading decisions specify that such a term will be implied only for ministerial-level employees. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980).

513. 427 U.S. 347, 367 (1976); *see also* Branti v. Finkel, 445 U.S. 507, 518 (1980); Gilbert v. Johnson, 419 F. Supp. 859 (N.D. Ga. 1976); *cf.* Kletschka v. Driver, 411 F.2d 436, 442-43 (2d Cir. 1969) (transfer); Coyne v. Boyett, 490 F. Supp. 292, 295 (S.D.N.Y. 1980) (same). The National Labor Relations Act makes essentially the same distinction in excluding supervisors from its coverage. 29 U.S.C. § 152(3) (1976); *see* NLRB v. Yeshiva Univ., 444 U.S. 672 (1980); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). Moreover, the effect of this labor law distinction is equivalent to the constitutional cases, since unions generally demand and obtain the guarantee that their members may only be dismissed for cause. *See* UNITED STATES BUREAU OF LABOR STATISTICS, MAJOR COLLECTIVE BARGAINING AGREEMENTS, BULL. NO. 1425-14, at 26 (1972). In fact, the guarantee is so universal that arbitrators generally imply its existence, even when it is not explicitly provided in the collective bargaining agreement. *See, e.g.*, Maclin Co., 52 Lab. Arb. (BNA) 805 (1969) (Koven, Arb.); New Hotel Showboat, Inc., 48 Lab. Arb. (BNA) 240 (1967) (Jones, Arb.); Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1501-02 (1959); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 748-49 (1973).

few close decisions, but it would also capture a reality that current doctrine tends to obscure.

Second, probationary positions can be discretionary, even at the ministerial level, while permanent positions are not. This has been the effective holding of a number of federal due process cases, including *Board of Regents v. Roth*[514] and *Perry v. Sindermann*.[515] What the Court perceived as creating a property interest in Sindermann's position, but not in Roth's, was nothing more than the nonprobationary nature of the latter.

The rationale for these two criteria is fairly standard. Policy-level employees carry out the will of elected or appointed officials, and constraints on their dismissal would conflict with that role. The problem is not so much that officials should be able to choose whomever they want for a given position; appointments are often subject to outside approval in American government,[516] and unexplained dismissals appear to be a rare occurrence. Rather, the problem is that an employee at will is one to whom one can give orders that must be obeyed, regardless of their rationale, with dismissal serving as a sanction for refusal. Job security would disrupt this hierarchical relationship.[517] But ministerial employees, as we understand that term, are supposed to meet an independent standard, whether that standard is professional, as it is for a lawyer; technical, as it is for a horse trainer; or purely functional, as it is for a clerical worker. This independent standard provides a basis for objective evaluation. More important, it suggests that the ministerial employee's role is to carry out a predefined function, rather than to implement a political official's policies.

With respect to the second criterion, the concept of a probationary appointment—necessarily at the ministerial level—results from there being more qualified applicants than available positions. The government is entitled to select the one who would function best, and this selection may involve subtle, subjective judgments that should be left to the decisionmaker's discretion. Once the employee has permanent status, however, he or she is expected to meet a defined level of behavior,

514. 408 U.S. 564 (1972).

515. 408 U.S. 593 (1972) (due process protection would be required before dismissal if college professor could establish that he had "tenure" under informal tenure system). Since the informal system did not specify any procedural requirements, or even a "cause" standard for dismissal, its only effect was to establish that certain faculty members were nonprobationary. *Cf. Roth*, 408 U.S. at 566-67 (respondents employed for one year; four such year-to-year appointments required for tenure). For other cases holding that probationary employees are not entitled to due process protection, see Codd v. Velger, 429 U.S. 624 (1977); Ryan v. Aurora City Bd. of Educ., 540 F.2d 222 (6th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); Buhr v. Buffalo Pub. School Dist. No. 38, 509 F.2d 1196 (8th Cir. 1974).

516. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 2.

517. *See* A. BICKEL, *supra* note 255, at 166-69, 186-87.

rather than excelling on a competitive basis. The determination that the employee has failed to achieve that level must generally be based on articulated criteria.

The third criterion—the sensitivity of the position—is directed toward the nature of the government activity that the employee is carrying out, rather than to the employee's status or position. Certain functions, such as national security or public safety, may be sufficiently sensitive so as to warrant a more discretionary regime. Such was the Supreme Court's implication in *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*,[518] although the Court based its decision on the proprietary nature of the government facility involved.[519] The point is that the ministerial and nonprobationary criteria should probably operate only as rebuttable presumptions that the government could overcome by showing that a firing was essential to the sensitive activity the employee was carrying out. But since the sensitivity claim will always be advanced, it must be carefully evaluated. The *Cafeteria Workers* opinion, for example, grants the government too much, since there was no indication that the dismissed employee, a cook, had any connection with the facility's national security function.[520]

In the final analysis, there is an undeniable tension between the government's overarching power, which demands the imposition of procedural protection, and its role as employer, which demands flexibility and dispatch. The value of fairness to public employees is counterbalanced by the value of efficiency in government operations, which involves fairness to the public-at-large.

Nonetheless, this sensitive function criterion should be narrowly construed. While the Constitution should not be read to sacrifice practicality on an altar of principle, the marginal increase in procedural requirements that a federal standard would entail hardly represents a prescription for disaster. In fact, we do not really know whether the unconstrained power to dismiss employees is more or less efficient than the imposition of procedural protections. It does bring with it the pos-

518. 367 U.S. 886 (1961).

519. *Id.* at 896. The case does contain some references to national security, *see id.* at 887 (facility in question engaged in "development of weapons systems of a highly classified nature"), although the Court did not rely on this consideration explicitly. Certainly, the Court's proprietary notion sweeps too broadly, at least in view of subsequent decisions. *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (municipal utility subject to due process restraint); Perry v. Sindermann, 408 U.S. 593 (1972) (state college subject to due process restraint). Several commentators have argued for a variant of this notion, proposing that due process restraints apply to the government when it functions as a monopolist. *See* Terrel, *supra* note 5, at 901-11; Williams, *supra* note 5, at 23-24.

520. It also treats the plaintiff's interest in her job rather off-handedly. *Cafeteria Workers*, 367 U.S. at 898-99. Perhaps it is difficult for someone whose job security is guaranteed by the Constitution to empathize with a cook.

sibility of rapid, decisive action and a decrease in administrative costs, as well as avoiding the limitations on the state's substantive program that procedural protections can involve. But it also creates the danger that errors will be made; that competent employees will be dismissed erroneously; that their replacements will be inexperienced and expensive to train; that the remaining employees will become demoralized, risk averse or job-security obsessed; and that new employees will be more difficult to attract—especially at government salaries. And in the final analysis, it should be recognized that a federal standard would not trench on the state's basic power to control its employees. The state could still establish any standard for dismissal it desired and exercise significant control over the dismissal procedure. All a federal standard would require is that the state articulate standards for ministerial, nonprobationary employees in nonsensitive areas, and provide minimum procedures to ensure that a dismissal conformed with those standards.

The implications of the opposite position—that public employment should not be governed by due process—are presented by Judge Posner's dissenting opinion in *Vail v. Board of Education*.[521] In firing an athletic coach, apparently in violation of a two-year employment commitment, a school breached its employment contract with the coach. This is no different, Judge Posner argues, from the breach of any other contract, such as a contract with "a supplier of paper clips."[522] To advance this idea, Judge Posner struggled with the minor awkwardness of a direct Supreme Court holding that a permanent, informal employment contract is entitled to due process protection,[523] but he avoided the major awkwardness that due process concerns the state qua state. If the state is permitted to act as a private contracting party—which is the case when it buys paper clips—then no process is due. But that is precisely the issue in public employment cases: should the state be treated as a private party, or should it be treated as the state? It is in the difference between the state and private parties, and between human beings and paper clips, that the argument for procedural protection for government employees resides.

As with benefit terminations,[524] the timing of the hearing would be

521. 706 F.2d 1435, 1449 (7th Cir. 1983) (Posner, J., dissenting), *aff'd by an equally divided Court*, 104 S. Ct. 2144 (1984) (per curiam).

522. *Id.* at 1449 (Posner, J., dissenting).

523. *See* Perry v. Sindermann, 408 U.S. 593, 599-603 (1972). Judge Posner's argument is that *Sindermann* involved tenure, a lifelong right that is more akin to property than a contract. *Vail*, 706 F.2d at 1451 (Posner, J., dissenting) (discussing distinction between property and contract). But all Sindermann had was a contract, and an implied contract at that. *Sindermann*, 408 U.S. at 599-600. Some professors may have tenure through programs so definitive and well established that their tenured position can be called property, but that hardly seems like a proper characterization of Sindermann's rights.

524. *See supra* text following note 504.

determined by focusing on the interest of the individual. While an employee can be fully compensated for loss of salary by a subsequent award of money damages, the injury to reputation, the loss of work experience, and the disruption of career advancement lie beyond the power of a court to remedy in full. The need for a prior hearing will depend on the relative strength of these considerations. This, in turn, would seem to depend on the nature of the employee's position.

3. Negative Consequences or Burdens

The third category of administrative actions is the distribution of negative consequences or burdens. The criminal law belongs in this category, of course, but its due process aspects are fully developed outside the administrative context. Most regulatory decisions can also be placed in this category in the sense that they impose limits or obligations on those to whom they apply but economic regulation has not been an important source of modern due process cases.[525]

A much less important type of administratively imposed burden, but one that has figured prominently in recent due process cases, is the circulation of an "undesirables" list. The cases have involved the listing of active shoplifters, excessive drinkers, labor racketeers, and political subversives.[526] According to the state standard, such a list could be circulated without any due process protection provided that there is a statute or regulation stating that an agency may, in its unfettered discretion, list people as undesirables.

525. Often, regulation occurs by means of general rules for which due process limits are not relevant. *See supra* notes 328-55 and accompanying text; *see, e.g.*, Texaco, Inc. v. Short, 454 U.S. 516 (1982) (sustaining state regulation of mineral interests); United States v. Florida E. Coast Ry., 410 U.S. 224 (1973) (sustaining regulation of rental rates for railway cars throughout railroad industry); North Am. Co. v. SEC, 327 U.S. 686 (1946) (sustaining general prohibition against ownership of more than one public utility system). Those decisions that are adjudicatory in nature frequently involve traditional forms of property, where the applicability of due process in general, and the trial model in particular, is not open to doubt. *See, e.g.*, Crowell v. Benson, 285 U.S. 22 (1932) (compensation award); ICC v. Louisville & N. R.R., 227 U.S. 88 (1913) (rate-setting). Many adjudications, moreover, are governed by statutory schemes, such as the Administrative Procedure Act, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.), that provide at least as much procedural protection as the Constitution. Finally, since many regulations are purely economic in effect, the boundaries of governmental power, whether generally or specifically applied, are often tested under the just compensation clause rather than the due process clause. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (challenge on just compensation grounds to law requiring landlords to permit installation of cable television wires in residential buildings); City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974) (challenge on just compensation grounds to 20% tax on gross receipts of parking lots); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (challenge on just compensation grounds to prohibition of mining activities).

526. Paul v. Davis, 424 U.S. 693 (1976) (active shoplifters); Wisconsin v. Constantincau, 400 U.S. 433 (1971) (excessive drinkers); Jenkins v. McKeithen, 395 U.S. 411 (1969) (labor racketeers); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954) (general undesirables); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (political subversives).

The federal standard would prohibit statutes or regulations of this nature. Listing a person as an undesirable is a governmental action that lies somewhere between indictment and conviction. Like both, it is accusatory, and it shares with the latter the claim that the governmental announcement represents the actual state of affairs.[527] Our general view is that such action should not be discretionary. It should be based—indeed it virtually asserts that it is based—on a clear finding that the person listed possesses the announced characteristic. An administrator's intuitive sense that the person belongs on the list is not an acceptable basis for action of this nature.[528] Thus, according to the federal standard, the equivalent of a civil trial should be required before the government lists a person as an undesirable. The argument could even be made for a criminal trial equivalent under certain circumstances.[529]

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527. This characterization distinguishes the promulgation of an undesirables list from the publicity given to a person in the course of investigatory hearings. Such investigations may proceed without procedural protections for the persons being investigated. *See, e.g.*, Hannah v. Larche, 363 U.S. 420 (1960) (investigation of voting registrars); Uphaus v. Wyman, 360 U.S. 72 (1959) (investigation of suspected subversives). Of course, there may be a point at which the investigation becomes nothing more than a subterfuge for the announcement of names in conjunction with an undesirable trait. That is a determination that the courts must make in each case.

528. In several cases, courts have held that a person may not be debarred from bidding on government contracts without due process, *see, e.g.*, Old Dominion Dairy Prods., Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980); Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964), despite the view that there is no "right" to do business with the government, *see, e.g.*, Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). The reason is that the debarment cases really involve undesirables lists, not denials of benefits. The awarding of a contract is the sort of benefit that can legitimately be made discretionary, since the government may be seeking excellence—the most desirable bid. (Of course, if bidding rules have been established, they should be followed. *See, e.g.*, B.K. Instrument, Inc. v. United States, 715 F.2d 713 (2d Cir. 1983)). But debarment from all contracting goes much further than mere denial of a contract. First, it denies the contractor a valuable opportunity to compete for future contracts. *Cf.* Eisenberg, *supra* note 401, at 649-51 (value of opportunity). Such opportunities, unlike the contract itself, are not inherently limited in number and are properly based on eligibility, rather than excellence, criteria. Second, debarment identifies the contractor as having committed a wrongful act of some sort, and thus imposes a stigma equivalent to that involved in the other undesirables list cases.

529. A case that has not arisen, but is worth considering, is a "desirables" list, such as a list of recommended products or government-approved physicians. According to a federal standard, the due process analysis of such a list would depend upon the implications of the government's description and the nature of the listing function. A list that simply recommended names—for example, knowledgeable experts in a certain field—could be promulgated within an administrative agency's unfettered discretion. As the list moved closer to a certificate of competence—for example, all doctors in a given area whose services are recommended—the need for preexisting standards and procedural protection would become more insistent. Only the equivalent of civil trial would be required, even for definitive recommendations based on competence, since exclusion from a desirables list would not create a stigma of the magnitude involved in criminal conviction.

Another difference between lists of desirables and undesirables would involve the timing of the hearing. For an undesirables list, the hearing would be required before the list was promulgated. The injury to individual interest is one that cannot be fully compensated by a money judgment. Nor would retraction compensate the person, since most of the damage is done when

Another type of burden that administrative agencies impose is the institutionalization of the individual. The prototypical institutionalization in nonadministrative law is imprisonment, and some general criteria for required minimum procedures can be derived from that example. Our basic sense of fairness, codified in numerous constitutional provisions, is that imprisonment requires an elaborate set of procedural protections, including criminal trial. The federal standard would require that institutionalizations equivalent to prison, in that they are designed to punish a person for a blameworthy act, be subject to precisely the same protections. This is certainly the law at present.[530] A general rule declaring that dangerous individuals could be placed in administrative incarceration for six months at the discretion of the FBI is obviously unconstitutional, although it does not violate the state standard for minimum procedures.

A somewhat different case is presented by institutionalizations designed to help the individual (such as compulsory education or civil commitment) and institutionalizations designed to protect society from some blameless action of the individual (such as a quarantine). The absence of blame and punishment would seem to eliminate the need for criminal trial. But at the same time, institutionalization itself seems the sort of governmental act that requires predefined rules and a process at least equivalent to civil trial. The notion that administrators could institutionalize individuals on discretionary grounds offends our sense of fairness. Again, current due process doctrine has abandoned the state standard in such cases and recognized the need for procedural protection. In fact, the Supreme Court has required something more than a civil trial in the case of civil commitment,[531] which can be explained on the ground that commitment bears a closer resemblance to imprisonment than other institutionalizations such as public education.[532]

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the list is promulgated, thereby linking the person's name with the undesirable characteristic. For a desirables list, a subsequent hearing would be the most that would be required. Omission from such a list would usually result only in lost opportunities, the sort of injury that money can make good, and a subsequent amendment would essentially repair the damage from that time forward.

530. *See, e.g., In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967); *cf.* O'Connor v. Donaldson, 422 U.S. 563 (1975) (state may not incarcerate nondangerous person in mental hospital without providing treatment).

531. *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979) (clear and convincing evidence required for commitment); *cf.* Vitek v. Jones, 445 U.S. 480, 496-97 (1980) (transfer of prisoner from prison to mental hospital requires appointment of advocate for indigent prisoner, in addition to standard civil-trial type protections); *id.* at 497-500 (Powell, J., concurring) (advocate need not be an attorney). Of the administrative due process cases decided since 1970, *Vitek* is notable for requiring something beyond civil-trial requirements. Again, commitment to a mental institution was the crucial factor.

532. Placement in public schools generally does not require procedural protection because it is achieved by means of general rules. *See, e.g.*, CAL. EDUC. CODE § 48200 (West 1978). How-

As for timing, it seems obvious that the hearing must come before institutionalization. The only exception would be when the purpose of institutionalizing the individual was to remove an immediate, demonstrable danger. In those cases, the best examples being communicable disease or violent behavior indicating mental instability, it seems fair for the government to act first since delay would frustrate the purpose of the institutionalization. The government would be obligated, however, to hold a subsequent hearing as soon as possible after the institutionalization.

4. The Operation of Institutions

The last category of administrative action is the regulation of the individual in government-run institutions such as prisons, mental hospitals, and schools. The general purpose of the institution is a matter of substantive law, and thus largely beyond the reach of procedural restraints. But in the course of running such an institution, state officials necessarily make numerous adjudicative decisions—that is, decisions singling out specific individuals. As previously noted, these decisions do not fit comfortably into the familiar model of adjudications, which are conceived of as discrete, time-delimited events.[533]

The source of the difference, of course, is that noninstitutionalized citizens are infrequently subjected to governmental determinations, while those in institutions are under constant governmental supervision. Thus, placement in an institution—a discrete event—can be treated as part of the general category of state-imposed burdens, whereas intra-institutional decisions must necessarily be analyzed in different terms. Nonetheless, decisions made by institutional supervisors regarding particular individuals are, in fact, adjudications, and any comprehensive theory of procedural due process must address them.

Institutional cases have been a major source of Supreme Court procedural due process decisions during the last decade.[534] The Court's approach has been largely based on the state standard. Again,

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ever, if a child alleged that he or she was outside the defined category and thus should not be required to attend, a trial or its equivalent would be required on the matter. Such hearings are rare because application of most school attendance statutes is relatively straightforward. If the state's rule were that all children whose home environment was not providing an adequate education must attend, application of the statute would be anything but straightforward and hearings would be held all the time.

533. *See supra* notes 468-69 and accompanying text.

534. *See* Olim v. Wakinekona, 103 S. Ct. 1741 (1983) (prison); Hewitt v. Helms, 459 U.S. 460 (1983) (prison); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981) (prison); O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980) (nursing home); Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1 (1979) (prison); Board of Curators v. Horowitz, 435 U.S. 78 (1978) (medical school); Ingraham v. Wright, 430 U.S. 651 (1977) (public school); Montanye v. Haymes, 427 U.S. 236 (1976) (prison); Meachum v. Fano, 427 U.S. 215 (1976)

a federal standard would define the types of decisions that could legitimately be considered discretionary, and those that would require predefined criteria and minimum procedures.

Unfortunately, a federal standard is somewhat more difficult to articulate in this area, due to the novelty of applying due process standards to institutional management, and the resulting absence of common law precedents. But nothing suggests that the standard could not be developed. The same unfamiliarity with the institutional context made adaptation of the trial model to school suspensions more difficult, but the Court solved the problem with one of its genuine doctrinal successes: the consultative process of *Goss v. Lopez*.[535] In actuality, the Court has also been working toward limiting discretion in the interpretation of inherently ambiguous state laws. Its decisions, plus some suppositions about our general notions of fairness, are sufficient to outline at least the rough contours of a federal standard for intra-institutional adjudications.

First, institutional administrators must be afforded discretion in their day-to-day activities. The creation of a government-run institution implies social approval of the on-going supervision of individual citizens by state agents. To require that every supervisory action follow predefined rules and be accompanied by procedural protection would do more than make the institution impossible to operate. It would be a rejection of the basic concept. Prison officials must have discretion to determine when prisoners may congregate and when they must disperse; school teachers must be able to decide when students should answer a question or fail a test.[536]

At the other extreme, granting supervisors absolute discretion would violate most people's notion of fair treatment. This is certainly true with respect to schools and mental institutions, where arbitrary action could turn the experience into the equivalent of punishment for

(prison); Goss v. Lopez, 419 U.S. 565 (1975) (public school); Wolff v. McDonnell, 418 U.S. 539 (1974) (prison).

535. 419 U.S. 565 (1975); *see supra* notes 468-69 and accompanying text. For an effort to adapt traditional due process notions—such as notice, a hearing and an impartial decisionmaker—to the institutional context, see Rubin, *supra* note 466.

536. The Court has certainly been sensitive to this consideration. *See, e.g.*, Board of Curators v. Horowitz, 435 U.S. 78, 90 (1978) ("We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship."); Meachum v. Fano, 427 U.S. 215, 228-29 (1976) ("Holding that [prison transfers] are within the reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges."); Wolff v. McDonnell, 418 U.S. 539, 566 (1974) ("We should not be too ready to exercise oversight and put aside the judgment of prison administrators. . . . The operation of a correctional institute is at best an extraordinarily difficult undertaking.").

the individuals involved.[537] In recent years, this prohibition on unfettered discretion has been extended to prisons. The post-*Roth* Court's clearest adoption of an absolute federal standard came in two prison cases, *Vitek v. Jones*[538] and *Hewitt v. Helms*.[539] Moreover, several opinions have sought to limit supervisory discretion by declaring that constitutional rights in general do not stop at the "prison door" or the "schoolhouse gate."[540] The metaphor suggests that the Supreme Court itself has felt compelled to enter what it previously regarded as a closed system, to impose constraints on the way institutional officials treat their charges.

Between these outer limits on discretion and constraint, one can discern certain characteristic situations that seem to demand procedural protection. One is the imposition of unusual discipline. Teachers tell schoolchildren to be quiet every day, and prison officials lock the cell doors every night. Such discipline as this falls into the category of routine action, of necessity left to official discretion. It is less common for a child to be sent out of the room or a prisoner to be denied visiting privileges, although these are still fairly routine. But it is the extreme, unusual sanction that carries with it the greatest potential for oppression and for arbitrary or vindictive behavior. Solitary confinement in the prison context, the issue in *Hewitt v. Helms*,[541] and corporal punishment in school, the issue in *Ingraham v. Wright*,[542] are two of the most notable examples.

Of course, both methods of discipline have become unusual only relatively recently. This means that the criterion suggested here would not have required procedural protection in the harsher era when solitary confinement was standard prison practice and schoolchildren were struck as regularly as churchbells. Perhaps that seems unsatisfactory,

537. *See* Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir. 1974) (mental institution), *vacated and remanded on other grounds*, 422 U.S. 563 (1975); Rubin, *supra* note 466, at 81-85. In holding that corporal punishment of school children was not "punishment" in the eighth amendment sense, the Court emphasized the constraints on official discretion that existed in that context. Justice Powell observed that "[t]he openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner." Ingraham v. Wright, 430 U.S. 651, 670 (1977).

538. 445 U.S. 480 (1980).

539. 459 U.S. 460 (1983).

540. *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); Jackson v. Bishop, 404 F.2d 571, 576 (8th Cir. 1968) (Blackmun, J.) ("[A] prisoner of the state . . . continues to be protected by the due process and equal protection clauses which follow him through the prison doors."); *cf.* Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country.").

541. 459 U.S. 460 (1983).

542. 430 U.S. 651 (1977).

but it is closely linked to the notion of procedural due process as a limitation of the unfair treatment of specified individuals, and not of the unfairness of general rules. As a method of discipline becomes less routine, the unfairness of its arbitrary or vindictive use increases, even though the gross amount of physical suffering that it causes will decline. In addition, focusing on the atypicality of the decision—the natural result of a due process standard that is guided by government behavior—avoids the practical difficulties of imposing procedural requirements on day-to-day activities. A standard based on individual interest, which would direct attention to the harshness of the punishment regardless of its generality, is significantly less workable in the institutional context.

Another characteristic situation that seems to demand procedural protection is the determination of the individual's basic status as a member of the institution. Examples from recent prison cases include transfer to another prison,[543] transfer to a mental institution,[544] cancellation of good time credit,[545] and denial of parole.[546] The major public school example is suspension or expulsion.[547] These determinations bear a structural resemblance to discrete adjudicative events in a noninstitutional setting. Indeed, the denial of parole inside a prison seems functionally indistinguishable from the revocation of parole

543. *See, e.g.*, Olim v. Wakinekona, 103 S. Ct. 1741 (1983); Meachum v. Fano, 427 U.S. 215 (1976).

544. *See, e.g.*, Vitek v. Jones, 445 U.S. 480 (1980).

545. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974).

546. *See, e.g.*, Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1 (1979); *cf.* Morrissey v. Brewer, 408 U.S. 471 (1972) (revocation of parole). Pardons, as opposed to parole, probation, or good time credit, are special cases. *See* Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981). The pardon authority is traditionally viewed as purely discretionary, at least when it is exercised by the chief of state. *See* Schick v. Reed, 419 U.S. 256 (1974); Hoffa v. Saxbe, 378 F. Supp. 1221, 1225-33 (D.D.C. 1974). *Dumschat* made passing reference to the point. 452 U.S. at 464. Thus, pardon decisions would be exempt from procedural requirements under a federal standard, just as day-to-day decisions by institutional administrators would be.

Modern government being what it is, however, pardon decisions are often made, at least in the first instance, by an administrative agency. *See Dumschat*, 452 U.S. at 460 (summarizing CONN. GEN. STAT. §§ 18-26 (1981)); CAL. PENAL CODE § 4801 (West 1982). Under this circumstance, the propriety of unconstrained discretion becomes questionable. Pardon determinations, which involve exit, are precisely the type of decisions that should be subject to criteria, and administrative agencies—unlike the chief of state—are precisely the type of governmental action that should be so subject. According to this view, *Dumschat* was wrongly decided. The Connecticut Board of Pardons may not have articulated any "objective and defined criteria," 452 U.S. at 467 (Brennan, J., concurring), but it seems virtually inconceivable that it had no criteria at all. The federal standard would require that it articulate these criteria. This would leave the executive's traditional power to grant pardons at will intact, but prevent delegation of that power in its unalloyed form. The delegation could still be made, but the agency would be required to articulate its criteria, and to grant hearings when significant questions under those criteria arose.

547. *See, e.g.*, Board of Curators v. Horowitz, 435 U.S. 78 (1978); Goss v. Lopez, 419 U.S. 565 (1975).

outside it, although the Supreme Court has decided the two cases differently.[548] Moreover, the content of basic status determinations in an institution is closely related to the content of the initial entry and exit determinations that ordinarily require procedural protection. Finally, these status determinations overlap substantially with the unusual discipline situations, since they are often used as severe disciplinary measures.

The argument is sometimes made that basic status determinations require subtle, intuitive judgments in institutional settings, and should thus be left to official discretion.[549] This can be supported by the fact that sentencing, which initially determines the length of a person's status as prisoner, is legitimately discretionary under current due process doctrine.[550] But the rules that confine official discretion in institutional status determinations can leave room for subtlety, as can the minimum procedures imposed. Our developing sense of government institutions as a regime of rules, rather than as specialized preserves secure from public scrutiny, suggests that these determinations should be based on some sort of articulated criteria. The potential for oppression in uncontrolled determinations of the individual's status seems unacceptably high. Nor are the practical problems of requiring procedures particularly persuasive, since status determinations are generally outside the flow of day-to-day activities. Sentencing is admittedly an important analogy for administrative determinations, but its discretionary aspect developed in contrast to the extreme formality of criminal trial. Now that a model as flexible as the consultative process[551] is available, the argument for unfettered discretion seems considerably weaker. In fact, discretionary sentencing has been heavily criticized as out of step with modern legal attitudes,[552] and criminal codes are now being extensively

548. Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 9-11 (1979), held that there is no due process right to procedural protections in parole determinations (although Nebraska had created such a right by statute). Morrissey v. Brewer, 408 U.S. 471, 484 (1972), held that the due process clause requires an evidentiary hearing before parole can be revoked. The distinction is essentially little more than the observation that the parolee already has "liberty," but the prisoner does not. *See Greenholtz*, 442 U.S. at 9. That does not even pass muster under an expectation theory, since prisoners expect parole if they follow the rules, while parolees cannot justifiably expect continued freedom if they break them. The real distinction is probably that the initial parole determination is inextricably tied to prison administration, while the revocation decision is not. Nonetheless, a focus on the nature of the government's action with respect to the individual suggests that the two situations should not be distinguished.

549. *See* cases cited *supra* note 536.

550. *See, e.g.*, United States v. Hernandez-Salazar, 471 F.2d 1209 (9th Cir. 1972); S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 210-30, 1047-1126 (4th ed. 1983); Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

551. *See supra* notes 456-59 and accompanying text.

552. *See* ABA ADVISORY COMMITTEE ON SENTENCING AND REVIEW, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1968); 2 K. DAVIS, *supra* note 286, at 171; Coffee, *The Future of Sentencing Re-*

revised to place limits on the judge's sentencing authority.[553]

Both extraordinary discipline and basic status determinations are qualitatively different from the routine action of supervisory officials. This difference illustrates the general principle for determining when minimum procedures are required in institutional contexts. But the concept of nonroutine decisions is probably too abstract to provide much guidance without some of the detail suggested above. Moreover, future cases may suggest other situations that call for minimum procedures. A fully articulated federal standard can be developed only if the courts begin using such a standard in deciding cases. The point here is simply to suggest that this standard can be developed fairly readily and without major dislocations in the present configuration of due process precedents.

CONCLUSION

In the course of articulating his jurisprudential views, Professor Dworkin has invoked a concept he calls "Hercules."[554] Dworkin's Hercules is a marvelous being: a superhuman judge who can look through the tangled surface of the law into its very essence, perceive the principles that operate there, and apply them directly to the case at hand. Hercules has no need to develop legal doctrine incrementally, altering what seems outmoded while retaining the remainder. He can dispense with a confused or inadequate set of precedents entirely, and fashion a new doctrine based on the underlying verities of our legal system.

The problem with *Board of Regents v. Roth*, *Mathews v. Eldridge*, and their successors is that the majority that decided them imagined itself to be Hercules. It set out to clean the Augean stables of procedural due process and to construct a new doctrine in the clear space that remained, based on a clean, logical elaboration of principle. Not being Hercules, the Court found itself mired in a mess, one that was substantially worse than had existed previously. It has tried to dig itself out, with decisions such as *Vitek v. Jones* and *Hewitt v. Helms*; but as *Olim v. Wakinekona* indicates, it keeps slipping back.

This Article suggests that a more modest approach to the problem of administrative due process would have yielded more appealing results. The problem the Court faced, after all, was a limited one: how to

form: Emerging Legal Issues in the Individualization of Justice, 73 MICH. L. REV. 1362 (1975); Frankel, *supra* note 550; Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733 (1980).

553. *See, e.g.*, CAL. PENAL CODE § 1170 (West Supp. 1984); ILL. REV. STAT. ch. 38, §§ 1005-1005.6.3 (1982). *See generally* Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978).

554. *See* Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083 (1975).

adapt procedural due process doctrine to the new situations presented by the welfare rights movement and related social trends. Prior law contained numerous ideas and analogies that the Court could have used in this effort. From the loyalty-security cases it could have derived the notion that due process is essentially concerned with the procedural fairness of governmental action, and that fairness is defined by the principles of rule obedience and minimum procedures. From administrative law, the area in which virtually all the recent cases have arisen, it could have adopted the general-specific distinction between rulemaking and adjudication as the required limit on the scope of the due process clause. From common law due process doctrine it could have derived the use of archetypes as a means of giving content to the minimum-procedures principle. It could also have derived the role of individual interest in establishing the time at which these minimum procedures are required. And from all these areas, it could have developed independent federal guidelines to determine which state actions require the protection of minimum procedures. As this Article suggests, these approaches would produce a more coherent doctrine of procedural due process in administrative law.