CRACKS IN "THE NEW PROPERTY": ADJUDICATIVE DUE PROCESS IN THE ADMINISTRATIVE STATE*

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AN INTRODUCTORY REVIEW

Between 1900 and 1970, two major changes occurred in public sector protection of constitutional rights. The first of these[1] was the gradual erosion and, finally, the complete extinction of the "right-privilege" distinction which allowed government to set aside the personal liberties of those with whom it contracted. The effect of the distinction was to excuse government from having to provide any justification for forbidding, under threat of ineligibility or termination, those with whom it contracted (or those to whom it extended any kind of license or assistance) from pursuing what would otherwise be protected by the Bill of Rights or by the fourteenth amendment.[2] Its best known early appearance dates from 1892, in the well-remembered dictum of Mr. Justice Holmes (then speaking for the Massachusetts Supreme Judicial Court) dismissing the claim of a person who had been fired for having violated a police department regulation forbidding even off-the-job political comment:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few

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* This article was prepared in connection with a lecture delivered by the author on October 28, 1976, for the Frank Irvine Lecture Series at the Cornell Law School.

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[1] The second major change is developed in sections I and II *infra*.

[2] For further discussions of the erosion of the right-privilege distinction, see R. O'NEIL, THE PRICE OF DEPENDENCY: CIVIL LIBERTIES IN THE WELFARE STATE (1970); Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector*, 39 WASH. L. REV. 4 (1964); Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99 (1916); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-49 (1968); Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J.89; Note, *The Effect of Tenure on Public School Teachers' Substantive Constitutional and Procedural Due Process Rights*, 38 MO. L. REV. 279, 281-87 (1973); Comment, *Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees*, 19 U.C.L.A. L. REV. 1052 (1972).

> employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.[3]

Virtually its last significant appearance came in 1950, in *Bailey v. Richardson* (sustaining the summary dismissal of a civil servant from a nonsensitive post on grounds of suspected disloyalty), where the District of Columbia Circuit stated: "The First Amendment guarantees free speech and assembly, but it does not guarantee Government employ."[4]

The doctrine has, of course, been utterly repudiated by the Supreme Court. It is now clear that the *manner* in which government trammels an otherwise sheltered constitutional right is wholly inconclusive of whether the affected party may nevertheless be able to state a claim. A running digest of that repudiation is provided in a closing case of the Supreme Court's most recent term, *Elrod v. Burns*, prohibiting a state from dismissing even patronage employees on grounds of political party affiliation:

> *Keyishian*[5] and *Perry*,[6] however, not only serve to establish a

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[3] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892).

[4] 182 F.2d 46, 59 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 918 (1951). *But see* Barsky v. Board of Regents, 347 U.S. 442 (1954).

[5] Keyishian v. Board of Regents, 385 U.S. 589 (1967). The case disapproved dictum from an earlier case, Adler v. Board of Educ., 342 U.S. 485 (1952), in which the Court had sustained special restrictions on employment of Communist Party members (or past members) as public school teachers, partly on the basis of the right-privilege distinction. In disapproving that portion of the *Adler* opinion, Mr. Justice Brennan noted in *Keyishian*:

> But constitutional doctrine which has emerged since that decision has rejected its major premise. That premise was that public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. . . . [T]hat theory was expressly rejected in a series of decisions following *Adler*.

385 U.S. at 605-06.

[6] Perry v. Sindermann, 408 U.S. 593 (1972). The Court in *Perry* reaffirmed its holding in *Keyishian* that nonrenewal of an untenured public school teacher's one-year contract may not be predicated on his exercise of first and fourteenth amendment rights, despite the lack of a contractual or tenure "right" to re-employment. *Id.* at 597-98. In referring to the Court's holding in *Keyishian*, Mr. Justice Stewart commented:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.

Id. at 597.

> presumptive prohibition on infringement [of first amendment freedoms of political association], but also serve to dispose of one suggested by petitioners' reference to this Court's affirmance by an equally divided court in *Bailey v. Richardson* . . . . That is the notion that because there is no right to a Government benefit, such as public employment, the benefit may be denied for any reason. *Perry*, however, emphasized that "[f]or at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." . . . *Perry* and *Keyishian* properly recognize one such impermissible reason: the denial of a public benefit may not be used by the Government for the purpose of creating an incentive enabling it to achieve what it may not command directly. " '[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' " . . . "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." . . . " '[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege." ' "[7]

The exorcism of the right-privilege demon was unquestionably important, but by no means was it a constitutional revolution. What it meant was simply that a person foreclosed from some connection with government on grounds he might deem constitutionally doubtful would not be barred from testing his claim solely on the basis that government is literally exempt from the Bill of Rights in the administration of any public enterprise. At its apogee, that basis had been the very foundation of the doctrine. Among the clearest expressions was the following statement of the Tennessee Supreme Court, altogether disallowing the first amendment/ fourteenth amendment arguments of Arthur Garfield Hays and Clarence Darrow in the appeal of the famous Scopes Monkey Trial: "In dealing with its own employees engaged upon its own work, the State is *not hampered by* the limitations of . . . the Four-

[7] 96 S. Ct. 2673, 2683-84 (1976) (citing, in addition to *Keyishian* and *Perry*, Bailey v. Richardson, 341 U.S. 918 (1951), *aff'g by an equally divided court*, 182 F.2d 46 (D.C. Cir. 1950); and quoting *Perry*, 408 U.S. at 597; *Keyishian*, 385 U.S. at 605-06 (*Keyishian* in turn quoting the court below, 345 F.2d 236, 239 (2d Cir. 1965)); Sherbert v. Verner, 374 U.S. 398, 404 (1963); and Sugarman v. Dougall, 413 U.S. 634, 644 (1973) (*Sugarman* in turn quoting Graham v. Richardson, 403 U.S. 365, 374 (1971)) (footnote omitted).

teenth Amendment to the Constitution of the United States."[8] Even in full context, it was clear that the phrase "not hampered by" meant what it said quite literally: not bound and not limited by—not subject *at all* to the fourteenth amendment. And, in essence, all that repudiation of the right-privilege distinction accomplished was to note that the fourteenth amendment in fact does not provide for any such exemption. In other words, contrary to the presuppositions of the right-privilege distinction, that amendment does not provide:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law, *except when the State acts as owner, proprietor, employer, contractor, or otherwise in a manner more characteristic of the private sector than of government* . . . .

On the other hand, there were a number of things that elimination of the right-privilege distinction did not do. Most obvious was that it did nothing to guarantee that the plaintiff, now free to litigate his constitutional objection to the government's action, would necessarily prevail on the merits. The plaintiff able to show that he would otherwise have been treated more favorably by government, but for his refusal (or breach) of some condition curtailing his freedom of action, would not by that showing alone be entitled to prevail. In many instances the government would be able to carry its burden of constitutional justification[9]—just as it so frequently succeeds in defending its more conventional criminal statutes, which themselves limit the various freedoms even of persons having no special connections with government at all.

Second, but less obvious, the elimination of the right-privilege distinction did not address itself to either of the following problems of public sector litigants: (*1*) the predicament of an individual foreclosed from some connection with government for a reason that, if true, is clearly unobjectionable under the Bill of Rights or the fourteenth amendment—but a reason of questionable validity in light of the dubious or casual circumstances under which it was determined; and (*2*) the predicament of an individual foreclosed

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[8] Scopes v. State, 154 Tenn. 105, 112, 289 S.W. 363, 365 (1927) (emphasis added).

[9] *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (dictum), *applied in* Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass.), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971). *See also* Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); Cole v. Richardson, 405 U.S. 676 (1972); Wyman v. James, 400 U.S. 309 (1971); Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 U.C.L.A. L. REV. 751, 755-72 (1969).

from some connection with government for a reason that he is unable to ascertain at all.

Examples of the first sort of difficulty might involve a public school teacher dropped from his job ostensibly for having embezzled school funds, or an applicant for welfare assistance turned down due to his high income, when in each instance the factual determination was made by an official who had "heard about" the "fact" (and who, incidentally, had recently had a violent personal quarrel with the teacher or applicant). Examples of the second might involve an applicant for a soft-drink franchise in Yosemite National Park receiving a form notice saying only "application denied," or a welfare department worker receiving a thirty-day notice of termination, each being proper and sufficient under the applicable state or federal law, or (if there were one) under the agreement that the individual had signed upon entering into the relationship.

To be sure, in some of these situations the government may itself be sufficiently concerned about the risk of error to provide for appellate procedures less prone to error. In such cases the adversely affected party may take advantage of those additional procedures or, failing that, sue to secure specific compliance with whatever procedures the agency has itself seen fit to provide.[10] But that, by definition, is to say only that government may be held to do what it undertakes to do, leaving government free to reconsider the matter and free to arrange to do less thereafter.

And, of course, if a reason has been given which is constitutionally improper on its face, judicial relief will be at once forthcoming pursuant to whatever clause of the Constitution it is that assures the individual of the particular liberty (or standard of equal protection) the reason is said to violate.[11] But there is no clause construed (or likely to be construed) to shelter embezzlement, or to entitle the well-to-do to welfare payments. Consequently, neither of those decisions is subject to attack on the ground that an unconstitutional condition has been imposed or that equal protection has been denied.

Nevertheless, it is entirely possible in any of these cases that constitutionally impermissible reasons for the adverse governmental action may in fact have played a nontrivial role (*e.g.*, the Yosem-

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[10] *E.g.*, Yellin v. United States, 374 U.S. 109 (1963); Vitarelli v. Seaton, 359 U.S. 535 (1959).

[11] *See* Elrod v. Burns (and cases cited therein), 96 S. Ct. 2673 (1976).

ite franchise applicant may have been rejected because of his race or his political beliefs). Insofar as the individual succeeds in discovering that fact and in convincing an appropriate state[12] or federal court of the matter, doubtless he becomes entitled to relief—although such relief may mean only that the previous decision is to be set aside and the decisionmaker is to consider the matter again, this time without reference to the tainting element.[13]

In general, however, these cases present a larger problem. When a litigant is adversely affected entirely as a predictable consequence of procedural grossness and not as a consequence of ulterior design by government (or by its agents) to utilize constitutionally impermissible substantive standards, he is in serious difficulty. The essence of his complaint is to the felt unfairness of procedural

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[12] *E.g.*, Williams v. Horvath, 16 Cal. 3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976) (holding federal civil rights statute, 42 U.S.C. § 1983 (1970), available to plaintiffs in state courts).

[13] *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 573 n.12 (1972); Mabey v. Reagan, 537 F.2d 1036, 1045 (9th Cir. 1976); Skehan v. Board of Trustees, 501 F.2d 31, 40 (3d Cir. 1974), *vacated and remanded on other grounds*, 421 U.S. 983 (1975); Anapol v. University of Del., 412 F. Supp. 675, 679-80 (D. Del. 1976).

There is a special problem that arises in cases where plaintiff has succeeded in establishing that constitutionally impermissible considerations were taken into account in the determination of his ineligibility (or termination), and where the basic remedy is to require that the matter be reconsidered free of these impermissible considerations. The problem runs into two kinds of an administrative "Catch 22." First, in the course of the judicial proceeding during which plaintiff is able to show that such impermissible considerations were taken into account, the defendant administrator may attempt to "confess and avoid," *i.e.*, admit that this was so, but avoid the usual legal consequence by testifying that even without consideration of the improper material, the decision would have been the same. This technique was successfully used in Franklin v. Atkins, 409 F. Supp. 439 (D. Colo. 1976), *appeal docketed,* No. 76-1256 (10th Cir. Apr. 7, 1976), and was apparently approved by the Supreme Court in Mount Healthy City School Dist. v. Doyle, 97 S. Ct. 568 (1977). *But see* Anapol v. University of Del., 412 F. Supp. 675, 679 n.15 (D. Del. 1976). Second, even assuming the court will require the matter to be reconsidered (as it should at least in the absence of a finding that the use of improper material was harmless beyond a reasonable doubt), the decision on reconsideration will usually be made by the very person who acted in violation of plaintiff's constitutional rights in the first instance and who is, correspondingly, more likely than someone else to want to vindicate his prior decision. Yet, plaintiff may be unable to insist successfully that the matter be reconsidered by someone with no prior involvement in the dispute. *See* Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976).

One proposed resolution of this dilemma is to hold that if the parties already shown to have acted against plaintiff on improper grounds are unable or unwilling to have the matter reconsidered by a suitably detached third party, then their subsequent decision (assuming they reach the same result as in their first tainted decision) must, at a minimum, be supported "by clear and convincing evidence," even supposing that no such standard would be applicable had they not acted improperly in the first instance. The argument is presented in Brief for the American Association of University Professors as Amicus Curiae at 20-21, Franklin v. Atkins, No. 75-1256 (10th Cir., filed Apr. 7, 1976).

grossness itself—that it builds in such a large margin of probable mistake as itself to be intolerable in a humane society. The difficulty of his position appears to be, however, that *unlike* his freedoms of speech, association, assembly, religion, and petition (sheltered by the first amendment), and *unlike* his entitlement to privacy (sheltered by the fourth and fifth amendments), he cannot anchor a claim to freedom from procedural grossness per se in any clause of the Constitution.

He cannot rely upon the equal protection clause, for we are here dealing with situations in which all similarly situated persons are uniformly subject to the same degree of procedural grossness; none is favored over any other in the common exposure to the risk of decisional mistake. Nor can one say (as doubtless is one's first impulse) that the individual's entitlement to "due" process is obviously anchored in the very clauses sheltering due process. The difficulty is that such reasoning (ironically akin to the reasoning that created the right-privilege distinction) must imagine a clause *which in fact is not there*. It imagines that the fourteenth amendment (or the same phrase in the fifth amendment) provides something like this:

> No State shall . . . deprive any person of life, liberty, property, or of due process of law, without due process of law . . . .

Alternatively, it imagines that the next clause of the fourteenth amendment provides something like this:

> [N]or [shall any State] deny to any person within its jurisdiction either due process of law or the equal protection of the laws.

To be sure, some courts *have* imagined such a clause, and, interestingly, no one appeared to notice at the time. In 1961, a full thirteen years before the Supreme Court examined the subject,[14] the Fifth Circuit said the following in the course of ordering the reinstatement of state-college students dropped by ex parte decision of their college president:

> It is not enough to say, as did the district court in the present case, "The right to attend a public college or university is not in and of itself a constitutional right." . . . [I]t nonetheless remains true that the State cannot condition the granting of even a privilege upon the renunciation of the *constitutional right* to pro-

[14] *See* Goss v. Lopez, 419 U.S. 565 (1975).

> cedural due process.[15]

There surely was in this explanation an ambiguous use of the word "right" in the italicized phrase. The matter slurred over was the source of such a free standing entitlement. Or, rather, the difficulty was in failing to note that there evidently is no such free standing entitlement. As the fifth and fourteenth amendments read in fact, due process is not itself a protected entitlement. Rather, the sole protected interests are "life, liberty, [and] property." Due process stands in relation to these not as an equivalent constitutionally established entitlement, but only as a condition to be observed insofar as the state may move to imperil one of the named substantive interests. That is:

> No State shall deprive any person of life, liberty, or property, without due process of law . . . .

Insofar as the state may seek to divest one of his life, some aspect of his liberty, or some modicum of his property, then it may yet be able to do so assuming that the condition of due process is met. But procedural due process appears never to be anything more than a kind of "constitutional condition." It is evidently not a free standing human interest.

The Fifth Circuit, then, erred in the very march of events that overturned the right-privilege distinction.[16] It correctly read the fourteenth amendment not to exempt the state when the state acts in some merely proprietary way,[17] and then went heedlessly further to read into the fourteenth amendment a substantive (phantom?) constitutional right to procedural due process.

I

ENTER STAGE LEFT: THE "NEW PROPERTY"

"One of the most important developments in the United States during the past decade," noted Charles Reich in 1964,

> has been the emergence of government as a major source of wealth. Government is a gigantic syphon. It draws in revenue

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[15] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 156 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (emphasis added).

[16] *But see* discussion in Part V *infra*.

[17] It was a disputed question in the case whether the activities in which the students were believed to have engaged—*i.e.*, off-campus "civil rights demonstrations"—were protected by the first amendment.

> and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale.[18]

In his very bright, upbeat article, Professor Reich went forward to describe the way in which personal security had been rendered insecure in this "new feudalism."[19] As though taking a leaf from John Locke,[20] Reich first recalled that

> [t]he institution called property guards the troubled boundary between individual man and the state. It is not the only guardian; many other institutions, laws, and practices serve as well. But in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.[21]

The rightness of this view is scarcely contestable from the perspective of our own Constitution, enshrining as it does property as equal in importance with life and with liberty, of which no person shall be deprived without due process of law. The difficulty (as seen by Reich) was that the kind of old property (*e.g.*, land, chattels, certain intangibles, and choses in action) historically at the center of individual self-sufficiency had become displaced by insecure, conditional, and contingent connections with government. Professor Reich called it the "public interest state."[22] Others have called it the "welfare state," the "garrison state," and a variety of other things, but for our purpose it may most usefully be called the "Administrative State," simply to lend emphasis to Professor Reich's essential points. Public sector jobs, public sector licenses, public sector housing, public sector education, etc., pervade the country. The personal security of these connections with government has come to occupy in the lives of many individuals much the same position that the security of old property (land and chattels) previously held. Under the new feudalism, however, these connec-

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[18] Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964).

[19] *Id.* at 768-71. Actually the idea and the phrase itself were not entirely new. Three and one-half decades earlier, the redoubtable Roscoe Pound had offered a similar perspective on the nature of our changing corporate order. Pound, *The New Feudal System*, 19 KY. L.J. 1 (1930), *republished in* 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW 82 (Association of American Law Schools ed. 1938).

[20] *See, e.g.*, J. LOCKE, THE SECOND TREATISE OF GOVERNMENT § 131 (London 1690).

[21] Reich, *supra* note 18, at 733.

[22] *Id.* at 771.

tions with government are frankly no more secure than was the old property under the old feudalism—when no one "owned" property, but each held it under some contingent or conditional tenancy, perpetually insecure in regimes of manorial largess. In like fashion, in this era of the Administrative State

> it must be recognized that we are becoming a society based upon relationship and status [rather than upon individual ownership of property]—status deriving primarily from source of livelihood. Status is so closely linked to personality that destruction of one may well destroy the other. *Status must therefore be surrounded with the kind of safeguards once reserved for personality.*[23]

In brief, "status" as the "new property."

Although Charles Reich did not have such an example at hand, the very next year the Supreme Court itself provided oblique encouragement for the idea of using functional alikeness as a basis of maintaining constitutional standards. In *United States v. Seeger*,[24] the Court was confronted by an individual whose conscientious scruples against combatant training and service were conceded to be functionally indistinguishable from those of other persons exempt from such service under section 6(j) of the Universal Military Training and Service Act,[25] except that they were not rooted in the supposed dictates of a "Supreme Being," as seemingly required by the Act. Seeger's objections were religious (as distinct from political), albeit not conventionally theistic. Nonetheless, the Supreme Court concluded that "[a] sincere and meaningful belief which occupies in the life of its possessor a place *parallel to* that filled by the God of those admittedly qualifying for the exemption" would likewise obtain the statutory protection.[26] Indeed, the technique of functional substitution was even more familiar than this and not limited to interpretation of statutory law. For instance, the Court had reviewed cases arising under the fourteenth and fifteenth amendments involving private associations or corporations that had functionally displaced the services of state or local government, and the Court had concluded that under such circumstances the word "State" in each of those amendments

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[23] *Id.* at 785 (emphasis added).

[24] 380 U.S. 163 (1965).

[25] Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 612 (current version at 50 U.S.C. app. § 456(j) (Supp. V, 1975)).

[26] 380 U.S. at 176 (emphasis added). *See also* Welsh v. United States, 398 U.S. 333 (1970).

would be deemed to encompass such entities.[27]

How sensible (and persuasive), then, to note that the myriad connections of persons with government had, for them, come to occupy "a place parallel to that" historically associated with conventional private property: thus, the basis for identifying such status connections as the new property.

Charles Reich devoted but two pages of his seminal article to tentative suggestions regarding the procedural due process implications of the new property,[28] leaving a great deal still to be worked out. Nevertheless, the theory of the article seemed to be a promising step toward eliminating the last conceptual difficulty remaining after the repudiation of the right-privilege distinction. That difficulty, it will be recalled, was that while in cases such as *Dixon v. Alabama State Board of Education*[29] (the student expulsion case), one could sensibly talk of a substantive personal liberty of free speech, assembly, and association anchored in the first amendment and protected from state abridgment even when the state attempted that abridgment as public college proprietor, there still seemed to be no anchor to secure a free standing substantive entitlement to procedural due process. By applying Charles Reich's suggestion, however, the Fifth Circuit might have met this difficulty simply by identifying the "matriculation status" of the students as constituting a property right, not subject to deprivation without (procedural) due process of law. Thus, while procedural due process is not itself a right or entitlement of each person, but rather a constitutional condition precedent to the deprivation of life, liberty, or property, the status each student had as a student-in-good-standing could itself have been said to be a kind of property, which in turn would have enabled the court to disapprove the instant form of procedural grossness as being inconsistent with due process of law.

II

THE NEW PROPERTY APPLIED: *Goldberg v. Kelly* AND THE PROCEDURAL DUE PROCESS REVOLUTION

"The constitutional issue to be decided," said Mr. Justice

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[27] *E.g.*, Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946). *But see* Hudgens v. NLRB, 424 U.S. 507 (1976); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

[28] Reich, *supra* note 18, at 783-85.

[29] 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

Brennan at the outset of *Goldberg v. Kelly*, "is the narrow one whether the Due Process Clause requires that the [welfare] recipient be afforded an evidentiary hearing *before* the termination of benefits."[30] He went on to note: "Appellant [the Social Services Commissioner] does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory *entitlement* for persons qualified to receive them."[31] Furthermore, an accompanying footnote quoted elaborately from Charles Reich's article-sequel to *The New Property*,[32] and the immediately following footnote adverted favorably to the Fifth Circuit decision in *Dixon*. Thus, the logic of status-in-the-public-sector-as-property was seemingly approved, and the gap that had appeared to remain even after the demise of the right-privilege distinction was seemingly closed. Indeed, while there were three dissents in *Goldberg* respecting the *fullness* of the procedure that government would be required to observe before terminating an allegedly ineligible welfare recipient, no one (not even the government itself, as Mr. Justice Brennan observed) dissented from the proposition that the due process clause was applicable to the case.

With *Goldberg*, there came almost at once an accompaniment extending requirements of procedural due process to debtors,[33] automobile drivers,[34] prisoners,[35] parolees,[36] employees,[37] students,[38] and others. The plethora of cases was comprehensively reviewed in 1975 by Professor Rendleman,[39] and the documentation was packed into 798 footnotes! Ostensibly, the basic situation was settled; to sum it up:

(*1*) Where a public sector litigant believed that any substantive restriction required of him by government was constitutionally foreclosed, he might file suit to test the sufficiency of the government's justification for that identifiable restriction. The fact that the challenged restriction might be applicable only insofar as the litigant

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[30] 397 U.S. 254, 260 (1970) (emphasis in original).

[31] *Id.* at 261-62. (emphasis added).

[32] *Id.* at 262 n.8 (quoting from Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965)).

[33] Fuentes v. Shevin, 407 U.S. 67 (1972). *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

[34] Bell v. Burson, 402 U.S. 535 (1971).

[35] Wolff v. McDonnell, 418 U.S. 539 (1974).

[36] Morrissey v. Brewer, 408 U.S. 471 (1972).

[37] Perry v. Sindermann, 408 U.S. 593 (1972).

[38] Goss v. Lopez, 419 U.S. 565 (1975).

[39] Rendlemen, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531 (1975).

sought to enter into some advantageous relationship with government (or only insofar as he wished to maintain some pre-existing advantageous relationship) did not forclose his suit or in any way lessen the burden of government to offer suitable justification for the restriction.

(2) Where a public sector litigant believed that he was disadvantaged by the grossness of procedures that government employed (and not that the substantive conditions required of him were themselves necessarily constitutionally doubtful), he might file suit to test the constitutional adequacy of those procedures insofar as they were used to place in jeopardy an identifiable status-relationship already existing between himself and government.

(3) In each instance, of course, the government might still prevail on the merits precisely because its suggested justification was adequate to the particular situation for which it was offered, whether or not the justification might fail in other situations.[40] In neither instance, on the other hand, was government exempt from the burden of justification.

III

ENTER, STAGE RIGHT: CRACKS IN THE NEW PROPERTY— FROM *Board of Regents v. Roth* THROUGH *Bishop v. Wood*

In 1972, Mr. Justice Stewart opened his opinion for the Court in *Board of Regents v. Roth*[41] with much greater attention to the syntax of the fourteenth amendment than the Fifth Circuit had earlier observed in *Dixon*. Far from positing a free standing substantive entitlement of each person to fair governmental process per se, Justice Stewart duly noted that the clause attaches a constitutional condition only to *certain* acts of government, *i.e.*, those placing in jeopardy the life, liberty, or property of the individual:

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. . . .
>
> The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved. It concluded that the

[40] *Compare* Mathews v. Eldridge, 424 U.S. 319 (1976), *with* Goldberg v. Kelly, 397 U.S. 254 (1970), *and* Elrod v. Burns, 96 S. Ct. 2673 (1976). *See also* 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 (1976).

[41] 408 U.S. 564 (1972).

> respondent's interest in re-employment at Wisconsin State University-Oshkosh outweighed the University's interest in denying him re-employment summarily. . . . Undeniably, the respondent's re-employment prospects were of major concern to him—concern that we surely cannot say was insignificant. And a weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.[42]

The obvious question was, therefore, what property did David Roth have that he could allege the Board of Regents had taken from him without having observed the constitutional requisite of due process (*i.e.*, notice and some sort of hearing)?[43]

Clearly David Roth had lost no property in the old property sense—the Regents had done nothing to take from him whatever realty, chattels, incorporeal hereditaments, or choses in action he held. What, then, of a form of the new property? Hadn't they taken from him his status as a university-assistant-professor-in-good-standing, the very kind of identifiable status-relationship already subsisting between himself and the state that, in *Goldberg*, the Court had unanimously found adequate?

Mr. Justice Stewart thought not. The difficulty was that the university was not accused of having ruptured a subsisting relationship without notice and hearing to establish adequate cause. Rather, it was accused only of failing to establish a new relationship identical to the previous one, which had already expired. To put it more strongly, the defendants' alleged wrongdoing was not in taking (without due process) something David Roth already had (his status as an assistant professor for one academic year), but was only in their refusal (without due process) to extend to him a new item

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[42] *Id.* at 569-71 (emphasis in original; footnotes and citations omitted).

[43] Admitting that the definition of the word "property" unquestionably presents a *federal* question—*i.e.*, that no state court interpretation of that word as it appears in the fourteenth amendment can be conclusive against the Supreme Court, a proposition scarcely novel since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816)—hardly advances the matter any more than it did in earlier decades when, for instance, the Supreme Court had to determine the point at which the petty larceny of a state's police power became such grand larceny as to amount to a "taking" of "property" requiring just compensation under the eminent domain clause. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 267-70.

of status identical to the one he had already consumed (a new one-year teaching contract). By what flights of legal fancy could David Roth conjure up a present legal entitlement, placed in jeopardy by the Regents' (in)action, that in *any* sense could be described as property?

Had there been a statute in force at the date of his original appointment, providing that his one-year appointment would be renewed *unless* certain eventualities occurred, presumably the statute would have vested in him an existing (albeit defeasible) future interest in that renewal. Thus, under these circumstances he would have held a current legal entitlement to continuing job security beyond the first year, subject to a variety of conditions subsequent, the alleged occurrence of any one of which would have required that procedural due process be observed insofar as the Regents might rely upon it to set aside his entitlement to a continuation of the subsisting relationship.[44] Even had there been no such specific statute, but nonetheless a more general one vesting in the Regents authority to establish rules and terms for professional employees, pursuant to which the Regents had themselves made like provision (*i.e.*, "renewal unless"), doubtless the same claim could have been made.[45] Even absent either of these circumstances, had the original letter of appointment signed by the university president contained such a provision, arguably the apparent authority of the president so to provide (and even supposing that the president had no such authority in fact) would have sufficed: the combination of agency, contract, promissory estoppel, and subsisting status-relationship might well have been deemed adequate to resolve the (federal) question of an existing (new) property in favor of David Roth.[46] There were no such sources of reference helpful to David Roth, however, and thus no way in which he could anchor his claim to some property.

To be sure, David Roth had been assured by institutional rule of *something* additional to one year of teaching, and one might readily describe the substance of that assurance as currently held property for purposes of the fourteenth amendment. The substan-

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[44] *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

[45] *See* Yellin v. United States, 374 U.S. 109 (1963); Vitarelli v. Seaton, 359 U.S. 535 (1959).

[46] Indeed, in the companion case to *Roth*, Perry v. Sindermann, 408 U.S. 593 (1972), the possibility of such ingredients (as inferred from the face of the complaint) resulted in remand of the case to determine whether they, or something sufficiently like them, were actually present.

tive assurance vested in him (as of the moment he accepted the offer of one year's appointment) was that he would receive notice of nonrenewal a certain number of weeks prior to the expiration of his appointment.[47] But again, even treating this procedural assurance as itself a substantive property belonging to David Roth, all that would be required was that insofar as the Regents might presume to deprive him of *that* property (*i.e.*, fail to provide him with the advance notice), they would be obliged to provide some (other) kind of due process, or, failing that, become liable to him for the taking.

As it happened, however, David Roth had received his notice of nonrenewal; thus, the last possible filament of intangible property was no longer in jeopardy. Even within the conceptual framework of the new property, David Roth must lose. Or so, at least, it seemed to Mr. Justice Stewart and to four other Justices of the Supreme Court.[48] Barely come of age just two years before in *Goldberg*, the concept of the new property had already developed a fissure in *Roth*.

A. *The Fissure Becomes a Crack: Arnett v. Kennedy*[49]

Unlike David Roth, Wayne Kennedy was discharged rather than nonrenewed. Mr. Kennedy was a *non*probationary civil servant who had already survived the hazards of probationary service, and there was no set term at the end of which he would again become (like other job applicants) a new property seeker rather than a new property holder. Even so, Wayne Kennedy's job-property was contingent, *i.e.*, subject to defeasance, albeit "only for such cause as [would] promote the efficiency of the service."[50] Implementing regulations of the Civil Service Commission provided that among such causes were "conduct prejudicial to the Government" and failure to "avoid any action . . . which might result in, or create the appearance of . . . [a]ffecting adversely the confidence of the public in the integrity of . . . the Government."[51]

Consistent with its abandonment of the right-privilege distinction, the Supreme Court readily recognized that these regulations were limited by the first amendment's substantive protection of

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[47] *See* 408 U.S. at 567.

[48] Justices Douglas, Marshall, and Brennan dissented. *Id.* at 579-92, 604. Mr. Justice Powell took no part in the Court's decision.

[49] 416 U.S. 134 (1974).

[50] 5 U.S.C. § 7501(a) (1970).

[51] *Quoted in* 416 U.S. at 142 (plurality opinion, Rehnquist, J.).

free speech. Consistent with the Court's own free speech cases, however, Wayne Kennedy had reason to understand that a public accusation of bribery leveled at a fellow civil servant, imputing a crime to that person, would certainly not be deemed within the protection of even robust political criticism—at least if the public accusation were not only false, but made by Wayne Kennedy "in reckless disregard of the actual facts,"[52] and made, moreover, about a person expected to continue to work with Wayne Kennedy from day to day.[53] In brief, nothing in the constitutionally safeguarded substantive rights of Mr. Kennedy would protect him from being deprived of his public employment under these circumstances, any more than a public school teacher dropped from his job for having embezzled school funds could somehow invoke a constitutional provision safeguarding a right to steal.

Exactly as in such a teacher's case, therefore, the line of defense Wayne Kennedy would be expected to take (insofar as he contested the charge of wrongdoing) was to insist in the first instance that his subsisting, legally created employment-status-property not be taken from him without due process of law. On the strength of *Goldberg*, and notwithstanding *Roth*, he appeared to have a powerful claim: (*1*) His entitlement to procedural due process seemed securely anchored in the status that government sought to take from him. And (2) the "due process" observed by government prior to discharging him had consisted only of an opportunity (which he spurned) to try to defend or to deny, in a truly extraordinary proceeding, what he was accused of having done. The proceeding was to be conducted and decided by the very person whom he had allegedly slandered, who had brought the complaint against him, and who would then decide whether the complaint was correct! From *Bonham's Case* (in 1610),[54] through the most recent decisions of the Supreme Court,[55] it appeared impossible to suppose that judgment by so involved a party could be viewed as due process of law.

Nevertheless, Wayne Kennedy was unable to convince the Court that the manner in which he had been fired deprived him of

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[52] *Id.* at 137.

[53] *Cf.* Pickering v. Board of Educ., 391 U.S. 563, 569-70 (1968) ("The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work . . . .").

[54] 77 Eng. Rep. 646 (K.B. 1610).

[55] Ward v. Village of Monroeville, 409 U.S. 57 (1972); Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

property without due process of law. By far the most interesting explanation of his failure was found in the opinion of Mr. Justice Rehnquist, writing for himself, Mr. Justice Stewart (who wrote the *Roth* opinion), and the Chief Justice. It was unnecessary to decide whether submitting Mr. Kennedy's fate to the judgment of his accuser was incompatible with due process of law, Mr. Justice Rehnquist opined, because a close examination of Mr. Kennedy's property interest made it clear that *nothing* was in fact being taken from him to which he had *any* legally recognizable entitlement. In short, he failed at step one.

The key sentence was this: "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet."[56] At first reading, this may seem shocking, and one is inclined to complain that it is circular in its reminiscence of the right-privilege distinction. This objection is encouraged by Mr. Justice Rehnquist's characterization of Wayne Kennedy's nonprobationary status as merely a "benefit"[57]—slipping back to the view of job-as-gratuity, take-it-or-leave-it, and waiver of constitutional rights if you do take it. A reimportation of the right-privilege distinction was suggested, too, by Justice Rehnquist's quotations from older cases on estoppel (*e.g.*, "It is an elementary rule of constitutional law that one may not 'retain the benefits of an Act while attacking the constitutionality of one of its important conditions.' ")[58]

That this would not suffice to answer Mr. Kennedy is plain enough from the whole line of right-privilege cases (up to and including the post-*Kennedy* decision in *Burns*). It is clear that a person need *not* take the bitter with the sweet if the bitter is a substantive restriction forbidden to government by the Constitution (which applies, of course, even when the government is operating as an employer), whether the bitter requires one to abstain from insisting upon one's first amendment rights[59] or to relinquish one's right to due process.

The sharper emphasis in the Rehnquist opinion, however, was not on the unfeeling nonsense of "the bitter with the sweet," but on the exquisite property sense of "a substantive right . . . *inextricably*

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[56] 416 U.S. at 153-54.

[57] *Id.* at 151.

[58] *Id.* at 153 (quoting Fahey v. Mallonee, 332 U.S. 245, 255 (1947)).

[59] *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967).

intertwined with the limitations on the procedures." Here Mr. Justice Rehnquist did come forward with a different idea, an idea that is also much more awkward to overcome within the conceptual framework of the new property. The suggestion is that as property interests are divisible interests (from fee simple ownership down through a license at sufferance), it is only fair that a court should look very closely to see how *much* property was vested in order to be careful in determining whether any of that *actually* vested quantum of property is sought to be taken at all. If none of the vested quantum of property is threatened by the subsequent government action, clearly the constitutional requisite of due process (as a condition of such taking) will not be applicable.

It is all quite plain from David Roth's case. Beyond the one year of teaching, all that had been vested in Roth was a very limited property right consisting of a legal, "legitimate," "objective" entitlement to a piece of paper (notice of nonrenewal), to be received by him prior to the end of that year by a specified number of days, which notice he did not allege had been "taken" from him (since he got the notice), and without which threatened taking there was otherwise nothing to which he could connect the constitutional requisite of due process of law.

In Wayne Kennedy's case, what was vested in him (in Rehnquist's view) was neither a permanent entitlement to occupy a status and to receive money, nor even an entitlement to occupy a status and to receive money until such time as he might *in fact* make a recklessly false public accusation imputing criminal wrongdoing to another federal civil servant. Rather, what was vested in Wayne Kennedy from the outset was a still more limited property —to occupy a status and to receive money until such time as a fellow civil servant: (*1*) sent him certain pieces of paper containing certain words (of authority and accusation); (*2*) provided him an opportunity to reply orally and in writing; and (*3*) thereafter sent him another piece of paper containing certain other words (declaring that for such-and-such reasons, pursuant to such-and-such authority, you are hereby terminated from the nonprobationary civil service with immediate cessation of salary, subject to such-and-such appeal as you may pursue before such-and-such commission within such-and-such number of days).

That this was, indeed, the harder essence of the Rehnquist opinion is clear from an earlier passage. After quoting from *Roth*—"[p]roperty interests, of course, are not created by the Constitution," but are created and their dimensions defined "by exist-

ing rules or understandings that stem from an independent source"[60]—Mr. Justice Rehnquist proceeded to cut off the only such source Wayne Kennedy had invoked:

> Here appellee did have a statutory expectancy that he not be removed other than for "such cause as will promote the efficiency of [the] service." *But the very section of the statute which granted him that right*, a right which had previously existed only by virtue of administrative regulation, *expressly provided also for the procedure by which "cause" was to be determined*, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. *Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it.* . . . The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such guarantee as enforced by the procedures which Congress has designated for the determination of cause.[61]

The subsequent reference, therefore, to taking "the bitter with the sweet," meant only that (to use a different metaphor) water cannot rise higher than its source. Wayne Kennedy's new property was not less, *but neither was it more*, than that which had been vested in him. Unable to show how anything actually vested in him was in jeopardy, he simply failed to state a due process claim at all. What Congress had provided to its nonprobationary civil servants was a procedurally boundaried interest—an enforceable property interest to work for salary and emoluments until a superior might accuse such an employee of slander, write up his own accusation, sit in judgment on the response, and dispatch a statement of adverse judgment. Not one whit of that vested property was invaded in Wayne Kennedy's case. His mistake (in the Rehnquist view) lay in supposing that the procedural incidents defining the precise contours of his subsisting status (his substantive property) were more generous than they were.

Kennedy did not itself demolish the new property, but it did point the way. And in two steps, the task has been nearly completed. A majority of the Court disagreed with Mr. Justice Rehnquist's analysis in *Kennedy*, even while offering little (or nothing) to indicate the least flaw in that analysis. One of those disagreeing

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[60] 416 U.S. at 151 (quoting 408 U.S. at 577).

[61] 416 U.S. at 151-52 (emphasis added).

was Mr. Justice Powell, who fully recognized the devastating effect of the Rehnquist treatment of the new property, but who seemed to miss Rehnquist's point in his own reply:

> [I]t [the Rehnquist analysis] would lead directly to the conclusion that whatever the nature of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. *That right is conferred not by legislative grace, but by constitutional guarantee.* While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, *once conferred*, without appropriate procedural safeguards.[62]

This passage looks two ways at once, and is simply a puzzle. In the first italicized sentence, it suggests that procedural due process is itself, like life, liberty, or property, an independent constitutional right (regardless of how its content may differ in different contexts), and not simply a condition to be met by government whenever and to whatever extent government moves to deprive a person of some existing, from-some-source-vested liberty or property. Yet the very next passage yields, implying that one must first show in what sense a legislature (or equivalent legal source) has conferred "a property interest," in order that "appropriate procedural safeguards" may be required of government as a constitutionally mandated set of conditions accompanying "the deprivation of such an interest." But to speak of "such an interest, *once conferred*," plainly begs the question Mr. Justice Rehnquist had raised: What "interest" *was* "conferred"? Show us a tittle or a jot of "interest" actually "conferred" by the legislature apart from the interest Wayne Kennedy held—the interest exactly bounded, as Rehnquist said, by the procedural provisions of the only source giving it any substance at all.

Mr. Justice Powell might have met the point in a different way. Thus, he might have said that he simply disagreed with Mr. Justice Rehnquist's impression of what the underlying Act of Congress meant.[63] Certainly, Wayne Kennedy may have been startled to be told that what Congress meant to confer on him as a nonprobation-

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[62] *Id.* at 166-67 (concurring opinion) (emphasis added; footnote omitted).

[63] Of course, Justice Powell did not dissent from the result in *Kennedy*. *But see* Bishop v. Wood, 426 U.S. 341, 345 n.8 (1976), in which *Kennedy* was described and distinguished exactly on this basis.

ary civil servant was "a job until a fellow civil servant says you falsely publicly accused him of bribery and charges you and judges you did it" (subject only to subsequent recourse to the Civil Service Commission and the courts months later, after being out of a job and without salary). Similarly, the Court would not have had to strain to read the Act differently. If one read it differently, *i.e.*, to confer on Kennedy more than he actually received, then one could describe the difference as the property that the government sought to take without due process of law. The ultimate weakness of this response, however, is that it might only delay the demise of the new property, rather than halt the erosion. That would be so, of course, insofar as a Congress would remain completely free to rewrite the conferring statute to correspond unequivocally with the crueler interpretation of Mr. Justice Rehnquist, after which this particular judicial mitigating device would no longer be available.

As it happens, Mr. Justice Powell may himself have lacked the conviction of his opinion in *Kennedy*. Just one year later, in *Goss v. Lopez*,[64] he dissented from a majority holding that ten-day suspensions of public school pupils sufficiently threatened their statutory right to education as to trigger the due process clause. His explanation for his dissent was indistinguishable from Mr. Justice Rehnquist's view in *Kennedy*:

> [T]he 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 accordance with [state] law. Rather, the right is encompassed in the entire package of statutory provisions governing education in Ohio [inclusive of that which qualifies the "right" to "education" when notice of suspension has been received].[65]

In other words, the laws of Ohio, from which the students derived their claim of property (continuing access to the public schools), conferred in fact but a limited property right to attend school only so long as a ten-day suspension notice had not been received. None of this limited property having been placed in jeopardy by the state (*i.e.*, it did what it said it would do), there was no threatened deprivation of property to which the constitutional requirement of procedural due process attached. Q.E.D.

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[64] 419 U.S. 565 (1975).

[65] *Id.* at 586-87.

B. *The Crack Becomes a Chasm and The New Property Collapses: Bishop v. Wood*

"[W]hoever hath an *absolute Authority* to *interpret* any written *or* spoken Laws," Bishop Hoadly preached to the King in 1717, "it is He who is truly the *Law-giver*, to all Intents and Purposes, and not the Person who first spoke or wrote them."[66] So it has been with the new property, procedural due process, and the courts. For whatever source the plaintiff may seek to invoke to meet the *Roth* requirement that some vested subsisting status be threatened in a manner requiring government to meet the constitutional condition of due process of law, it is obviously open to the courts to examine that source. Upon examining it, the court may interpret it wholly against the plaintiff's view, construing it as vesting far less than the plaintiff had supposed, and concluding that nothing vested is sought to be taken. Three Justices responded in this way in *Kennedy*, Mr. Justice Powell (apparently) joined them in *Lopez*, and Mr. Justice Stevens has now joined them in a clear signal to state courts and to federal district courts that they are free to halt the procedural due process revolution by acting on Bishop Hoadly's advice. The event is *Bishop v. Wood*, decided near the end of the 1975 term.[67]

Carl Bishop became a policeman for the City of Marion, North Carolina, in 1969. Unlike David Roth and just like Wayne Kennedy, Carl Bishop had survived the uncertainties of probationary service. After six months in that status, he was reclassified as a "permanent employee," pursuant to the following ordinance which appeared to vest in him a continuing entitlement to that status subject only to certain conditions subsequent:

> *Dismissal.* A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice.[68]

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[66] Benjamin Hoadly, Bishop of Bangor, Sermon Preached before the King, at 12 (1717) (emphasis in original).

[67] 426 U.S. 341 (1976).

[68] *Quoted in id.* at 344 n.5.

"On its face," Mr. Justice Stevens readily conceded, "the ordinance on which [Carl Bishop relied] may *fairly* be read as conferring" a "property interest in employment . . . [and] an enforceable expectation of continued public employment."[69] According to an uncontradicted affidavit in the record of the case, this, indeed, was Carl Bishop's own understanding. Moreover, even had it been thought relevant to assess the objective reasonableness of Mr. Bishop's understanding by looking to see whether a state court had previously construed the ordinance contrary to that understanding, it would not have affected the case: there had been *no* previous state court construction of the ordinance. The matter thus appeared to Mr. Bishop and to (ACLU) counsel in this fashion: Mr. Bishop held a "legitimate," "objective," "entitlement" to his status-property as a "permanent employee," subject only to its defeasance (or deprivation) for acts or omissions demonstrative of his unfitness as a police officer. The process according to which such unfitness should be determined must therefore be "due" process, and the question appeared to be whether the wholly trivial process adverted to in the ordinance was adequate under the fourteenth amendment.

The case seeking Mr. Bishop's reinstatement with back pay (subject to the right of the City Manager to proceed against him consistent with due process) had, however, been heard on motion for summary judgment by one of the more severe federal district judges. "Based on his understanding of state law, [Judge Jones] concluded that petitioner 'held his position at the will and pleasure of the city,' "[70] a remarkable interpretation to which the court of appeals had yielded (by force of the presumed greater local expertise of the district judge), albeit by an equally divided vote. Yielding in turn, Mr. Justice Stevens dryly concluded for a majority of five: "Under that view of the law, petitioner's discharge did not deprive him of a property interest protected by the Fourteenth Amendment."[71] In brief, Carl Bishop, as a "permanent employee," had even less fourteenth amendment property than had David Roth, probationary employee at Oshkosh, Wisconsin. Roth had the enforceable assurance of at least the one year of assistant professor status (which he had completed) before encountering the hazard of nonrenewal. Although unknown to him, Carl Bishop as a "perma-

[69] *Id.* at 344-45 (emphasis added).
[70] *Id.* at 345.
[71] *Id.* at 347.

nent employee" literally had no job *even from day to day*, but was dependent upon the non-happening of an event (receipt of notice of dismissal from the City Manager) as a condition precedent to vest affirmatively in him each day's entitlement to his status.

In *Bishop*, the Court distinguished *Kennedy* (in which a majority had not accepted Mr. Justice Rehnquist's analysis, even while concluding that post-dismissal access to the Civil Service Commission supplied enough due process to meet the demands of the fifth amendment) on the basis that in *Kennedy* a federal statute (rather than a local ordinance) had been involved. A majority of the Court had construed that statute as vesting in Wayne Kennedy sufficient property at least to trigger the due process condition of the fifth amendment. In *Bishop*, however, the majority yielded to the bizarre "no property" interpretation of the local ordinance, not from considerations of federalism,[72] moreover, but in genuflection to the not disapproved interpretation of the federal district court (*i.e.*, an interpretation not disapproved by the federal court of appeals).

Summing up, I believe it is a fair resumé of the principal post-*Goldberg* doctrinal developments in the new property and procedural due process[73] to suggest the following:

(*1*) Given a knowledgeable legislature (whether state or federal), sufficiently careful in establishing a new feudalism under which basic wants and needs (jobs, education, housing, welfare, food, medical aid) in the sprawling public sector are tenurial, uncertain, contingent, dependent, and subordinate to the administrative sheriffs of the Administrative State, "due process of law" is the same as "due process of those laws which the legislature provided." In brief, what you get is what you see.[74]

(*2*) Given a clumsy legislature, *i.e.*, one inartful in describing things as "conditions precedent" or "conditions subsequent," or careless enough to describe a status as "permanent," what you get may be even *less* than what you see.[75]

(*3*) To the extent that one may get *more* than what one sees

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[72] The concept is that state courts have the last say as to what state law means, although obviously not the last say as to whether that law is constitutional as construed or applied. In *Bishop*, however, no state court had provided an interpretation of the ordinance.

[73] *See also* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), *reviewed in* Tushnet, *supra* note 43, at 263-67.

[74] This was Justice Rehnquist's analysis in *Kennedy* (joined by Chief Justice Burger and Mr. Justice Stewart), subsequently joined by Mr. Justice Powell (in *Lopez*), and tacitly approved by Mr. Justice Stevens (in *Bishop*).

[75] *See* Bishop v. Wood, 426 U.S. 341 (1976).

(*i.e.*, more than the procedural amenities provided by extraconstitutional legal sources), it will occur because a federal or state court separates the property vested in a person from the procedural limitations entwined in the description of that property.[76] Having navigated successfully between the Scylla of legislative ingenuity and the Charybdis of hostile judicial interpretation, one may then arrive in the land of "due process of law"—only to discover that it is a veritable desert.[77]

In the counterculture music that Charles Reich might well appreciate, there is a refrain by the Rolling Stones that is uncharacteristically cheerful. Backed by a full symphony orchestra, introduced by the angelic voices of small children, Mick Jagger sings:

> You Can't Always Get What You *Want* . . .,
> You Can't Always Get What You *Want.*
> You Can't Always Get What You *Want*
> But if you try sometime,
> . . . you just might find you get what you *need*![78]

Perhaps, but don't bet on it. Neither *The New Property* nor *The Greening of America*[79] has been cordially received by the Supreme Court of the Administrative State.

IV

Palliatives and Placebos for The New Property

For courts of a mind to be humane to persons victimized by the predictable errors and prejudices of procedural grossness, there are a number of devices to ease the situation even within the narrow conceptual framework of the new property. Some of these devices we have already noted in passing, but it may be well to restate them here, to acknowledge some additional ways around the problem, and to say why they are probably not going to make much difference.

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[76] *E.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974); Goldberg v. Kelly, 397 U.S. 254 (1970).

[77] *See, e.g.*, Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976); Mathews v. Eldridge, 424 U.S. 319 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974); Cafeteria & Rest. Workers Local 473 v. McElroy, 367 U.S. 886 (1961).

[78] M. Jagger & K. Richard, *You Can't Always Get What You Want* (© 1969, Abkco. Music, Inc.).

[79] C. Reich, The Greening of America (1970).

A. *The Benign Reading of Statutes*

The most obvious course for a court is to construe the pertinent statute (or implementing regulation) as vesting in the individual a present legal entitlement to continuation of the given relationship, subject only to the *actual occurrence* of certain extrinsic events, rather than as creating merely a relationship that terminates automatically when the prescribed procedural events occur. In brief, the interpretation would be that what the statute (or contract, regulation, or implied-in-fact understanding) vests by way of property is an interest defeasible only upon the actual occurrence of some specified disabling event (*e.g.*, that Mrs. Kelly was vested by law with a right to welfare payments until she in fact received income from other sources in such amount to disqualify her,[80] and not merely until she received notice that an administrator, acting ex parte, had asserted his belief that she was receiving such income). If the statute is read that way, then plainly the plaintiff's entitlement will not be exhausted merely by the occurrence of a lesser and different event, such as the arrival of a letter declaring that Administrator *X* says (or believes or has determined) that the critical fact exists. Rather, the occurrence of the critical event will itself have to be established by means consonant with due process of law. This is, of course, how the majority of the Supreme Court actually construed the relevant statutes in *Goldberg*, *Kennedy*, and *Lopez*, and how Judge Jones (of the federal district court) could have construed the relevant ordinance in *Bishop*.[81]

In retrospect, it is also clear that the federal district court

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[80] A colleague has rightly reminded me that I cannot possibly mean this sentence in its most literal sense. His point is that ultimately we can never "know" whether Mrs. Kelly "in fact" received additional income that, if received, would then have disqualified her from eligibility to receive welfare checks. Rather, even with the benefit of the fullest imaginable due process and the best possible evidence of such a fact (*e.g.*, the sworn testimony of 12 bishops that they personally handed her $20,000 in cash, confirmed by the testimony of Mrs. Kelly herself), it remains true that nothing is absolutely knowable, regardless of our willingness to base even life and death decisions on such evidence as confronts us.

Never mind that difficulty, however, for it is quite enough to read the statute as reflecting another metaphysical view—that for all practical purposes such facts are knowable—and providing that Mrs. Kelly should not lose her welfare payments until such time as those "knowable" facts come into actual existence. If this does reflect the view of Congress, then the entitlement to procedural due process will lock into place. And the purpose of that due process will be to enhance the probability that our conclusion, that such and such fact exists, corresponds to the (ultimately unknowable) existence of that fact.

[81] For a recent benign contrast to the district court opinion in *Bishop*, see Sartin v. Columbus Utils. Comm'n, 421 F. Supp. 393 (N.D. Miss. 1976).

might readily have construed the pertinent regulations in *Roth* in this saving fashion.[82] David Roth, it will be recalled, was a full-time, regular, tenure-eligible assistant professor on an initial one year appointment subject to renewal, *i.e.*, a "tenure-track" member of the faculty. Formally and substantively, he stood in a very different position than a "one year visitor," a "one year author-in-residence," or some other person invited to fill in for one year during the absence of a regular faculty member (a person who, for instance, would have been surprised and insulted by a "notice of non-renewal"). The district court might thus have distinguished a tenure-track faculty member from a special appointee, inferring from the status of the former a currently vested entitlement to renewal, subject, however, to the nonoccurrence of certain facts, *e.g.*, less-than-excellent teaching, less-than-excellent scholarship, the appearance of a more promising candidate for the same position, a decline in departmental enrollment, a decline in overall university funds, or whatever. The array of so many disabling contingencies would have put Mr. Roth on notice that his currently vested interest in renewal was precarious (because the actual occurrence of but one of a very considerable number of things would cut him off). Nonetheless, from the outset he would have possessed more currently held property than a special, one-year-only, tenure-ineligible visitor. And, of course, had the district court construed "full-time-probationary-tenure-track appointee" under Wisconsin law in this way, the due process clause would have applied.

Quite apart from the fact that such constructions are unlikely at this time (given the current evidence of judicial attitude), however, the use of this palliative is plainly limited, and in some ways probably counterproductive. It is limited because it must necessarily collapse against a subsequent and more clearly expressed legislative determination to disallow it, *i.e.*, against legislative modifications making unmistakably clear that the delimiting procedures are to be deemed part-and-parcel of the property vested in the status-holder. It may be downright counterproductive, moreover, since any tendency by the courts to "overread" statutes or contracts or regulations is likely to be noted (especially by attorneys responsible to those with the power to alter these sources, at least prospectively) and met by a devastating response. To avoid the possibility of courts' reading too much into the very modest security arrangements that they are willing to provide, public employers are likely

[82] *See* Part III-A *supra*.

to provide even less than they might otherwise have done.[83] And when the dust has cleared from this sort of jockeying, the matter is most likely to settle nearest the Rehnquist view of the question: what you get is what you see.

The same defect is present in most other potential palliatives. In *Bishop*, for instance, it would not have been remarkable under the circumstances to have invoked a principle of constitutional estoppel against the City of Marion (even assuming that a state court might have construed the ordinance in question to equate a "permanent employee" with an "employee at will"), particularly when the incumbent employee both believed in fact and was objectively reasonable in believing (and was encouraged by the city to believe) otherwise. There would have been nothing unreasonable in holding the city to that understanding of the relationship.[84] As for employees subsequently hired, however (*i.e.*, hired subsequent to the decision announcing the employee-at-will construction of the ordinance), they would not be entitled to prevail when their turn came.

B. *Procedural Due Process and the First Amendment*

Still a different kind of palliative might be used in certain limited contexts within the public sector, by reasonable analogy to what the Supreme Court has done with respect to procedural due

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[83] I base this conjecture partly upon my experience as National President of the American Association of University Professors (1974-76). On several occasions, officers of AAUP chapters reported that their university administration had been advised by counsel to eliminate modest provisions assuring untenured faculty of some elements of intramural procedural due process—on grounds that *Roth* and its companion case, Perry v. Sindermann, 408 U.S. 593 (1972), might otherwise be applied by a federal district court to require even greater due process. *See* Van Alstyne, *Furnishing Reasons for a Decision against Reappointment: Legal Considerations*, 62 A.A.U.P. BULL. 285 (1976).

[84] There is, moreover, a serious inconsistency in the manner in which the Supreme Court has tied the (wholly federal) question of the meaning of "property" in the fourteenth amendment so tightly to technicalities of *state* law. In its more benign administration of the fourth amendment, the Supreme Court has not permitted the states to undermine zones of protected privacy by defining "property" or "trespass" in narrow ways that are at once binding on the federal courts for fourth amendment purposes. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967). Concurring in *Katz*, Mr. Justice Harlan noted:

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

Id. at 361. Transposed to the setting of *Bishop*, application of that standard (to Carl Bishop's subjective belief and to the objective reasonableness of that belief) would clearly have dictated a different result.

process and the first amendment,[85] and what it has done also with respect to the fifth amendment privilege against self-incrimination. It is well established that an otherwise enforceable requirement to supply information to government may be resisted on fifth amendment grounds if the particular information required falls within a subject area that is extensively covered by criminal statutes.[86] By analogy, where a given public sector relationship is peculiarly subject to governmental abuse of identifiable and specific constitutional rights (such as freedom of speech), the intimate involvement of these substantive constitutional rights may itself supply an independent source of procedural entitlement.[87] An example may exist in our public schools or colleges. Here, where the "adequacy" of the employee's performance is so characteristically and immediately linked with what the employee says, as well as with what ideas he propounds, one might very reasonably conclude that the substantive liberties of the first and fourteenth amendments (*e.g.*, free speech and academic freedom) generate their own procedural due process entitlements, not at all contingent upon the capacity of government to manipulate the property description of the teacher's position. In brief, insofar as the state fails to provide anything even remotely resembling a tenure system, but instead subjects every teacher to a form of procedural grossness like that in *Bishop*, it would be neither farfetched nor unprecedented to hold that the omission of fuller due process produces so chilling an effect upon the first and fourteenth amendment substantive liberties of the teacher as itself to be a violation of those substantive rights.[88] Thus, in certain areas of the public sec-

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[85] *See, e.g.*, Cole v. Richardson, 405 U.S. 676 (1972); United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Speiser v. Randall, 357 U.S. 513 (1958); Adler v. Board of Educ., 342 U.S. 485 (1952).

[86] Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968). *But see* California v. Byers, 402 U.S. 424 (1971).

[87] *See, e.g.*, Pred v. Board of Pub. Instruction, 415 F.2d 851 (5th Cir. 1969); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967). Other courts, however, that have faced the question whether a nontenured public employee has a right to a statement of reasons or a hearing, have differed in their conclusions. *See, e.g.*, Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972); Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971); Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969).

[88] *See* Shelton v. Tucker, 364 U.S. 479 (1960). Indeed, this idea has already been specifically applied, by Judge Matsch in Hamm v. Scott, Civil No. 76-910, slip op. at 14-15, 20 (D. Colo. Jan. 25, 1977):

> Are all public employment contracts to be given some form of pretermination protection by the due process clause? The Supreme Court has not answered that

tor, the indirect threat that procedural grossness poses to certain substantive constitutional rights could well be a basis for holding such procedural grossness unconstitutional.

In fairness, however, for courts to use the opening wedge of the first amendment as a means of requiring at least some minimum of adjudicative process throughout the public sector would be a poor case of allowing the tail of the first amendment to wag the dog of the new property. To be sure, a recorder of deeds might in fact be fired wholly for anti-first amendment reasons, welfare recipients may sometimes thus be victimized, so too with public housing occupants,[89] and doubtless a law entitling them to nothing more than notice of termination (without reasons) will leave them quite helpless as a practical matter. Even supposing each has reason to suspect that termination occurred in response to some first amendment activity on his own part, the cost of access to state or federal court for relief will often be too high and the relief may come too late. Of course, the same will also be true of mere applicants for any of these positions, who characteristically do not even receive notice of rejection. But to declare with a straight face that procedural due process of some kind (never mind how much for the moment) is uniformly required in all these areas because of uncharacteristic and numerically rare instances of anti-first amendment state activity, seems to make altogether too much of the opening wedge. The notion of "first amendment generated procedural due process entitlements" has a sound ring to it in portions of the public sector where the typical activity and the typical standards of judgment are likely themselves to be first amendment related. Beyond that, it is a poor makeweight.

Moreover, even as one tries out the idea as a general formula, it is unconvincing. To the extent that one finds procedural gross-

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question. It seems significant that *Roth* and *Sindermann* involved the employment of teachers. The courts have long been concerned with attempts to articulate academic freedom. The many cases which have arisen on the subject of teacher conduct, curriculum control, retaliation for speech or conduct, and parental objections to assignments all reveal the enormous difficulty in the balancing of interests involved in public education.

. . . .

. . . The perhaps singular nature of teacher employment—imbued with the precious and precarious notion of academic freedom—provides . . . an extra dimension deserving of procedural due process safeguards. It would be inappropriate at this time to speculate on what other positions of employment might qualify under this standard.

[89] *See* Housing Auth. v. Thorpe, 267 N.C. 431, 148 S.E.2d 290 (1966) (per curiam), *vacated per curiam*, 386 U.S. 670 (1967).

ness offensive in food stamp administration, public housing, public employment, etc., it is almost certainly because one believes that access to these things is itself of importance. Mistaken denial, or mistaken termination of such things to those who are in fact eligible is per se the wrong that makes one angry. It belittles the matter to rest the case for minimal procedural fairness only on an extended anxiety in behalf of first amendment interests, which we know in advance will be involved in but a tiny fraction of the cases in which mistakes are made. Neither this nor the previously considered palliatives and placebos will prove very useful in overcoming the intrinsic conceptual problem of linking the right to due process with the right of property.

C. *Marginalia of "Liberty"*

The Supreme Court has always recognized that the requirement of procedural due process applies as a condition of taking away a person's liberty in the literal and usual sense of jailing him or of otherwise significantly restricting his natural capacity to move about freely. This much, after all, is the recognized core of the due process clause, traceable at least as far back as 1215 and the thirty-ninth article of the Magna Carta, which provided:

> No freeman shall be taken, or imprisoned, or disseized, or outlawed, or banished, or any ways destroyed; nor will we pass upon him, nor send upon him, unless by the legal judgment of his peers, or by the law of the land.[90]

In all cases of this kind, it is assumed that government can meet whatever constitutional justification is required to sustain the legislative restriction imposed on the persons to whom the restriction applies—*e.g.*, that they shall not kill, that they shall not charge prices above a certain designated level, that they shall not abuse or neglect the trust they hold. The question is, rather, whether the verdict that a given person has violated the restriction was reached under sufficiently circumspect adjudicative procedures as to fulfill the requirement of "due" process, when the immediate consequence of that verdict is a sentence which takes from that person some measure of his natural freedom.

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[90] *Quoted and discussed in* Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions which Protect "Life, Liberty, and Property,"* 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW 185, 191 (Association of American Law Schools ed. 1938).

Ordinarily, this most conventional application of procedural due process is not thought to be involved at all when public sector litigants are simply rebuffed or cut loose by the Administrative State. The reason why this is so is quite plain: the decision of which they complain may be of very damaging consequence to them (*e.g.*, termination of their employment, denial of social security payments), but it does not restrict their liberty in the literal sense of confining them to a jail. No affirmative restraint is imposed to restrict their physical movement or other activity that they have the personal means and capacity to do without aid of the state. They remain as free as before the decision to come and to go as they like. And as nothing involved in the foreclosure or termination of the particular status-relationship with government takes away any of that natural liberty, there is no occasion to determine what degree of due process they would be entitled to receive as a condition of their being deprived of it.

Nevertheless, there are sometimes collateral consequences of administrative adjudications beyond the foreclosure (or termination) of a particular status-relationship—consequences additional to the loss of the governmental connection immediately at stake between the parties. And so, even under the view that the immediate connection with government is itself but a property interest (subject to all of the circular devices to which the new property has fallen prey), the Supreme Court has entertained the idea that insofar as the collateral effects of adjudicative governmental decisions may restrict a person's liberty, such decisions are subject to the requirement of procedural due process of law.

The plainest sort of such an administrative decision, itself resulting in an additional affirmative restriction on personal physical freedom, would be one where the restriction is direct and not merely incidental, *e.g.*, a prison warden's determination that a prisoner has in fact violated a prison rule, resulting not in termination of some status-as-property (*e.g.*, forfeiture of his role as a favored trusty), but in being placed in solitary confinement.[91] To be sure, the elaborateness of "process" which is "due" the prisoner who is now to be even more sharply confined than before will remain to be decided.[92] The pertinence and applicability of the due process

[91] *See* Wolff v. McDonnell, 418 U.S. 539 (1974) (due process required in committing prisoner to solitary confinement and in taking away "good time" credit); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (due process required in revoking probation); Morrissey v. Brewer, 408 U.S. 471 (1972) (due process required in revoking parole).

[92] The procedure held to be due the prisoner in Wolff v. McDonnell, 418 U.S. 539

clause itself, however, would be clear.[93]

Off and on, however, the Supreme Court has flirted with much more vagrant definitions of liberty in the context of administrative adjudication. The Court has teased from "liberty" additional interests that may, when affirmatively jeopardized by adjudicative administrative action, trigger the due process clause. The adventitious presence of such a loss of liberty incidental to administrative adjudication may thus serve as a hook on which to hang an entitlement to procedural due process. In *Roth*, for instance, Mr. Justice Stewart went out of his way to note that while David Roth may have lost his job in Oshkosh, nothing operated as a matter of law to restrict him from seeking employment elsewhere. Similarly, nothing operated as a matter of law to restrict any other person, agency, company, or governmental employer from hiring him. The point was that his freedom of contract (as an aspect of liberty) was not restricted as a legally imposed consequence of his nonrenewal.[94]

Similarly, Mr. Justice Stewart noted that the institution had not released to the public any statement derogatory of David Roth's personal or professional integrity. Had it done so, it might have been deemed to have taken from him a "liberty of reputation"—a deprivation which must itself be preceded by due process of law, even supposing that no property was threatened in the mere nonrenewal of his appointment:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had

(1974), like that in *Lopez*, *Kennedy*, and Cafeteria & Rest. Workers Local 473 v. McElroy, 367 U.S. 886 (1961), was very slight indeed.

[93] *But see* Meachum v. Fano, 96 S. Ct. 2532 (1976), which held that the disciplinary transfer of an accused prisoner to a substantially more secure (and hence harsher) prison failed to trigger the due process clause at all. The case is extremely important because, as noted in the dissent of Mr. Justice Stevens, the majority assumed that a liberty interest must be derived either from some substantive source within the Constitution (or federal law) or from some positive grant by state law. *Id.* at 2540-41. Mr. Justice White, for the Court, noted: "Here, Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct." *Id.* at 2539. Justice Stevens correctly observed that this approach utterly discards the understanding that natural persons need no help from the state to account for their freedom in the first instance.

Doubtless it is the fact that additional restriction was imposed upon the individual's physical freedom in *Meachum*, while no restriction on such a rudimentary physical freedom was involved in *Bishop*, that explains why Mr. Justice Stevens wrote the majority opinion in the latter and dissented in the former.

[94] 408 U.S. at 573.

> been guilty of dishonesty, or immorality. 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." . . . In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's "good name, reputation, honor, or integrity" is at stake.[95]

And similarly, more than half of the Court's opinion in *Bishop* grappled with explaining why Carl Bishop had no claim to due process based on deprivation of his reputation (wholly apart from loss of his job).[96] The assumption was that such a taking would require the observance of procedural due process.

Thus, the imaginative discovery of additional kinds of substantive liberty or property,[97] drawn into some degree of jeopardy incidental to the foreclosure of a person's status-relationship with the Administrative State, may save a case that might otherwise be lost. Accordingly, a catalogue of palliatives and placebos would not be complete without mention of this device. But aside from the fact that Professor Monaghan has considered this portion of the Court's labors much more systematically than would thus be sensible to review again,[98] nothing much is likely to come of it.

The principal reason for this is exactly the same one we noted

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[95] *Id.* (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)) (footnote and citations omitted).

[96] 426 U.S. at 347-50.

[97] Mr. Justice Brennan, dissenting in Paul v. Davis, 424 U.S. 693, 722-27 (1976), stated that prior decisions of the Supreme Court had characterized 14th amendment reputational interests as liberty interests. It would, however, be at least as logical to describe them as property interests, albeit interests in one's own "natural" property—an asset one has simply as a person, an asset one can attempt to exploit commercially to whatever grand or trivial extent one chooses, and an asset that (like one's natural freedom to move about) is in no sense dependent in the first instance upon either state law granting it or a constitutional provision establishing it. Even in its best remembered tribute, reputation is spoken of in words that are more reminiscent of a natural property:

> Good Name in man and woman, dear my lord,
> Is the immediate jewel of their souls:
> Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.

W. SHAKESPEARE, OTHELLO, Act III, sc. III, *ll.* 155-161 (London 1622).

[98] Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977).

in respect to the benign interpretation of statutes as a means of saving the new property. It always remains open to government to eliminate the objectionable liberty-abridging excrescence of its administrative action, in which event all persons subsequently terminated or denied status are left without any possible hook on which to hang the due process clause.[99] For example, if it is only the habit of an agency to speak freely to newspaper reporters or to others, a habit pursuant to which they "slander" the status holder they have just summarily terminated, which "slander" provides enough of a liberty abridgment (to reputation) to trigger the due process clause, then the agency need only adjust its practice prospectively (by keeping its mouth shut) to avoid triggering the due process condition at all.

Even had the Supreme Court not already retrenched (*e.g.*, it has already begun to eliminate reputational interests from the category of protected liberty and property within the fourteenth amendment),[100] this means of using a liberty-abridging tail to wag the procedural due process dog would have a very limited future. Its essential difficulty is, of course, that it is largely a gimmick. What bothers one in the public sector cases is essentially the arbitrariness with which government determines the matter most immediate and important to the individual—the employment, the housing, the social security at stake. That government may add insult (slander) to injury adds to one's sense of outrage over the procedural grossness of the government's action to be sure. But to rest the constitutional justification for procedural fairness solely on the exacerbating presence of the additional harm is to strain the meaning of liberty beyond all familiar recognition, even while knowing that it will seldom be of any lasting usefulness to do so.

D. *A Theory of Constitutional Tenure*

Finally, there is the suggestion that Professor Mark Tushnet has recently put forward,[101] building on Charles Reich's observation that the high degree of uncertainty characterizing many kinds of status in the public sector does, indeed, reduce the actual personal security of the status holder virtually to the level of a mere manorial tenant-at-will. To increase the security of the status-dependent person, he suggests that the courts should derive from

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[99] *See, e.g.*, Meachum v. Fano, 96 S. Ct. 2532 (1976); text accompanying note 83 *supra*.

[100] *See* Paul v. Davis, 424 U.S. 693 (1976); Codd v. Velger, 45 U.S.L.W. 4175 (U.S. Feb. 22, 1977).

[101] Tushnet, *supra* note 43.

the (substantive) due process clause a restriction on the extent to which government is free to limit the status that the individual holds. Professor Tushnet has much more in mind than what courts already do in this regard.

We have already noted that with the demise of the right-privilege distinction, there are a number of substantive constitutional restrictions on the kinds of conditions that government is free to attach to its various programs, *e.g.*, limitations imposed by the first, fourth, and fifth amendments. None of these sources, however, precludes government from qualifying status in the public sector in ways that do not affront these constitutional rights, even while leaving the status holder very insecure. Professor Tushnet's example is an excellent one: public employees subject to mere annual contracts under circumstances where the legislative body has decided against establishing a professional civil service with statutory job tenure.[102] To meet this problem (*i.e.*, "cases in which no constitutional provision other than the [substantive] Due Process Clause is available"),[103] Professor Tushnet suggests that a court might well reconsider such cases as *Truax v. Raich*[104] and *Lochner v. New York*,[105] and transpose their best features to the public sector. In brief, he suggests that in certain areas the notion of substantive due process might be used to generate a *private* property claim to *continuing* public status as such, regardless of a clearly expressed contrary legislative intention. Thus, Professor Tushnet suggests: "The sheer number of governmental employees, when taken in conjunction with these constitutional overtones, supports the conclusion that civil service tenure ought to be recognized as constitutionally protected."[106]

If the courts were to do this, they would necessarily also take care of the procedural due process problem. That is, if in *Bishop* the Court were to have held that the City of Marion, North Carolina, was forbidden (by the substantive due process clause of the fourteenth amendment) from qualifying a police officer's job status as one "terminable at will," and were to have held, rather, that having once served a (constitutionally?) reasonable probationary term the officer must enjoy a (constitutionally conferred?) job tenure, then quite plainly the tenure itself would have been an existing

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[102] *Id.* at 283-84.
[103] *Id.* at 277 n.84.
[104] 239 U.S. 33 (1915).
[105] 198 U.S. 45 (1905).
[106] Tushnet, *supra* note 43, at 284.

property—the deprivation of which would have required the observance of procedural due process.

There is, as Professor Tushnet himself states, a peculiar delicacy in proceeding in this way. He recognizes that courts are scarcely well positioned to ascertain whether "at will" jobs, "year-to-year" jobs, jobs "until" a certain date, or jobs "unless" something happens are constitutionally indefensible legislative preferences. He proposes to go very slowly, encouraging the courts to move in this way only where "there is general agreement on the social importance of [the] right" (as evidenced, for instance, by the degree of protection it enjoys in the vast majority of jurisdictions) and, even then, "only to the extent supported by the settled weight of responsible opinion" (*e.g.*, by the American Law Institute or the Commissioners for Uniform State Laws).[107]

The approach is a serious one, and despite one's first impulse to shudder at the mention of *Lochner*, its time may well come 'round. Indeed, it has precedent of a kind to support it. For instance, in determining whether a given punishment shall be deemed constitutionally "cruel and unusual," courts often compare the challenged practice to that which is routine throughout the nation. Thus, whether a given *mode* of punishment is cruel and unusual (*e.g.*, cropping the prisoner's ears or manacling his feet) is in significant part a function of how unusual that mode of punishment is in fact.[108] And whether a given *intensity* of punishment is cruel and unusual is likewise, in significant part, a function of how widespread is provision for the challenged degree of punishment.[109] With respect to both mode and intensity, moreover, judicial reference to expert opinion is believed proper. The Supreme Court's most recent examination of this subject, while rejecting an eighth amendment attack on the death penalty as cruel and unusual *per se*, was still quite consistent with this approach.[110]

Nevertheless, Professor Tushnet's proposal would probably make very little difference, quite apart from the unlikelihood of the Supreme Court's making so radical an adaptation of *Lochner*. For one thing, even according to the proposed terms of Professor Tushnet's test, the analysis is applicable only insofar as widely prevailing practice provides convincing evidence that a particular

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[107] *Id.* at 279.

[108] *See* Weems v. United States, 217 U.S. 349 (1910).

[109] *See In re* Foss, 10 Cal. 3d 910, 419 P.2d 1073, 112 Cal. Rptr. 649 (1974); *In re* Lunch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1973).

[110] Gregg v. Georgia, 96 S. Ct. 2909 (1976).

status limitation is indefensible. What this must necessarily mean is that the Supreme Court could use the idea only as a "clean up" measure. Only where so few jurisdictions maintained these practices that their maintenance seemed wholly atavistic, would a court be reasonable in forbidding them as a matter of constitutional law. This is not to say that the idea would be wholly pointless, for doubtless some such situations could be isolated and dealt with. It is to say, however, that the test would very seldom be met. Enough jurisdictions doubtless keep their public school teachers on annual contracts, for instance, and enough police departments use "at will" arrangements (as in *Bishop*), that it would require a Court virtually as presumptuous as that which decided *Lochner* itself to declare that such arrangements have *no* rational connection with *any* defensible interest.

There is also a different and more fundamental objection to this approach—an objection possibly fatal to all efforts to solve the problem of procedural due process through the side door of the new property. The objection is that something just won't go down in the labored efforts to redefine the myriad connections of persons with government in the "mine and thine" vocabulary of private property. Indeed, it may fairly be said that we have already moved much too far toward this view of job and of office holding, and that the very jargon of "private property entitlements" in the public sector encourages some of our worst tendencies. It is unhappily reminiscent of a much earlier period when important positions of trust were sold (by the crown) quite literally as property, and the office holder felt entitled to treat the office as "his" property, charging fees to make the office secure and profitable. Correspondingly, the status holder acted with the officiousness of an office "owner." There is something abrasive and offensive, something anachronistic, in the idea that public sector positions can be appropriately described as the property of the individual status holder, at least if the idea is not confined to those special cases in which the metaphor has a better feel.

Without doubt, in certain situations a literal freedom of private property may be indispensable to each person's sense of self.[111] A homely example may involve one's own pair of shoes, to

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[111] The nexus between private property and personal liberty was eloquently noted in the following dictum from Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972):

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel,

do with as one damned well likes, to scuff them or to shine them, to wear them or to abuse them, with no duty to account to anyone, and to know fully the freedom that goes with the feeling that "these things, at least, are truly *mine*." In this sense, Charles Reich was almost surely right in the idea of the new property, insofar as it might restore to many so meanly dependent upon governmental largess a sense of autonomy and of their own real freedom. Shoes (including those purchased with welfare assistance) and food (including that purchased with food stamps) ought to carry the entitlements of freedom classically associated with the freedom of private property, and not be entangled with fiduciary obligations to the state. It is not desirable in a free society that the "grateful dependent" eternally genuflect to the state—that he be made to show how healthy a diet he selects, or how well he keeps his shoes.

Nonetheless, to apply these elementary human concerns for personal freedom indiscriminately to all public sector relationships will not do, nor should it be done in order to overcome the separate problem of arbitrariness in the adjudicative procedures of the Administrative State. To be specific, I do not believe it is truly correct (or persuasive) to say that what bothers one in *Kennedy* is that Wayne Kennedy was deprived of his *property* without due process. If we are willing to say this, we are almost surely saying it only instrumentally, *i.e.*, only because we see no other constitutional handle on the problem. What really bothers one in *Kennedy* is that Wayne Kennedy was not treated *fairly*. And surely there must be a way to carry forward the simplicity of that concern by more direct means, without vindicating property in all its meanness, as was done in *Lochner*.

The concept of public sector status as property both overstates and understates the problem. It overstates the problem by carrying with it additional notions of personal entitlement and of sinecurism that no constitutional court since *Lochner* should desire to encourage. At the same time, it understates the problem by ignoring a vast number of situations in which it is impossible to describe the relationship as one giving rise to property, but in which the government's procedural grossness is nevertheless profoundly unfair and objectionable.

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is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have any meaning without the other. That rights in property are basic civil liberties has long been recognized.

V

CONCLUSION: REMEMBRANCES OF LIBERTY

When Charles Reich composed his seminal article on the new property, the Supreme Court had not yet wholly abandoned the right-privilege distinction. Thus, Professor Reich's concern was not exclusively or even principally directed to the problems of procedural grossness in the Administrative State. Rather, it was directed to a theory that courts could use to restrict the variety of substantive conditions that government continued to impose upon those who dealt with government as employees, contractors, licensees, or recipients of largess. He believed that the answer to that problem rested in recognition of public sector status as a species of private property—a vested interest of the status holder not subject to restriction or forfeiture on grounds that would be constitutionally impermissible if applied to more traditional private property. In brief, the major emphasis of the Reich article was on the application of substantive due process in the public sector, principally to curtail the government's use of criteria substantively offensive to individual liberty. The implications of the new property for procedural due process in the Administrative State were only dimly seen, in two pages of mild (and optimistic) conjecture.

My own view of the matter, at the time, was that the metaphor of the new property was not necessary to show the bankruptcy of the right-privilege distinction. Additionally, I believed that the very phrase itself might produce ironic consequences in light of the courts' increasing reluctance to second-guess legislative restrictions on private property in general: "Overzealous courts may err too far in the protection of this 'new property,' and then shift violently to the other extreme, just as they once overextended themselves in behalf of the old property, only ultimately to leave it to the mercies of the political process."[112]

I did not believe the metaphor was at all important, because I believed that the right-privilege distinction was itself based on a premise that was utterly false. It was false because, as Mr. Justice Holmes himself readily recognized,[113] the denomination of something as a "privilege" (rather than as a "right") does not itself explain why that something can be restricted in ways otherwise forbidden by the Bill of Rights. The explanation (insofar as one was

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[112] Van Alstyne, *supra* note 2, at 1463.

[113] *See* O. HOLMES, THE COMMON LAW 169 (M. Howe ed. 1963).

ever put forward) came in the unexamined (and wholly indefensible) supposition that government was unconstrained by the Bill of Rights when it operated by methods more characteristic of the private sector, *e.g.*, by contract, lease, license, or grant, rather than by the more settled method of general legislation. Holmes evidently thought it self-evident that since a *private* contractor was bound only by the common and statutory law of contracts in his freedom to maximize his bargains with others, government must enjoy the same freedom from the Bill of Rights when operating by contract: "The servant cannot complain, as he takes the employment on the terms which are offered him." Similarly, Holmes wrote as though it were self-evident that since a private landowner was bound only by the common and statutory law in determing the conditions under which others would be admitted to his land, government must somehow enjoy the same freedom when acting as a "private" landowner, in rationing access to public land: "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is *no more* an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[114]

Respectfully, there was in this technique an utter inversion of constitutional reasoning. The Bill of Rights exempted private parties, *but not government*, because those who drafted and ratified the Bill of Rights were not then apprehensive of private parties, but were apprehensive of government. Similarly, the fourteenth amendment exempted private parties, *but not government*, because those who drafted and ratified it were not then sufficiently apprehensive of private parties, but were apprehensive of state government. To say that private citizens may deal with one another "unhampered by" the fourteenth amendment may be true (and indeed it is generally true), but plainly it says nothing at all as to why a state may likewise deal with private citizens unhampered by that amendment, which was drafted precisely to hamper the state. Thus, an Act of Congress forbidding any federal employee from voicing public criticism of a given foreign policy clearly offends the unexceptionable text of the first amendment that "Congress shall make no law . . . abridging the freedom of speech," although the speech being abridged in this case is merely that of several million (rather than that of all two hundred-twenty million) Americans.

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[114] Commonwealth v. Davis, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895) (emphasis added).

The answer to the right-privilege distinction, in my view, never turned upon the ingenious fashioning of a new property. Rather, it turned upon the more general protection of the old liberty, *i.e.*, those personal freedoms sheltered from government in *all* its protean exercises of power.

Is it plausible to treat *freedom from arbitrary adjudicative procedures* as a substantive element of one's liberty as well—a freedom whose abridgment government must sustain the burden of justifying, even as it must do when it seeks to subordinate other freedoms, such as those of speech or of privacy? I believe that it is plausible so to regard the matter, and that the ideas of liberty and of substantive due process may easily accommodate a view that government may not adjudicate the claims of individuals by unreliable means.

"The history of liberty," Mr. Justice Frankfurter once recalled, "has largely been the history of observance of procedural safeguards."[115] It was an especially fitting statement for Felix Frankfurter, succeeding as he did to the Supreme Court seat previously held by Benjamin Cardozo, who had expressed a very similar idea: "Fundamental too in the concept of due process and so in that of liberty, is the thought that condemnation shall be rendered only after trial. . . . The hearing, morever, must be a real one, not a sham or a pretense."[116] Now there is a truly interesting thought to consider: "Fundamental . . . in the concept of due process, *and so in that of liberty* . . . ." There is, here, an implication that the protected essences of personal freedom include a freedom from fundamentally unfair modes of governmental action, an immunity (if you will) from procedural arbitrariness. Liberty may indeed be an ambiguous category of uncertain content,[117] but a category informed by (rather than standing apart from) a normative standard called "due process of law." Such a liberty may be at least as old as the idea of the social contract, which informs so much of our Constitution.

To treat the matter as might John Rawls (in his impressive update on John Locke),[118] is it plausible that persons contemplating the structuring of a social organization to be subsequently binding upon them (persons discussing the matter under a "veil of

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[115] McNabb v. United States, 318 U.S. 332, 347 (1943).

[116] Palko v. Connecticut, 302 U.S. 319, 327 (1937) (citation omitted).

[117] *See* discussion in Part IV-C *supra*.

[118] J. RAWLS, A THEORY OF JUSTICE (1971).

ignorance" respecting what particular place and configuration of talents they themselves would hold in that social organization) would agree upon a government vested with power to proceed as our government proceeded in *Kennedy*? Would they think the ends of the social contract well served by vesting in that government a power to submit the truth of a charge of "reckless and false defamation" to the original (and near-final) judgment of the accuser himself? It seems impossible so to believe.

The idea of freedom from adjudicative procedural arbitrariness as an element of personal liberty does not lack text, logic, flexibility, or precedent. Textually, there is not the least strain in its association with the liberty of persons, nor is it the least at odds (but rather wholly congruent) with highly conventional social contract theories that yield the background of the Constitution. Logically, by the same reasoning that Mr. Justice Rehnquist has recalled, it fits as well. If it is correct to speak of a substantive property interest being bounded exactly by the aggregate of procedural protections of that property (and in some sense it *is* reasonable so to view the matter), it is likewise accurate to note that an aggregate of procedural protections may well describe the very substance of a given freedom or liberty. It is, moreover, wholly reasonable to regard the matter as one of liberty (freedom from something threatened by government), rather than of right (an enforceable claim to something one does not already possess), insofar as all that one claims is an exemption or immunity from governmental action that proceeds by certain means, *i.e.*, fundamentally unfair, biased, arbitrary, summary, peremptory, ex parte means that without justification create an intolerable margin of probable error or prejudice.

Nor does the idea of a liberty-immunity from unwarranted procedural grossness lack either flexibility or precedent. With respect to flexibility, the situation is exactly the same as with other, clearly protected liberties, such as freedom of speech. The acknowledgment that a freedom is constitutionally sheltered against varieties of state action by the due process clause has not meant that the extent of protection is therefore absolutely fixed, regardless of context. Just as the context of public employment may well justify a restraint on political solicitation (*e.g.*, a restraint applicable to the police officer soliciting political contributions from businesses along his beat) not applicable to others (*e.g.*, a restraint applicable to private citizens soliciting political contributions from their neighbors), so the context of governmental adjudicative de-

cisions must make a difference. That is, the processing of a social security application will always require different procedural protections than will a criminal trial. It is perfectly familiar learning that when due process applies, its particular dimensions are nevertheless the function of many contextual considerations.

Indeed, prior to *Roth*,[119] literally every case had been treated in this fashion. Notice and an opportunity to be heard by a reasonably disinterested party prior to decision are the most obvious and conventional elements of fundamentally fair procedures, but whether elements beyond these (or less than these) would be deemed constitutionally required (or constitutionally sufficient) was made to depend almost entirely upon the various justifications offered to extend or to diminish such procedural safeguards. And while individual due process decisions will probably always draw criticism as being either unduly harsh[120] or unduly maudlin,[121] there is nothing peculiar in this regard to distinguish them from any other subject of constitutional review, whether it be in the staidness of the commerce clause[122] or in the tempest of the first amendment.[123]

Finally, as a matter of precedent, the situation is most striking of all. The two-step inquiry of Mr. Justice Stewart in *Roth* may seem to have the advantage of settled authority, but only to those who started reading cases in 1972. The fact is, as we have already noted, that *Roth* was itself the wholly unprecedented case—no case prior to that time had even hinted at *Roth*'s wizened view that liberty in a free society can be conceived as something having nothing to do with the fundamental fairness of how facts are determined and standards are applied in the Administrative State. Indeed, as others have noted,[124] the *Roth* approach is shot through with anomalies. First, the plaintiff must overcome the often insurmountable burden of the *Roth-Arnett-Bishop* challenge to show in what sense he was vested with a substantive property interest

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[119] *Roth*, of course, is the case in which Mr. Justice Stewart "discovered" that there is no substantive freedom from governmental procedural arbitrariness.

[120] *See, e.g.*, Cafeteria & Rest. Workers Local 473 v. McElroy, 367 U.S. 886 (1961).

[121] *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975), *reviewed in* Wilkinson, *Goss v. Lopez: The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25.

[122] *Compare, e.g.*, Maryland v. Wirtz, 392 U.S. 183 (1968), *with* National League of Cities v. Usery, 426 U.S. 833 (1976).

[123] *Compare, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), *with* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[124] *See, e.g.*, Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89, 103-14. *See generally* Tushnet, *supra* note 43.

greater than that circumscribed by the procedural restrictions laid upon it. He may utterly fail in this endeavor—because of the circular new property approach taken to the problem—although it may be true, even as the Court will concede, that the administrative decision was mistaken and the loss to the individual is grievous. Yet, failing at this step, no amount of grievous loss and no degree of probable mistake entitle him to even trivial adjudicative due process. Anomalously, however, no matter how trivial the loss-in-fact may be, if the litigant *is* able to meet the "vested property" test, he then will be entitled to have the matter reconsidered according to due process of law, although under the circumstances that process may be minimal.

The irony of all this, in the end, is that compassionate persons outside the Supreme Court were the first to urge the doctrinal departure that has brought the Court to its present circumstance. As the idea of the new property was brought forward, to suggest vested private interests in public status entitlements (a suggestion that is frankly repugnant in some of its implications), it inadvertently invited the response that now caricatures the misguided zeal of the "reform." The fact of the matter is that this transmogrification of the old property, seeking to anchor claims of private property to positions and entitlements in the Administrative State, was wholly unnecessary to meet the particular problem—the right-privilege distinction—it was designed to deal with. By dealing with that problem in the wrong way, the new property threatens now to leave us with the worst possible legacy—highly contingent and insecure dependencies on government and the doctrinal erosion of due process of law.

APPENDIX

A THUMBNAIL EXPLANATION OF THE FOLLOWING GRAPHS

Graphs I, II, and III describe three different approaches the Supreme Court has taken in determining the extent of adjudicative procedural due process required of government in acting upon individuals. Continually, the Court has measured the fullness of procedural entitlements it deems required by the Bill of Rights (or, with respect to the states, by the fourteenth amendment) by weighing the adverse effect of the government's adjudicative action against the justification given by government in defense of its procedural informality. The resulting balance has determined the extent of due process deemed required by the Constitution.

Prior to 1962 (Graph I), the balance struck between the needs of the individual and the opposing interests of government was determined by the particular facts of each case; *i.e.*, the balance was determined ad personam. For instance, of two felony defendants, each of whom might be indigent (and thus unable to afford counsel), the refusal of a state to provide counsel might or might not be deemed a denial of due process—depending upon a number of additional considerations illuminating the particular circumstances of each.[1] Similarly, of two dismissed federal employees, the refusal of government to provide more than notice of dismissal plus a rather vague indication of reasons might or might not be deemed a denial of due process—depending on the different collateral consequences to each person.[2]

Between 1962 and 1972 (Graph II), the balance struck by the Court became more categorical; *i.e.*, all cases sharing certain basic features were treated identically, without further ad personam refinement. For instance, all persons accused of a felony (later extended to include misdemeanors) and unable to afford counsel were deemed entitled to assigned counsel, without further inquiry into the ad personam differences among them (*e.g.*, how much formal or legal education each happened to have, how "seasoned" in the criminal process each might be, how intelligent or articulate each might be, how complicated or simple were the disputed facts or law of the case).[3] Similarly, all persons threatened with termination of welfare benefits were deemed entitled to notice, reasons for termination, and a personal hearing prior to termination, without further inquiry into the ad personam differences among them (*e.g.*, whether some might have friends or relatives capable and willing to sustain them, while others might not be so favorably situated).[4] The practical

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[1] *Compare* Powell v. Alabama, 287 U.S. 45 (1932), *with* Betts v. Brady, 316 U.S. 455 (1942), *and* Crooker v. California, 357 U.S. 433 (1958).

[2] *Compare* Greene v. McElroy, 360 U.S. 474 (1959), *with* Cafeteria & Rest. Workers Local 473 v. McElroy, 367 U.S. 886 (1961). *See also* Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 874-79.

[3] Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).

[4] Goldberg v. Kelly, 397 U.S. 254 (1970).

differences under this more categorical approach were principally these: (*1*) ascertaining the requisite procedural due process was significantly simplified; and (*2*) procedural protections were extended to many more people than in the past.

Beginning in 1972 (Graph III), an additional consideration was introduced. It became the individual's burden to show some source of law vesting in him an element of substantive liberty or property threatened with divestiture by government, before he would be entitled to *any* degree of procedural due process.[5] Thus, as between two persons otherwise similarly situated in terms of personal consequences resulting from a proposed adjudicative governmental action, their respective entitlement to due process would depend upon the legal form of the threatened interest—which legal form might itself be wholly within the discretion of government to define. For example, of two public school teachers, each in the twenty-seventh year of continuous employment in a school district, each being fifty-seven years old, and each as unemployable anywhere else as the other, the one on "continuous contract" would be entitled to procedural due process in the event of proposed termination, but the other, on "annually renewable contract," would be entitled to no due process at all. Of two prisoners, each proposed to be shifted from mild ("honor grade, minimum security") confinement to severe ("solitary, maximum security") confinement for identical suspected misconduct, the entitlement of either to due process would be contingent upon his establishing a legally vested entitlement to his current condition of greater liberty.[6]

Since the legal form of an individual's status may vary depending upon whether its source is federal law or state law (as well as vary from state to state), the fortuitous gaps in the Graph III due process curve are meant to suggest the current fortuitous gaps in *actual* due process protection. That is, the Supreme Court has refused to include certain important interests within the categories of liberty and property, even though such non-liberty-or-property interests (*e.g.*, a person's interest in continuing as a nontenured public school teacher) may well outweigh, and so be higher on the vertical axis of the graph, well settled liberty or property interests (*e.g.*, a motorist's interest in avoiding a five-dollar fine for double parking). Therefore, these important interests receive no due process protection whatsoever, and thus fall at zero, if at all, on the horizontal axis of the graph.

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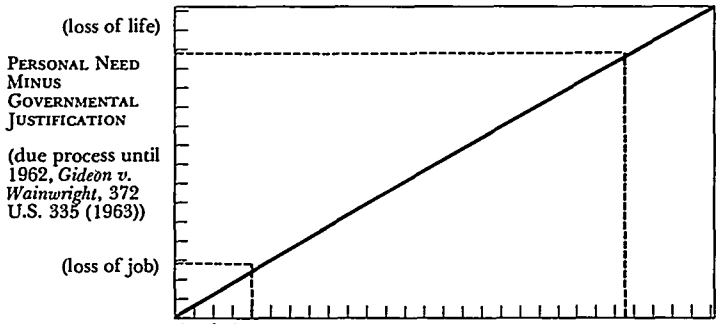
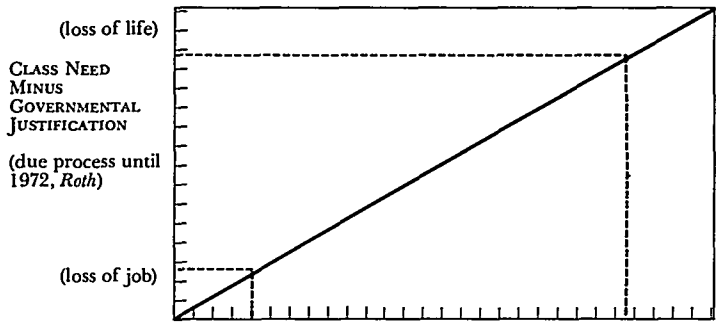
[5] Board of Regents v. Roth, 408 U.S. 564 (1972).

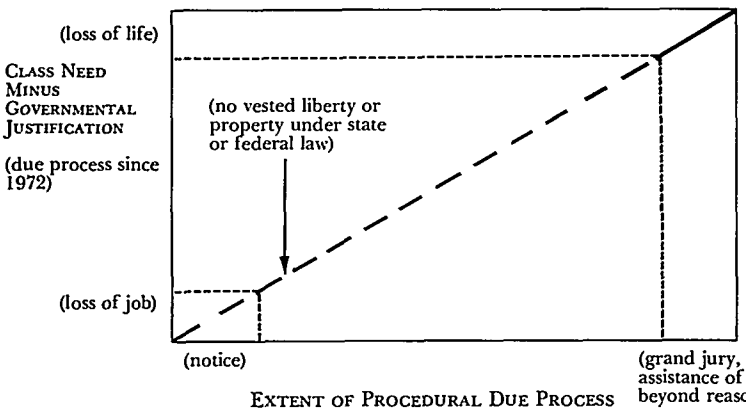
[6] Meachum v. Fano, 96 S. Ct. 2532 (1976).



GRAPH I



GRAPH II



GRAPH III