NOTES

DEMOCRATIC DUE PROCESS: ADMINISTRATIVE PROCEDURE AFTER *BISHOP V. WOOD*

A policeman is fired; a teacher is denied tenure; a prisoner is transferred into solitary confinement; a student is suspended from school; a welfare recipient's payments are cut off; a driver has his license revoked. In each case the claim is made that the administrative action was taken without observance of proper procedure, and a court is petitioned for relief. In June of 1976, the Supreme Court decided *Bishop v. Wood*,[1] a case which portends an entirely new judicial approach to these situations. The effect of *Bishop* may be to reduce substantially the quantum and quality of procedures which administrative agencies must observe before taking actions which significantly affect the status of a recipient of government largess.[2]

The courts have traditionally drawn on three sources in establishing standards of administrative procedure. The due process clause,[3] general administrative procedure statutes,[4] and statutes establishing specific agencies[5] have all been used to determine the procedural rights which attach to public benefits.[6] Since 1970, the judicial trend has been to utilize the due process clause as the most important source of administrative procedural rights.[7] Courts have found the recipients of government largess entitled to such procedural protections as notice and hearing even when those protections were not required by any relevant statute; they have viewed the due process clause as the source of an independent constitutional mandate for such safeguards. This phenomenon has been called the "due process explosion,"[8] and it recently prompted Chief Judge Friendly to ask "whether

1. 426 U.S. 341 (1976).

2. "Largess" is a term used to designate the full panoply of benefits, contracts, licenses, services and jobs which government provides without being obligated to do so. *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964). See text accompanying note 54 *infra*.

3. U.S. CONST. amend. XIV, § 1.

4. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-06, 1305, 3344, 6362, 7562 (1967); CAL. GOV. CODE §§ 11370-11445, 11500-11528 (West 1966); MODEL STATE ADMINISTRATIVE PROCEDURE ACT, *reprinted in* 9C UNIFORM LAWS ANNOTATED 134-61 (Cum. Supp. 1967).

5. *See, e.g.*, Railway Labor Act, 45 U.S.C.A. § 151, 153, 155-56 (West 1926).

6. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 8.01 (3d ed. 1972).

7. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 572-76 (1974); Wolf v. McDonnell, 418 U.S. 539 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972); Bell v. Burson, 402 U.S. 535 (1971). The trend began with Goldberg v. Kelly, 397 U.S. 254, 261-66 (1970).

8. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975).

government can do anything to a citizen without affording him 'some kind of hearing.' "[9]

This Comment advances the view that with *Bishop v. Wood* and several related recent decisions,[10] the Court has effectively eliminated the due process clause as an independent source of administrative procedure. Statutory law, in the form of general procedure acts and specific agency-related statutes, has become the solitary source of procedural protection for recipients of public largess. If an administrative agency wishes to fire an employee, terminate a welfare benefit, or revoke a license, it may do so with impunity provided only that it follows the procedures (however minimal) that are prescribed by the governing statutes. No additional requirements will be imposed by the Constitution. As a concomitant to this development, the responsibility for defining, shaping and limiting administrative due process has been taken from the courts and given to the legislatures. By placing this responsibility in the hands of elected representatives, the Supreme Court has in effect created a "democratic due process clause."

Because *Bishop* and the antecedent cases from which it evolved[11] are all concerned with public employment, it is tempting to conclude that the Court has announced a topically narrow doctrine which will be confined to that context and which will be given little effect across the broader spectrum of administrative law. It will be contended here, however, that the logic and policy behind the *Bishop* decision apply to other agency actions just as strongly as they apply to employment.

After setting forth the precedential basis for *Bishop* and analyzing the dimensions of its holding, this Comment will examine the Court's democratic due process approach in light of several basic principles of constitutional law. Democratic due process will be linked to the long-standing but recently repudiated right-privilege doctrine, and the history of that doctrine will be critically reevaluated in the context of the *Bishop* decision. Finally, the theory will be tested against the equal protection clause and the doctrine of separation of powers. It will be proposed that democratic due process is inconsistent with conventional interpretations of both of those constitutional limitations.

I. DEMOCRATIC DUE PROCESS EXPLAINED

A. *From* Roth *to* Bishop: *The Development of the Doctrine*

Carl Bishop was fired from his post as a policeman in the city of

9. *Id.* at 1275.

10. Montanye v. Haymes, 427 U.S. 236 (1976); Meachum v. Fano, 427 U.S. 215 (1976); Paul v. Davis, 424 U.S. 693 (1976). See notes 56-77 *infra* and accompanying text.

11. Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

Marion, North Carolina without being afforded a hearing to determine the sufficiency of the cause for his discharge. He brought suit against the police chief and city manager under section 1983,[12] claiming that he was constitutionally entitled to a pretermination hearing.[13] The federal district court found that under the law of North Carolina and the applicable city ordinances, Bishop held his job "at the will and pleasure of the city."[14] The Supreme Court accepted this interpretation of local law,[15] and ruled that because Bishop was not granted the right to a hearing by the relevant state statutes and local ordinances, he was entitled to no procedural protection under the due process clause of the Constitution.[16]

Bishop represents the culmination of a lengthy process of doctrinal evolution. To understand fully the analysis utilized in the decision, it is necessary to trace the process back through three cases: *Arnett v. Kennedy*,[17] *Perry v. Sindermann*,[18] and *Board of Regents v. Roth*.[19]

Prior to the companion cases of *Board of Regents v. Roth* and *Perry v. Sindermann*, due process claims were treated with what has been called a "unitary analysis."[20] The cases assumed that the recipient of a government benefit was entitled to some kind of due process before the benefit could be taken away; the issue was simply "how much process was due."[21] Resolution of the issue depended on an assessment of the importance or "weight" of the interest being deprived, measured against the "weight" of the government's interest in efficient administration.[22] For example, when a welfare recipient claimed that his benefits could not be stopped without a pretermination hearing, the Court balanced the importance of the welfare payments to the individual against the importance to the government of swifter, less burdensome procedure.[23] A ruling in favor of the individual had the effect of invalidating the procedures established by statute as constitutionally deficient. On the other hand, results favoring the government interests established the constitutional validity of the statutory procedures. Under this unitary due process analysis, the judiciary exerted primary and independent control in defining the scope of the fourteenth amendment's procedural requirements.

12. 42 U.S.C. § 1983 (1970).
13. Bishop v. Wood, 377 F. Supp. 501 (W.D.N.C. 1973).
14. *Id.* at 504.
15. 426 U.S. 341, 345-47 (1976).
16. *Id.* at 347.
17. 416 U.S. 134 (1974).
18. 408 U.S. 593 (1972).
19. 408 U.S. 564 (1972).
20. Tushnet, *The Newer Property: Suggestions for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 261-62.
21. *Id.*
22. *See, e.g.*, Goldberg. v. Kelly, 397 U.S. 254, 262-66 (1970).
23. *Id.*

Roth and *Sindermann* altered this approach by eliminating the assumption that some degree of procedural protection is always due.[24] Justice Stewart, writing for the Court in both cases, introduced the notion that there are some interests in government largess to which the due process clause simply does not apply.[25] The analysis began with the text of the fourteenth amendment, which commands that no state shall "deprive any person of life, liberty, or property without due process of law."[26] According to its literal terms, Justice Stewart asserted, the due process clause is activated only if a person's life, liberty, or property is at stake.[27] Extreme definitional pressure was therefore put on the two words "liberty" and "property"; before a litigant can even argue the equities of his due process claim, he must demonstrate that he is being deprived of one of those interests. In developing its definition of property, the *Roth* Court made what in retrospect would prove to be the most important statement in the case:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.[28]

Virtually all of the Court's significant administrative due process decisions subsequent to *Roth* have been based on the words in this passage.[29] It contains two discrete judgments: first, a property interest is not an abstract expectation of a benefit, but a legitimately claimed entitlement; and second, in determining whether an asserted interest is a mere expectation or a matured entitlement, the Court will look not to the Constitution, but to an independent source of law, such as a state statute.

The importance of these two principles is well illustrated by the facts of *Roth* and *Sindermann* themselves. Both cases involved professors whose teaching contracts were not renewed by their respective state universities.

24. *See generally* Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 977 (1976).

25. *See* Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

26. U.S. CONST. amend. XIV, § 1.

27. Board of Regents v. Roth, 408 U.S. at 571.

28. *Id.* at 577. The gloss which this passage has taken on subsequent to *Roth* has ignored the qualifying phrase "such as" and has treated the entitlement doctrine as if an entitlement can come *only* from a statute, a written contract, or an implied agreement such as the de facto tenure program involved in *Sindermann*. *See, e.g.*, Connealy v. Walsh, 412 F. Supp. 146, 159 (W.D. Mo. 1976).

29. *See, e.g.*, Bishop v. Wood, 426 U.S. 341, 344 n.7 (1976); Goss v. Lopez, 419 U.S. 565, 572-73 (1975); Arnett v. Kennedy, 416 U.S. 134, 151 (1974).

Each claimed that the decision not to rehire was made without proper procedure. Sindermann succeeded in his due process claim, but Roth failed. Roth, the Court held, did not possess a property interest in continued employment.[30] He was not a tenured faculty member, and state law explicitly provided that a decision not to renew his teaching contract could be made without explanation, review or appeal.[31] Thus, the Court said, Roth had only an abstract, subjective expectation of future employment with the university; the state had granted him no "entitlement."[32] Sindermann, on the other hand, was able to argue successfully that an entitlement based on state law did exist in his case, by virtue of a long-standing "de facto tenure" program at his university.[33]

Under the traditional unitary analysis, these two cases would have been decided identically. Justice Stewart's two-tiered approach, however, called for the establishment of an entitlement before any weighing of interests could take place. Because Roth and Sindermann were subject to different academic tenure laws, their cases produced opposite results.

Two years after *Roth*, the Court laid the groundwork for last term's radical expansion of the entitlement doctrine with its decision in *Arnett v. Kennedy*.[34] That case involved the dismissal, without a pretermination hearing, of a nonprobationary federal civil service employee by the same superior whom the employee had publicly accused of illegal conduct.[35] Notwithstanding the maxim that "no man is to be judge in his own case,"[36] the Supreme Court upheld the procedures that led to the dismissal.

Drawing on the entitlement requirement announced in *Roth*, Justice Rehnquist's plurality opinion[37] produced a theory which obviated constitu-

30. 408 U.S. at 578.

31. *Id.* at 566-67.

32. *Id.* at 578.

33. Perry v. Sindermann, 408 U.S. at 599-603.

34. 416 U.S. 134 (1974).

35. Kennedy was a nonprobationary employee in the competitive Civil Service, who worked in the Chicago office of the Office of Equal Opportunity (OEO). He had publicly charged his superior, Wendell Verduin, with attempting to bribe a community action organization with $100,000 of OEO funds. Verduin promptly brought charges against Kennedy, and, in his capacity as regional director of the OEO, also upheld those charges in the form of a written "Notification of Proposed Adverse Action". Kennedy was instructed that he could respond to the charges orally and in writing, and that he could submit supporting affidavits at the appeal. His reply and supporting evidence, however, were to be submitted to and evaluated by Verduin. Understandably, Kennedy did not wish to proceed before Verduin, who was already the victim of the alleged slander and the prosecutor of the charges. He sued for injunctive and declaratory relief, asserting that he could not be removed without a trial-type hearing before an impartial hearing officer.

36. *In re* Murchison, 349 U.S. 133, 136 (1955) ("[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.").

37. There was no majority opinion in *Arnett*. Chief Justice Burger and Justice Stewart joined in the opinion of Justice Rehnquist which announced the judgment of the Court. Justices

tional analysis entirely. In effect, the Court held that a public employee is entitled only to those procedural protections which are expressly granted by the relevant statutes. In its view, this holding was compelled by the language in *Roth* which stated that property interests are created and "their dimensions defined" by state law.[38] It is not enough, the argument goes, simply to find an entitlement; the dimensions of that entitlement must also be examined.[39] If, for example, a driver's license has expired, one can hardly assert that he is being deprived of a property interest if the license is taken away. An expired license is worth nothing. The dimensions of the entitlement to the license are set by the expiration dates which accompany it, and the license to drive cannot be accepted without also accepting the limitations on its face. In addition to expiring on a certain date, the license may also be terminated by the occurrence of a certain event, such as an arrest for driving more than twenty miles per hour over the speed limit. The state has effectively provided two expiration dates, one fixed by the calendar and another contingent on the occurrence of a specific event. If either contingency comes to pass, the license expires and any property interest in it no longer exists.[40]

The same underlying principles are readily extended to public employment. If a person is hired by a state to fill a short-term vacancy and is told in writing that his job will expire at the end of six months, the dimensions of his property interest are fixed by the dates set forth by the state.[41] A person who accepts the position must also accept the six-month limitation. When the six months have passed, his property interest will have lapsed. As in the case of the driver's license, the state may provide an additional "expiration date" for the employee's position: it may permit his termination on the happening of a specified event, such as a determination by his superior that the employee's work is unsatisfactory. The enumeration of these critical events and the procedures to be followed when they occur are left to the state. It may require a finding of misconduct by an impartial judge at a trial-type hearing, or it may allow termination on the mere subjective determination of a superior, without notice, hearing, explanation or appeal.

Powell, Blackmun and White all concurred in part and dissented in part. Justices Marshall, Brennan and Douglas dissented.

38. *See* Arnett v. Kennedy, 416 U.S. at 151 (citing Board of Regents v. Roth, 408 U.S. at 577), set forth in text accompanying note 28 *supra*.

39. Arnett v. Kennedy, 416 U.S. at 152.

40. This analysis cannot be reconciled with Bell v. Burson, 402 U.S. 535 (1971), in which the Supreme Court held that a driver's license could not be revoked without providing procedures that comport with minimum standards of constitutional due process. Justice Rehnquist's *Arnett* approach, if adhered to, requires overruling of *Bell v. Burson. See* Freund, *Supreme Court, 1973 Term—Forward: On Presidential Privilege*, 88 HARV. L. REV. 13, 88 n.38 (1974).

41. Perry v. Sindermann, 408 U.S. 593, 601 (1972); Hostrop v. Board of Junior College Dist. No. 515, 471 F.2d 488, 494 (7th Cir. 1972).

Whatever event is selected, the result is the same. Once the event occurs, and the statutorily prescribed procedures (if any) are carried out, the property interest is extinguished and no further "process" is "due" the affected party.[42]

Thus, the essence of the analytic model propounded by the *Arnett* plurality is that "[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 . . . must take the bitter with the sweet."[43] When Kennedy accepted his job he agreed to take the bitter—the abbreviated procedures for its termination—with the sweet—the enjoyment of his job until it was terminated.[44] Once those procedures were followed, Kennedy's property interest in his job ceased to exist, and he therefore had nothing left to support a claim under the due process clause. If the Rehnquist theory is extended to its natural limits, it will be virtually impossible to find constitutional deficiencies in a statutory procedure for the termination of a publicly conferred benefit.[45] For once that procedure is followed, the prop-

42. This conceptualization is analogous to the fee simple determinable interest in real property. Just as a grantor may retain the power to take back what he has granted upon the happening of a designated event, government may create property interests subject to defeasance after certain procedures have been followed. One accepts the conditions for defeasance when he accepts the property interest; the two are inseparable. *See* Arnett v. Kennedy, 416 U.S. at 152; Comment, *Entitlement, Enjoyment and Due Process of Law*, 1974 DUKE L.J. 89, 109 n.81.

43. Arnett v. Kennedy, 416 U.S. at 153-54.

44. The *Arnett* Court was defining the dimensions of the right to public employment under the removal provision of the Lloyd-LaFollette Act, 5 U.S.C. § 7501 (1970):

> 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.

416 U.S. at 151-52.

45. At least two commentators have found the Rehnquist approach in *Arnett* to be the logical corollary of *Roth*, stating that once the *Roth* entitlement doctrine is accepted, *Arnett* inexorably follows. Tushnet, *supra* note 20, at 264; Freund, *supra* note 40, at 87. Professor Tushnet therefore argues that the only way to undo *Arnett* is to undo *Roth* and eliminate the entitlement doctrine. As a practical matter, however, few of the Justices appear willing to abandon *Roth*'s entitlement requirement. The closest thing to an attack on *Roth* itself is the dissenting opinion of Justice Brennan in *Bishop*, where he states that "[t]here is certainly a federal dimension to the definition of 'property' in the Federal Constitution . . . ." 426 U.S. at 353. He stresses that the plain language of *Roth* says no more than the entitlements "*can* arise from 'existing rules or understandings' that derive from 'an independent source *such* as state law.' " *Id.* (emphasis in original). The balance of the Brennan dissent mounts a frontal assault on the entitlement theory, substituting in its stead a more subjective inquiry into what the employee could reasonably believe about his chances for continued employment. *Id.* Although the dissent does not literally repudiate *Roth*, it is difficult to see how Justice Brennan's statement that "property" has a "federal dimension" can mean anything other than a "constitutional dimension." Yet there is no ambiguity in Roth's declaration that "[p]roperty inter-

erty interest evaporates, and the fourteenth amendment is defined away into irrelevance.[46]

At the time *Arnett* was decided, only two other Justices shared Justice Rehnquist's restrictive reading of the due process clause.[47] But barely two years later, in *Bishop v. Wood*,[48] Justice Rehnquist's analysis commanded the support of a majority of the Court.

In his opinion for the *Bishop* Court, Justice Stevens began by reiterating the notion from *Roth* that a property interest in employment can be created by ordinance or implied contract.[49] He then followed the approach taken by Justice Rehnquist in *Arnett* and focused on the city ordinance[50] to determine the "dimensions" of the property interest which Bishop had in his job as a police officer. Deferring to the district court's interpretation of

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ests . . . are not created by the Constitution." 408 U.S. at 577. Thus, the most direct judicial attack on the "democratic due process" approach did precisely what Professor Tushnet said it must: reject the entitlement theory of *Roth* and *Sindermann*.

The issue which this Comment will attempt to resolve is whether there is logical ground for an intermediate position. Assuming the entitlement theory is retained, is there a basis for leaving the delineation of what the due process clause requires in the hands of the federal courts instead of delegating that task to the plenary control of the states? In effect, this will be an effort to find support for the position espoused by Justice White (a position which Professor Tushnet assails as contradictory, Tushnet, *supra* note 20, at 263). Justice White maintains that "[t]he fact that the origins of the property right are with the States makes no difference for the nature of the procedures required." Arnett v. Kennedy, 416 U.S. at 185 (White, J., concurring). As he further states, "While the State may define what is and what is not property, once having defined those rights the Constitution defines due process . . . ." *Id.*

46. Once the theory of Justice Rehnquist is accepted, the due process clause loses most of its force and is reduced to little more than a requirement that the states observe whatever procedures they have actually set. *See* Comment, *supra* note 42, at 94 n.25. This renders the clause superfluous, however, for courts may require states to observe their own laws without invoking the due process clause; state laws are enforceable in their own right.

47. Six justices in *Arnett* specifically rejected the Rehnquist approach. *See* 416 U.S. at 166-67 (opinion of Powell, J.); *id.* at 185 (opinion of White, J.); *id.* at 211 (Marshall, J., dissenting). Justice Powell, who joined in rejecting the approach in his *Arnett* opinion, embraced the Rehnquist theory in writing for the four dissenters in Goss v. Lopez, 416 U.S. 565, 584 (1975) (Powell, J., dissenting); see note 85 *infra* and accompanying text and note 90 *infra*.

48. 426 U.S. 341 (1976).

49. *Id.* at 344.

50. Article II, § 6 of the Personnel Ordinance of the City of Marion read as follows:

> *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.

Bishop v. Wood, 426 U.S. at 344 n.5. The Court drew support for its reliance on state law from a decision of the North Carolina Supreme Court, Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971), which it characterized as holding that an "enforceable expectation of continued public employment" can be found only where the state has expressly conferred such a guarantee, either by statute or by contract. 426 U.S. at 345. The basic facts of *Bishop* are set forth in the text accompanying notes 12-16 *supra*.

local law, the Court found that "the ordinance may . . . be construed as granting no right to continued employment but [as] merely conditioning an employee's removal on compliance with certain specified procedures."[51] Since the procedures which the city had written were "found not to have been violated," the Court concluded that the "petitioner's discharge did not deprive him of a property interest protected by the Fourteenth Amendment."[52]

For the purposes of termination procedure, *Bishop* puts the governmental employer in roughly the same position as a private employer. A private employer is constrained only by the employment contract; the governmental employer is constrained only by the statute defining the public employment relation, which serves as the functional equivalent of a contract. A private employee who sues because his job was terminated without proper notice, explanation or hearing must rely on breach of contract to sustain his cause of action. After *Bishop*, a public employee who believes he was wrongfully fired may still bring his claim under the rubric of the due process clause. But unless the state has breached the procedural rules which it itself has written, the employee will lose.[53]

Government largess, of course, takes many forms besides public employment. It includes Social Security benefits, unemployment compensation, public housing, veterans' benefits, welfare, government contracts, licenses, franchises, subsidies and government services.[54] The truly significant question posed by *Bishop* is whether the democratic due process analysis will be extended to cover the wide range of benefits and services administered by public agencies. Before that question can be answered, however, it is necessary to explore the other avenue by which a recipient of public largess can invoke the due process clause—the claim that he has been deprived of a liberty interest. Since *Roth* and *Sindermann*, litigants have routinely claimed deprivation of both property and liberty interests when

51. 426 U.S. at 345.

52. *Id.* at 347.

53. Strategically, after *Bishop*, it will almost always be counter-productive for a dismissed state employee to make his claim in federal court under the due process clause and section 1983, 42 U.S.C. § 1983 (1970). The federal court's role is now purely mechanical; it is to determine what procedures are required by looking to state court interpretation of state law. No meaningful appeal is available, for under established federal practice, appellate courts defer to district court interpretations of ambiguous state law. *See, e.g.*, Bishop v. Wood, 426 U.S. 341, 346 (1976); Propper v. Clark, 337 U.S. 472, 486-87 (1949); Township of Hillsborough v. Cromwell, 326 U.S. 620, 629-30 (1946).

State courts, on the other hand, will be free to interpret the statute or ordinance as they see fit. As a result, a state employee suing for breach of his employment contract in state court will be able to invoke a much broader range of arguments than he could under a due process claim in federal court. Balancing of the state's interest in efficiency against the need for employee protection will be perfectly appropriate for a state court attempting to construe an ambiguous law in light of public policy.

54. *See generally* Reich, *supra* note 2.

bringing suit under the due process clause.[55] *Bishop* would be of little import if it could be sidestepped merely by characterizing one's claim as a deprivation of "liberty." In fact, however, this avenue of escape has already been sealed off; the Court is quite clearly prepared to extend its democratic due process analysis to liberty interests as well.

B. *The New Liberty*

What began in *Roth, Sindermann* and *Arnett* as a theory for defining the concept of property has evolved into a device for bifurcating the concept of liberty. Several cases decided during the October 1975 term[56] indicate that two kinds of liberty now exist—liberty which is created by the Constitution and liberty which is created by state law.[57] Liberty which has its genesis in state law is subject to the same analysis which the *Bishop* Court has applied to state-created property interests.

The first case in which the Court equated analysis of property interests with analysis of liberty interests was *Paul v. Davis*.[58] Davis brought suit against the Louisville, Kentucky police chief under section 1983, claiming that the police chief's circulation of a flyer which listed him as an "active" shoplifter[59] deprived him of liberty and property without due process of law. The *Paul* opinion, written by Justice Rehnquist, follows a line of analysis strikingly similar to that which would appear three months later in *Bishop*.

55. *See, e.g.*, Mitchell v. King, 537 F.2d 385 (10th Cir. 1976); Shore v. Howard, 414 F. Supp. 379 (N.D. Tex. 1976); Connealy v. Walsh, 412 F. Supp. 146 (W.D. Mo. 1976); Turano v. Board of Educ., 411 F. Supp. 205 (E.D.N.Y. 1976).

56. Montanye v. Haymes, 427 U.S. 236 (1976); Meachum v. Fano, 427 U.S. 215 (1976); Paul v. Davis, 424 U.S. 693 (1976).

57. At least since the appearance of Charles Reich's germinal article *The New Property*, Reich, *supra* note 2, it has been popular sport to bifurcate the concept of "property" according to the origin of the interest at stake. Roughly put, the new property is that which owes its existence to government; old property is that which comes from somewhere else. As the word "property" connotes "ownership" and "rights," the concept "new property" has come to stand for the notion that the judiciary should recognize rights to procedural protection in forms of government largess. The idea reached its apex in Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970): "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property."

Bishop is in many ways a renunciation of the new property concept. It declares that the Constitution will not be read so as to transmute public benefits into private property interests. As the heading of this section implies, the Court has worked a double irony on Professor Reich's efforts. Not only has it refused to extend protection to the property interests which Reich described, it has also withdrawn protection from interests in liberty which had been thought secure.

58. 424 U.S. 693 (1976).

59. Davis had been arrested on a shoplifting charge 17 months before the flyer was circulated. He had been arraigned and had entered a plea of not guilty, and soon thereafter the charge was "filed away with leave to reinstate." At the time the flyer was issued, therefore, he had not been found either guilty or innocent of shoplifting. Shortly after the flyer appeared, a local judge dismissed the charge. *Id.* at 695-96.

The Court first acknowledged that there are a "variety of interests . . . comprehended within the meaning of either 'liberty' or 'property' as meant in the due process clause."[60] The question whether the law of Kentucky granted such an interest in one's reputation was resolved with the bald assertion (unsupported by discussion of state statutes or judicial precedents), that Kentucky law conferred no "legal guarantee of present enjoyment of reputation which has been altered as a result of [the police chief's] actions."[61] Since no liberty interest expressly recognized by state law had been infringed, Justice Rehnquist found no claim cognizable under the due process clause.[62]

Reading *Bishop* in conjunction with *Paul* produces a devastating effect on due process claims based on reputation. *Paul* requires that the reputational interest be connected with some more tangible property interest, and *Bishop* assures that such a property interest will almost never be found to exist.[63]

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60. *Id.* at 710.

61. *Id.* at 711-12. The Court might have found reputation to be of constitutional dimension, of course, and therefore not subject to the throes of entitlement analysis. A ruling that reputation is a constitutionally protected interest would not have been without precedent. *See* Goss v. Lopez, 419 U.S. 565, 574-75 (1975); Board of Regents v. Roth, 408 U.S. 564, 572-74 (1972); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Cafeteria Workers v. McElroy, 367 U.S. 886, 898-99 (1961); Wieman v. Updegraff, 344 U.S. 183, 190-91 (1952); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); United States v. Lovett, 328 U.S. 303 (1946). By far the most important case faced by Justice Rehnquist was *Wisconsin v. Constantineau*, in which the Court stated:

> The *only* issue present here is whether the label or characterization given a person by "posting," though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such that those requirements of procedural due process must be met.

400 U.S. at 436 (emphasis supplied). The Court went on to say, "[C]ertainly where the State attaches 'a badge of infamy' to the citizen, due process comes into play." *Id.* at 437. Justice Rehnquist, somehow finding this language "ambiguous," 424 U.S. at 707, observed that when read against the backdrop of earlier precedents, *Constantineau* stands only for the proposition that reputation is protected when coupled with injury to some other more tangible interest, such as loss of employment. *Id.* at 708-10.

62. 424 U.S. at 712. In one lower court decision which has construed this aspect of *Paul*, the Tenth Circuit held that an appointee to a state museum commission could be summarily removed by the Governor with impunity. The court read *Paul* to require that "the governmental action complained of must deprive the petitioner of a *right which has its genesis in state law, and the protective shield of § 1983 extends only to those interests . . . .*" Mitchell v. King, 537 F.2d 385, 390 (10th Cir. 1976) (emphasis in original). Finding that the state law in question gave the governor an unrestricted power of removal, the court held that no state-created property or liberty interest existed. *Id.*

63. Justice Stevens would apparently not acquiesce in the combination of liberty and property interests. In Codd v. Velger, 97 S. Ct. 882 (1977), Justice Stevens interpreted *Bishop* as leaving the door open for liberty interest claims resulting from discharge for detrimental remarks made in a personnel record of previously held public employment. He states "[t]he discharge itself is part of the deprivation of liberty against which the employee is entitled to defend," *id.* at 887 (Stevens, J., dissenting). It is clear from his dissent in Meachum v. Fano, 427 U.S. 215, 229 (1976), that he rejects the democratic due process approach when applied to

In two other cases from the 1975 term, *Meachum v. Fano*[64] and *Montanye v. Haymes*;[65] the Supreme Court again applied democratic due process analysis to liberty interests. Both involved prisoners who were moved from low security to maximum security institutions where living conditions were "substantially less favorable."[66] Each prisoner claimed a due process right to a pre-transfer hearing. In each case, the court examined state law to determine whether the prisoner had a state-created liberty interest in remaining at the more comfortable, less restrictive prison.[67] Finding that no such interest had been conferred, the Court held that the prisoners' claims were not actionable under the due process clause.[68]

Whatever may be said of the Court's treatment of property interests, its analysis of liberty interests within the democratic due process framework is objectionable on several grounds. To begin with, it is beyond dispute that certain liberty interests exist which have absolutely nothing to do with state law. The Court in *Paul* gives apparently grudging recognition to this idea by acknowledging in a footnote that "there are other interests protected not by virtue of their recognition by the law of a particular state, but because they are guaranteed in one of the provisions of the Bill of Rights."[69] However, the Court's admission that some aspects of liberty derive from the Bill of Rights only serves to illuminate a more fundamental problem with the *Paul* opinion. *Paul* is predicated on the notion that liberty interests other than those enumerated in the Bill of Rights are utterly outside the protection of the due process clause except to the extent that they are "recognized . . . by state law."[70] It must therefore be read as assuming that all liberty interests not expressly protected by the Bill of Rights were surrendered to the states, to be granted back to the people a parcel at a time as the states deem fit.[71]

This analysis is incompatible with the numerous historical and judicial precedents which assert that non-enumerated liberties are not surrendered to the states.[72] These precedents are premised on two different theoretical

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liberty. See note 77 *infra* and accompanying text. It is not at all clear, however, that Justice Stevens has succeeded in reconciling his *Bishop* opinion with *Meachum*; the attempt to do so in *Codd* simply exacerbates the confusion. Justice Stevens' point in *Codd*—that a hearing is required both to determine "what happened" and "what disciplinary action is appropriate" would seem to require a result in *Bishop* exactly opposite of that which occurred.

64. 427 U.S. 215 (1976).

65. 427 U.S. 236 (1976).

66. Meachum v. Fano, 427 U.S. 215, 217 (1976); Montanye v. Haymes, 427 U.S. 236, 238 (1976).

67. 427 U.S. at 223-29; 427 U.S. at 243.

68. 427 U.S. at 229; 427 U.S. at 243.

69. 424 U.S. at 710 n.5 (1976).

70. *Id.* at 710-11.

71. *Cf.* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 327-28 (1976).

72. The Federalists opposed adoption of the Bill of Rights on the ground, among others,

constructs. One theory asserts that certain rights exist which are outside the Bill of Rights but nonetheless beyond the reach of government;[73] the other holds that those rights are actually grounded in the Bill of Rights despite the lack of direct textual support for them.[74] Whether one adopts the former, the "natural law" theory, or the latter, the "penumbral" theory, the result is the same: there are liberties which have full constitutional status despite their non-enumeration.[75]

Most disturbing of all, however, is the basic assumption in *Paul*, *Meachum* and *Montanye* that a man's liberty exists at the grace of the state—that unless positive law grants him a specific aspect of liberty, it does not exist.[76] It is this fundamental misconception of the nature of liberty

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that because it would be impossible to list all rights, it would be dangerous to list only some since that would imply that those not listed had been surrendered. *See* THE FEDERALIST No. 84 (A. Hamilton). Even James Madison thought that the Federalists' point was "one of the most plausible arguments . . . against the admission of a bill of rights . . . ." 1 ANNALS OF CONG. 439 (1789). He specifically addressed the issue when he introduced the proposed bill of rights to the House of Representatives, *id.*, explaining that he had attempted to guard against such a construction by inserting what eventually became the ninth amendment—"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

73. *See, e.g.*, United States v. Guest, 383 U.S. 745, 758 (1966) (citations omitted):

> Although the Articles of Confederation provided that "the people of each State shall have free ingress and regress to and from any other State," that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.

74. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965): "Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

75. The Supreme Court has expressly recognized the existence of many of these rights. Among them are the right to a proportionally equal vote, Reynolds v. Sims, 377 U.S. 533 (1964); the right to procreate, Skinner v. Oklahoma, 315 U.S. 535 (1942); the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to use contraceptives, Griswold v. Connecticut, 381 U.S. 479 (1965); the right to obtain an abortion, Roe v. Wade, 410 U.S. 113 (1973); the right to possess "obscene" material in one's own home, Stanley v. Georgia, 394 U.S. 557 (1969); and a limited right of access to the courts to obtain a divorce, Boddie v. Connecticut, 401 U.S. 371 (1971).

76. This notion goes well beyond the language of *Roth*, from which the entitlement theory came. *Roth* did not include "liberty" within the range of interests that are created and defined by state law. In fact, *Roth* gave the concept of liberty much more deferential treatment, stating that "[i]n a Constitution for a free people, there can be no doubt that the meaning of liberty must be broad indeed." 408 U.S. at 572. The idea that liberty depends on state-enacted positive law for its existence is antithetical to the *Roth* Court's definition of liberty, as characterized by its quotation from Meyer v. Nebraska, 262 U.S. 390, 399 (1923):

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

As this passage demonstrates, the narrow treatment which Justice Rehnquist lends to liberty interests in his *Paul* opinion is drastically different from the tenor of the opinion in *Roth*.

which prompted Justice Stevens, who fully accepted the democratic due process analysis when applied to property, to dissent from its application to liberty:

> If a man were a creature of the state, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.[77]

Despite Justice Stevens' protestations, a majority of the Court appears fully prepared to apply democratic due process theory to liberty and property interests without differentiation. The next inquiry, then, is whether the Justices will truncate due process protections in a wide variety of administrative actions involving government largess.

C. The Prospects for Expansion

It would be premature to infer from *Bishop, Paul* and *Meachum* a broad condemnation of "interest balancing" and a conclusive statement of the dominance of democratic due process. Although *Bishop* seems clearly to be the last word on public employment,[78] it is far from certain that the Court will move to extend the democratic due process approach to such areas as student and prisoner discipline, termination of welfare payments or license revocation.[79] The indications from the October 1975 term are that the Court simply has not committed itself irrevocably to either "balancing" or democratic due process "defining." The democratic due process theory was embraced by four dissenting Justices in *Goss v. Lopez*,[80] a student discipline case, but it is not known whether Justice Stevens, who provided the decisive fifth vote in *Bishop*, would also apply it in the public school

77. Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting).

78. *See* City of Chicago v. Confederation of Police, 427 U.S. 902 (1976), a due process case involving transfer and demotion of Chicago policemen which the Court vacated and remanded for reconsideration in light of *Montanye, Meachum* and *Bishop*. The Seventh Circuit had found that the police officers did possess a *Roth* "entitlement," which gave them a right to constitutionally adequate procedures before they could be transferred or demoted. 529 F.2d 89 (7th Cir. 1976). Given the fact that the actions taken against the officers were carried out in accordance with procedures spelled out in Illinois statutes and police regulations, *id.* at 90 n.2, 91, the Supreme Court's remand would appear to indicate that at least in the area of public employment, procedures prescribed by statute or ordinance will not be held deficient.

79. Recent lower court decisions have continued to employ the balancing approach. *See, e.g.*, Basel v. Knebel, 551 F.2d 395 (D.C. Cir. 1977) (food stamps); Hathaway v. Mathews, 546 F.2d 227 (7th Cir. 1976) (medicaid payments).

80. 419 U.S. at 586-87 (Powell, J., dissenting).

context. *Meachum* and *Montanye* extended the democratic due process method to prison transfer cases, yet the traditional balancing theory was used in *Mathews v. Eldridge*,[81] which involved termination of Social Security payments.[82] There is no principled way to reconcile *Bishop* with *Eldridge*.[83] It will not do to say that Social Security benefits are more important in the Court's estimation than continuing employment, for if the democratic due process concept is utilized, judicial estimations of "importance" are not relevant at all.[84] *Eldridge* must therefore be taken as an index of the Court's current indecision about how best to analyze the bewildering array of due process problems in this area.[85]

It must be noted, however, that the policy underlying the democratic due process theory is possessed of an inherent expansiveness that is not easily limited to public employment.[86] The final paragraph in *Bishop* echoes a familiar theme of the Burger Court: the federal judiciary is not the

81. 424 U.S. 319 (1976).

82. *Eldridge*, decided prior to *Bishop*, held that a recipient of Social Security payments has no right to a pretermination hearing. The adequacy of the administrative procedures at issue was determined by balancing the private interests of the recipients, the risk of an erroneous deprivation through use of procedures already in force, and the government's interest in avoiding the fiscal and administrative burdens that additional procedures would entail. *See id.* at 332-35.

83. It is true that *Bishop* involved state administration while *Eldridge* was concerned with administrative procedure at the federal level and that the Court does play a different role when it reviews procedures undertaken pursuant to federal statutory authority. When dealing with federal law, the Court has the power to construe a statute (or regulations promulgated pursuant to it), and in the process of so doing, it may impose additional procedural requirements on sub-constitutional grounds, purely as a matter of statutory construction. This is roughly analogous to the supervisory function performed by the Court in the area of federal criminal and civil procedure. Furthermore, considerations of federalism, as distinct from simple deference to the democratic choice of the legislature, are not present in a case such as *Eldridge*. The Court does not mention any of these factors, however, and there is little likelihood that they can account for the inconsistency between *Eldridge* and cases such as *Bishop, Meachum* and *Montanye*.

84. *Eldridge* does reveal, however, how the Court can reach the same result as it did in *Bishop*—both cases held existing procedure to be adequate—without making the drastic analytic leap undertaken in *Bishop*. Instead of discarding the weighing process entirely, the Court can achieve its ends by simply "tinkering with the weights."

85. Just as vividly emphasized is the indecision of Justice Powell. Justice Powell explictly rejected the democratic due process approach in his *Arnett* opinion, only to embrace it in his dissent in *Goss*. He joined the Court's opinions in *Bishop, Paul, Meachum* and *Montanye*, only to apply the traditional balancing approach in *Eldridge*. It should be noted, however, that one unifying thread runs through all of his decisions: in no case did Justice Powell hold the statutory procedures consitutionally inadequate. Whether by way of democratic due process or balancing, Justice Powell consistently ruled against increased procedural protection for the recipient of largess. It is fair to treat *Eldridge* as an effort by Justice Powell to minimize the precedential importance of cases such as *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Bell v. Burson*, 402 U.S. 535 (1971). Justice Powell makes a particular point of treating the trial-type hearing requirement of *Goldberg* as an aberration from a line of cases in which a full dress hearing was not required. *See* Mathews v. Eldridge, 424 U.S. 319, 340, 344-46 (1976).

86. See text accompanying notes 130-36 *infra* for a more detailed discussion of the policy judgments underlying democratic due process theory.

appropriate place to resolve the countless disputes which arise in the "day-to-day administration of our affairs."[87] States should be free to set administrative standards and procedures for distributing government largess that are consonant with the values which the people in those states attach to those interests.[88] The federal courts should not dictate the relative importance to be assigned interests in various types of government benefits, nor can they meaningfully supervise the management of largess once these initial value judgments have been made.[89]

If the motivations underlying *Bishop* are strong enough to warrant its expansion, the actual rationale of the decision would seem absolutely to require it. There is nothing in the notion of a state-created interest which warrants its confinement to one variety of public benefit. If the states have the power to demarcate the limits of a property interest in government employment, they must also have that power for all other property interests in public largess. Strictly adhered to, democratic due process leaves no room for balancing of any kind.[90] Since the Court has not yet opened up

87. 426 U.S. at 350.

88. *See* Meachum v. Fano, 427 U.S. 215, 228-29 (1976), where the Court emphasized the importance of leaving the individual states the flexibility which it deemed essential to effective prison administration.

89. A broad range of cases reflecting a movement towards greater deference to state decision-making processes have been decided by the Court recently. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976); National League of Cities v. Usery, 426 U.S. 833 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Miller v. California, 413 U.S. 15 (1973). *See also* Shapiro, *supra* note 71, at 294; Comment, *Post-*Younger *Excesses in the Doctrine of Equitable Restraint: A Critical Analysis*, 1976 DUKE L.J. 523.

90. A strict application of democratic due process theory could seem to require overruling of two recent Supreme Court cases. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Supreme Court was confronted with the problem of terminating welfare benefits. A welfare recipient's entitlement to benefit payments is generally defined and limited by a statute which provides for termination of payments after a determination that the recipient is no longer eligible. The statute does not require a hearing. Using a balancing approach, the *Goldberg* Court found that the importance of welfare relief overcomes any countervailing state interest and that a hearing must be available. *Id.* at 266. Under the democratic due process approach, the welfare recipient would lose his property interest as soon as the agency completed the minimal procedural steps required by statute. Since no property interest is created by state law, the due process clause is never even activated. *Cf.* Bishop v. Wood, 426 U.S. at 353 n.4 (Brennan, J., dissenting).

In Goss v. Lopez, 419 U.S. 565 (1975), a suspended student asserted a constitutional right to a pre-suspension hearing. Under the *Bishop* analysis, he is only entitled to whatever statutory protection the state has provided for. As Justice Powell wrote in his *Goss* dissent, "The very legislation which 'defines' the 'dimensions' of the *students' entitlement*, while providing a right to education generally, does not establish this right free of discipline imposed in *accord* with Ohio law." *Id.* at 565 (emphasis in original). The student, no less than the public employee, must take the "bitter with the sweet." See note 43 *supra* and accompanying text. The right to an education "is encompassed in the entire package of provisions governing education . . . of which the power to suspend is one." Goss v. Lopez, 419 U.S. at 465 (Powell, J., dissenting). *Bishop*, with a little help from *Paul v. Davis*, has already seriously undermined *Goss* without explicitly overruling it. *Bishop* itself would eviscerate any attempt to establish a property interest in public education, for that interest would be contingent on whatever disciplinary procedure the state decides to develop. *Paul*'s devastating interpretation of *Wis-*

democratic due process to a wider range of interests, it is precisely at this juncture that it is most appropriate to subject the theory to rigorous critical analysis.

II. DEMOCRATIC DUE PROCESS EXPOSED

A. *The Return of the Right-Privilege Distinction*

Although *Bishop v. Wood* marks a radical break with the recent past, it is far from revolutionary when viewed against the background of the due process jurisprudence of the last seventy-five years. *Bishop* represents a return to a long-established constitutional doctrine—the right-privilege distinction.[91]

The doctrine traces its origins to the celebrated case of *McAuliffe v. Mayor of New Bedford*.[92] Police officer John McAuliffe was fired for violating a regulation which forbade participation in political activity. McAuliffe brought his suit on grounds hauntingly similar to *Bishop*'s: he argued first, that the relevant statute gave him a position from which he could not be removed except for an act of bad behavior; second, that he did not receive a "due hearing"; and third, that the notice and evidence were irregular and insufficient.[93] Justice Holmes disposed of the claim with cryptic dispatch, announcing that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[94]

Holmes' epigram became the classic statement of a simple but devastating approach to government largess.[95] As to any interest which it has no

consin v. Constanineau, see note 61 *supra*, effectively finishes off whatever *Bishop* might have left, for a student will no longer be able to assert a constitutionally protected interest in reputation. *Compare* Goss v. Lopez, 419 U.S. at 574-75, *with* Paul v. Davis, 424 U.S. at 701-10. The Court in *Paul* does make a passing reference to *Goss, id.* at 710, but this should not be misinterpreted as a signal that the students' reputation claim would still be viable. Justice Rehnquist refuted the claim that reputation is a constitutionally rooted liberty interest by taking *Goss* and every other case from which such a principle might be garnered and demonstrating that it can be explained on alternate grounds. *See id.* at 701-10. Thus, he observes that while the *Goss* Court noted that charges of misconduct could seriously damage a student's reputation, it was also careful to point out that Ohio law conferred a "property" right upon all children to attend school, and that suspension resulted in a denial of that right. *Id.* at 710. Under Justice Rehnquist's analysis in *Paul*, then, injury to a liberty interest in reputation is cognizable only when it is suffered in conjunction with deprivation of a distinct property interest. Of course, after *Bishop v. Wood*, this careful distinction only serves to undermine *Goss* further, for no property interest can exist beyond the dimensions created for it by state procedures.

91. This Comment is not the first place that the similarity between *Bishop* and the privilege doctrine is noted. The point is made by Justice Brennan in his *Bishop* dissent, *see* 426 U.S. at 350. Significantly, several Justices made the same point in their discussions of Justice Rehnquist's opinion for the *Arnett* plurality. Arnett v. Kennedy, 416 U.S. 134, 210-11 (1974) (Marshall, J., dissenting).

92. 155 Mass. 216, 29 N.E. 517 (1892).

93. *See id.* at 220-21, 29 N.E. at 517-18.

94. *Id.* at 220, 29 N.E. at 517.

95. *See* K. DAVIS, *supra* note 6, § 7.12; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439-41 (1968).

affirmative duty to provide—be it employment, education, welfare relief, a license or a contract—the government could, as the "giver," attach any conditions it pleased to the "gift."[96] Until relatively recent times, the privilege doctrine stood as the stock response to procedural attacks on the termination of public benefits.[97] Justice Rehnquist's trenchant remark that public employees must take the "bitter with the sweet" is in perfect consonance with the line of authority emanating from *McAuliffe*. To the extent that Holmes' dictum has reached fruition in *Bishop*,[98] the right-privilege distinction must once again be confronted.

The distinction must be be confronted "once again" because in the decade prior to *Bishop* it had generally been supposed that the privilege doctrine was dead.[99] An impressive string of Supreme Court decisions explicitly denounced the right-privilege distinction,[100] and scholarly comment fully supported the trend.[101] One cannot help but wonder how a

96. *See* Wilkie v. O'Connor, 261 App. Div. 373, 375, 25 N.Y.S.2d 617, 620 (1941): "[I]n accepting charity, the appellant has consented to the provisions of the law under which the charity is bestowed."

97. *See, e.g.*, Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951). The doctrine received one of its more celebrated applications in the appeal from the "Scopes Monkey Trial," Scopes v. State, 154 Tenn. 105, 111, 289 S.W. 363, 364 (1927).

98. Some of the language in *Bishop* shows a strong resemblance to language in *McAuliffe*. Compare, for example, Justice Stevens' statement that "the employee is merely given certain procedural rights which the District Court found not to have been violated in this case," 341 U.S. at 347, with Holmes' statement in *McAuliffe*:

> The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control.

155 Mass. at 220, 29 N.E. at 518.

99. *E.g.*, W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW—CASES AND COMMENTS xv (5th ed. 1970); Comment, *The Due Process Clause and Dismissal from Government Employment*, 2 HOUSTON L. REV. 120 (1964); Comment, *Constitutional Rights of Public Employees—Progress Toward Protection*, 49 N.C. L. REV. 302 (1971); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

100. Elrod v. Burns, 427 U.S. 347, 361-62 (1976); Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Morrisey v. Brewer, 408 U.S. 471, 482 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971); Bell v. Burson, 402 U.S. 535, 539 (1971); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969).

101. See note 99 *supra*.

In his leading article in this area, Professor Van Alstyne cites a series of cases founded on the doctrine of unconstitutional conditions in support of his assertion that the right-privilege dichotomy had been eviscerated. Van Alstyne, *supra* note 95, at 1446 nn.26-27. He is careful to make it clear, however, that the doctrine of unconstitutional conditions by itself is not potent enough to overthrow the right-privilege distinction. *Id.* 1447-49. He suggests an alternative attack which, if applied, would effectively reach to the heart of the privilege doctrine and destroy it from the inside. *Id.* at 1458-64. Had the courts adopted the jurisprudence suggested by Professor Van Alstyne's approach the demise of the privilege doctrine would be a reality.

That jurisprudence, however, was grounded in the notion that a "right" was nothing more than an ex post facto label attached to an interest which a court had deigned to protect. The entitlement theory of *Roth* and *Sindermann* is diametrically at odds with Professor Van

movement which had gained such vigorous and unanimous approval could be so suddenly and summarily reversed. The answer is that the "death" of the privilege doctrine was somewhat of a misnomer all along. What was called the death of the right-privilege distinction was actually an over-reading of two recent judicial trends: the increased use of the doctrine of unconstitutional conditions, and the tendency to recognize as legal rights interests which had formerly been classified as privileges.

The doctrine of unconstitutional conditions prohibits the government from conditioning the receipt of public benefits on the surrender of a constitutional right.[102] It will defeat the privilege theory only in one limited species of case, when a recognized constitutional right is clearly at stake. The shortcomings of the doctrine are aptly demonstrated by the Supreme Court's recent decision in *Elrod v. Burns*.[103] In *Elrod*, the Court held that patronage workers could not be fired solely because of party affiliation.[104] Using an unconstitutional conditions approach, the Court ruled that such dismissals violated the employees' first amendment rights of expression and free association.[105] Even though the employees had no right to hold their jobs, it was impermissible for the sheriff to condition continued employment on espousal of his own political party affiliation.[106] Consistent with Holmes' epigram, the *Elrod* Court did not assert that the petitioners had a constitutional right to be policemen; it simply emphasized that they did have a

Alstyne's approach. Once the entitlement theory gained acceptance, the "demise" of the privilege doctrine was left to be effectuated by the doctrine of unconstitutional conditions alone. As the article itself demonstrated, this state of things could only serve to make the "demise" short-lived.

102. Thus, even though a state has no obligation to provide unemployment benefits, it cannot administer such a program so as to refuse benefits to a person who will not work on Saturday for religious reasons. Sherbert v. Verner, 374 U.S. 398 (1963). *But see* Wyman v. James, 400 U.S. 309 (1971) (inspection of welfare homes). A state is under no constitutional obligation to hire a teacher, but it may not condition his employment on surrender of first amendment rights. Keyishian v. Board of Regents, 385 U.S. 589 (1967). A tenant may have no right to public housing, but the Housing Authority cannot require certification as a "nonsubversive" as a condition of continued occupancy. Lawson v. Housing Authority, 270 Wis. 269, 70 N.W.2d 605, *cert. denied*, 350 U.S. 882 (1955). An early analysis of this area can be found in Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum. L. Rev. 321 (1935).

103. 427 U.S. 347 (1976). The judgment of the Court was announced in an opinion by Justice Brennan, in which Justices White and Marshall joined. Justice Brennan's opinion was a frontal assault on the spoils system: it declared the entire practice of patronage employment unconstitutional. *Id.* at 355-74. Justice Stewart, joined by Justice Blackmun, wrote a short concurrence in which he fully supported the Court's judgment but refused to join its "wide-ranging opinion." *Id.* at 374.

104. The petitioners in *Elrod* were employees in the Sheriff's office of Cook County, Illinois. Their jobs were not protected by any Illinois statute or ordinance; like Officer Bishop, they could be fired at will. *Id.* at 349-51. The employees were Republicans who had been appointed by a Republican sheriff. Following the election of a Democratic sheriff, they were dismissed.

105. *Id.* at 360-61.

106. *Id.*

constitutional right to talk politics. Because *Elrod* did not question the assertion that there is no constitutional right to public employment, the employees scored a hollow victory. The finding that an unconstitutional condition has been imposed may easily be avoided by a more astute sheriff in the future. He need only take care not to explain *why* he fires his subordinates, and fire with sufficient selectivity to prevent a court from inferring that he was motivated solely by a desire to retailiate against those who refused to surrender their constitutional rights.[107] In order to make use of the doctrine of unconstitutional conditions, the plaintiff must first establish a prima facie showing of unconstitutional purpose,[108] but the proof required to make such a showing will nearly always be in the hands of the very official whose conduct is the cause of the complaint.

This leads to a second important observation: the doctrine of unconstitutional conditions has absolutely no potency when, rather than alleging that the government has discriminated, the complaint is simply that the government was wrong.[109] Officer Bishop did not claim that he was fired because he exercised a constitutional right. He argued simply that he did not do what his superior said he did. As a practical matter, the vast majority of plaintiffs who complain of insufficient or improper administrative procedure will be complaining for the same reason that Bishop complained—they want only a chance to present their side of the story and to have it fairly evaluated. But the doctrine of unconstitutional conditions avails them nothing, for they are not claiming a violation of any constitutional right.[110]

The presumed death of the right-privilege distinction was based also on the recent inclination of courts to give legal protection to interests which had previously been labeled as mere privileges. This trend is more accurately characterized as the creation of new rights. A right is nothing more than that which the law protects.[111] As such, it must be distinguished from the many

107. Van Alstyne, *supra* note 95, at 1447.

108. The doctrine has sometimes failed even when a constitutional right ostensibly has been violated. *See* Wyman v. James, 400 U.S. 309 (1971).

109. Van Alstyne, *supra* note 95, at 1447.

110. Something of the jurisprudential relationship between the two doctrines is revealed by a Seventh Circuit decision of then Judge Stevens. Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972) *cert. denied*, 410 U.S. 928 (1973). The *Lewis* case was brought by non-civil service employees of the Illinois Secretary of State's office who were discharged from their positions without explanation. Under state law, they could be fired at will. As in *Elrod*, the dismissals occurred after a change in the party affiliation of the head of the governmental department, this time the Secretary of State. The plaintiffs claimed they were fired because they refused to become Republicans or to support the Republican party. Judge Stevens held that if the allegations were true, the plaintiffs had stated a cognizable claim under 42 U.S.C. § 1983 (1970) for violation of their first amendment rights. 473 F.2d at 576. Foreshadowing his opinion in *Bishop*, however, Judge Stevens was careful to point out that his ruling did not provide employees with any job security as such. The federal courts, he made clear, do not sit as a "super-civil service commission" to determine standards and procedures for employee dismissals. *Id.* at 567-68. *But see id.* at 578 (Campbell, J., concurring).

111. See notes 119-20 *infra* and accompanying text.

things which people value, but which are not legally protected.[112] These other things may be called "privileges," "gratuities" or simply "interests."[113] Whatever they are called, they embody nothing more than desires and needs. Used in this sense, all people have interests in food, shelter, employment and a good reputation.[114] But these interests do not rise to the level of a right unless the law lends them protection. As the law began to afford protection to such desires as public jobs, welfare benefits and drivers' licenses, much of what was formerly "privilege" became elevated to "right." It was mistaken, however, to suppose that the distinction between rights and privileges itself had vanished, or that having lent protection to certain desires, the courts could not later take that protection away.[115]

In implicitly recognizing the continued vitality of the distinction between rights and privileges, *Bishop* is ultimately concerned with the two questions which the application of the distinction will always pose: first, from what body of law, if any, is the procedural protection for a given interest derived; and, second, how much protection does that body of law provide?

Constructive criticism of *Bishop* must focus on these two questions, for no purpose is served by merely protesting that the right-privilege distinction has returned. To be preoccupied with the previously proclaimed death of the distinction is to be drawn away from the genuinely significant issue. The epigram of Holmes must be squarely faced: the analysis in *Bishop* must stand unless one is prepared to argue that the due process clause does protect Bishop's desire to retain his job—that the petitioner does have a constitutional right to be a policeman.[116]

B. *The Jurisprudence of Federalism*

The notion that a person may have a constitutional right to be a policeman, or to receive a welfare check, or to possess a driver's license, seems ludicrous in its very statement. None of these things is mentioned in the Constitution, and no one can seriously suppose that he can walk into his local precinct station and demand induction into the constabulary on "constitutional grounds." Nothing so sweeping is meant by the phrase. Bishop

112. *See* K. DAVIS, *supra* note 6, § 7.12.

113. *See id.*

114. *See id.*

115. This analysis is consistent with that of Professor Van Alstyne who has argued that what is labeled privilege and what is labeled right should turn on a normative inquiry into whether or not the interest at stake ought to be protected. Van Alstyne, *supra* note 95, at 1459-64. Insofar as such a normative analysis yields protection to an increased variety of interests, it is correct to say that the set of interests collectively labeled "privileges" has been reduced. That is not to say that it is an empty set, however, or that later, courts with different normative inclinations would not reverse the trend and make the set expand once again.

116. *Cf.* Van Alstyne, *supra* note 95, at 1458.

sought only to establish that once he had become a policeman, the due process clause had something to say about how that status could be altered.

Even this limited effort to establish a protective right, however, has a suspicious aura. The suspicion springs from the tendency to think of rights as pre-existing absolutes. Holmes claimed that rights have no *a priori* existence: at the most, they are predictions of what a court will protect;[117] at the least, they are nothing more than the reiteration of a court's holding.[118] The statement that someone has a "constitutional right to talk politics" is only a prediction that a court will protect his desire to talk politics against the efforts of the state to limit or restrain him.[119] If it seems like something more than a prediction, that is only because experience has shown that its accuracy approaches certainty. The "right" to talk politics is, to use Holmes' own image, like the "law" of gravity: "[o]ne phrase adds no more than the other to what we know without it."[120] It is merely an explanatory label for a phenomenon confirmed in experience, not an immutable precept transcending its physical manifestations.

This notion of a right as a prediction of what the law will protect necessarily focuses attention on the problem of how the law develops. Again, Holmes' jurisprudence provides a useful insight: logic is not the only force at work in the development of the law. Ethical judgments are implicit in every legal decision,[121] and these judgments will of course change with time. As Holmes explained:

> You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or in short, because of some attitude of yours as a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body *in a given time and place*. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.[122]

Given this perspective, Holmes' epigram takes on yet another shade of meaning. Constitutional rights have a temporal dimension.[123] In 1892, there

117. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) ("The primary rights and duties with which jurisprudence busies itself are nothing but prophecies").

118. *Id.*; Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918).

119. Van Alstyne, *supra* note 95, at 1460.

120. Holmes, *Natural Law*, *supra* note 118, at 42.

121. Holmes, *The Path of the Law*, *supra* note 117, at 465-66.

122. *Id.* at 466 (emphasis added).

123. *See generally* H. HART, THE CONCEPT OF LAW 97-120 (1961); Dahl, *The Supreme Court and Majority Control* in READINGS IN AMERICAN POLITICAL BEHAVIOR 165 (2d ed. 1970) (R. Wilfinger ed.).

was no constitutional right to be a policeman. There was, in fact, only a frail and somewhat hypothetical right to talk politics[124]—certainly not the broad right of free expression recognized today.[125] There was no judicially confirmed constitutional right to procreate,[126] travel[127] or cast a proportionally equal vote.[128] A right of privacy was, even in the common law, receiving only sparing recognition.[129]

The very assumption on which *Bishop* and democratic due process theory rest—that a right in property or liberty is only that which the law protects—furnishes the proof of Holmes' premise. Constitutional law protects much more in 1977 than it did in 1892. The legal rules extrapolated from the Bill of Rights have changed, precisely as Holmes' theory said they should. No matter how often the fourteenth amendment is read, its words will not reveal whether the due process clause protects a person's desire to be a policeman. The Court cannot decide what the due process clause protects without deciding what it *ought* to protect.

The problem with democratic due process theory is that it purports to decide what is protected and what is not without any inquiry at all into the competing interests at stake in the controversy. It is a theory which apparently leaves nothing to be decided. Judicial "judgment" is obviated. There is no uncertainty, no element of prediction, no deliberation, no weighing of relative interests. The formula is plugged in and the answer emerges.

But the certainty of *Bishop*'s democratic due process analysis is illusory. By itself, the democratic due process formula adds nothing to what we know without it. The Court says that the due process clause protects only constitutional rights. If a right is not constitutional in origin, the due process clause affords protection for it only to the extent that the right is expressly recognized and protected by state law. But this merely states a tautology. By definition, if the due process clause protects an interest, it becomes a constitutional right.

A glance backward at *Roth* and *Sindermann* reveals that the same inverted logic was at work in those cases. *Roth* and *Sindermann* stand for the proposition that to have a protected interest one must have an entitlement to it, not a mere abstract expectation of its enjoyment. An entitlement,

124. The first case in which a claimant successfully invoked the protection of the first amendment did not come until 1927, in Fiske v. Kansas, 274 U.S. 380 (1927).

125. *Compare* Debs v. United States, 249 U.S. 211 (1919) (Holmes, J.), *with* Brandenburg v. Ohio, 395 U.S. 444 (1969).

126. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

127. *See* Aptheker v. Secretary of State, 378 U.S. 500 (1964).

128. *See* Reynolds v. Sims, 377 U.S. 533 (1964).

129. The famous article by Samuel Warren and Louis Brandeis appeared only two years prior to *McAuliffe*. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *See also* Robertson v. Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

however, is nothing more than a guarantee of protection. To say that one must have an entitlement to an interest in order to gain legal protection for it is simply to say that an interest must be protected if it is to gain protection. The Court in essence proclaims that in order to have a "protected" interest, one must have a "protected interest." To decide a case, however, a court must go beyond definition: it must decide what ought to be protected.

As Holmes' theory suggests, the Supreme Court's decision in *Bishop* implies a policy judgment that there should not be any constitutional right to be a policeman. Despite its elaborate analytic superstructure, the democratic due process approach is founded neither on pure reason nor on a foreordained interpretation of the fourteenth amendment, but on considerations of policy. And as it is based on policy grounds, it can be criticized on policy grounds.

Justice Stevens' short, tersely worded opinion in *Bishop* still manages to reveal a great deal about what motivated the Court to decide the case as it did. The *Bishop* majority did not purport to decide that the petitioner's desire to be a policeman deserved no protection; rather, the Justices decided that the Court had no business making such decisions.[130] This broad judgment can be distilled into several component parts, each of which reflects a choice between competing interests. On the most abstract level, it is a choice for popular sovereignty and against judicial intervention. A given individual's desire to have certain interests placed beyond the risks of the political process is held subordinate to the collective desire to make those interests subject to the will of fifty-one percent of the people. The people, after all, are the consumers of government largess—if it is not packaged in a manner acceptable to them, they can "vote the rascals out" and have it packaged differently. From the standpoint of government employment, fairness becomes a function of market forces: the body politic grants its employees such job security as it must in order to attract suitably qualified employees into public service. Similarly, in dispensing charity, government need only be as fair as the conscience or discretion of the majority dictates.

Further support for democratic due process is drawn from Brandeis' notion that the states in a federal system should be laboratories for social and political experimentation.[131] It is perfectly sensible to maintain, for example, that the people of North Carolina should be allowed to establish law enforcement jobs which have less "value" than comparable positions in California.[132] Clearly, the Constitution does not contemplate that all states must pay their police officers the same salaries, or set the same minimum standards of education, or establish the same retirement age.[133] To accept

130. *See* 426 U.S. at 349-50.

131. *See* New State Ice Co. v. Leibmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

132. *Cf.* Meachum v. Fano, 427 U.S. at 229.

133. Indeed, the Court recently ruled that Congress has no authority to make federal

the claim presented in *Bishop v. Wood* and hold that the Constitution mandates uniformity in termination procedures or even minimum standards of fairness would sharply restrict interstate diversity and local sovereignty.[134]

When viewed against the backdrop of the wide expanse of government largess, these concerns multiply. If the Supreme Court sets procedural protection for welfare benefits at "level A" and establishes less stringent procedures for driver's license revocation at "level B," it imposes on the states an important choice as to the relative worth of those interests. One can argue strongly that the states ought to be free to make these relative judgments individually, just as they are free to make differing determinations concerning how much of their budgets will go to welfare or how difficult they will make their driving examinations.

Finally, *Bishop* evidences a concern that state administrative decisions are too numerous and complex to allow meaningful policing by the federal courts.[135] The Court seems to feel not only that it has no basis for establishing standards and safeguards, but that it could not enforce them effectively even if it wanted to:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.[136]

The felt strength of these policy considerations is further accentuated by the peculiar mode of analysis which the Court employed to implement

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minimum wage and maximum hour standards applicable to employees of state and local governments. National League of Cities v. Usery, 426 U.S. 833, 844-852 (1976).

134. The *Bishop* Court refused to accept this inconsistency. While sitting on the Seventh Circuit, Judge Stevens was faced with a case somewhat similar to *Bishop*, involving the Illinois Governor's decision to remove a liquor commissioner. The following excerpt from his opinion reveals much about *Bishop*:

> The question whether Adams had a property interest in his position as a member of the Liquor Control Commission is, of course, purely a question of Illinois law. It is not for us to appraise the wisdom of the State's choice between giving such a Commissioner fixed tenure, on the one hand, or making his employment terminable at the unfettered discretion of the Governor, on the other.

Adams v. Walker, 492 F.2d 1003, 1009 (7th Cir. 1974).

135. *See* 426 U.S. at 349-50.

136. *Id.* (citations omitted).

them. It would have been far simpler to apply the traditional balancing approach attaching sufficient weight to the government's interests to foreclose a finding that additional procedures were required. Instead, the Court chose to use a far more sweeping method of analysis. In ceding the legislative branch effective control over the due process clause, the Court did not simply reweight the elements in the balance; it circumvented use of the balance altogether.

Even if the democratic and state-oriented policies behind the *Bishop* decision are valid, they do not exist in a vacuum. Other longstanding principles of constitutional law may restrict the extent to which those values should be implemented. The Constitution has taken many decisions out of the democratic process, and it has taken many areas of state authority and made them at least partially subject to national control.[137] If the analysis of democratic due process presented here correctly assesses the broader import of that doctrine, then the Court has effectively ruled that such limitations no longer apply to administrative procedure. It is that judgment to which the final sections of this Comment will address itself, examining the principles of equal protection and separation of powers to see if they are inconsistent with plenary legislative control over the contours of administrative due process. If such an inconsistency does exist, then there must be at least a limited constitutional right to be a policeman.

C. Equal Protection as a Source of Procedural Due Process

The democratic due process theory rests on what might be called the "defining power" of the states. Because the Court leaves the states the power to define what liberty and property interests are, the states acquire effective control over the scope of due process itself. But one unexplored assumption in the theory of democratic due process is that the definition and protection of property and liberty interests must come either from the state alone or from the Constitution alone.[138] The Court never considers the possibility that an interest may draw protection from both sources simultaneously.[139]

It is perfectly possible, however, for an interest to draw protection from *both* state law and the Constitution. There are many areas of law in which both the states and the federal government have mutually limited spheres of influence. It does not follow that because the states have the initial power to bring a particular interest into existence, they have plenary power to fix the

137. See note 140 *infra* and accompanying text.

138. Tushnet, *supra* note 20, at 268-70.

139. In *Paul v. Davis*, for example, the Court first decided whether an interest in reputation receives constitutional protection. *See* 424 U.S. at 701-10. After holding that it did not, it moves on to a totally separate analysis of whether reputation is a protected liberty or property interest under Kentucky law. *See id.* at 711-12.

limits of that interest.[140] The Constitution may act as an external check on the use of a power, even though it is wholly up to the state, in the first instance, to decide whether it will first exercise the power at all.[141]

The paramount example of such an external check is the equal protection clause.[142] A state is not required to provide appellate review of trial court decisions, or even to establish appellate courts at all.[143] The initial decision whether to create a right of appeal is left completely to the states' discretion.[144] But once this power is exercised, there are constitutional limits on the manner in which it is wielded. *Griffin v. Illinois*[145] held that states may not limit the right to appellate review in such a way as to discriminate against those who are too poor to pay for a trial transcript.[146] Similarly, no

140. The cases which have interpreted the "taking clause" of the fifth amendment present the classic example of an external restraint on the states' otherwise uninhibited police power. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); Miller v. Schoene, 276 U.S. 272 (1928); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). The cases provide an interesting foil for the procedural due process cases dealt with here, for they too are concerned with the extent to which private property interests can be taken away by government action which does not comport with constitutionally required procedure. Insofar as any given "taking" is labeled an "exercise of the police power," it is *not* a "taking" in the constitutional sense, and the fifth amendment no longer applies to it. The label which is attached to the transaction becomes determinative. If it is characterized as a "taking," the fifth amendment's strictures on condemnation procedure and just compensation must be adhered to. If it is characterized as an exercise of the police power, the government's action will be unimpaired. This mechanical jurisprudence resembles the same sort of either/or labeling which has plagued the entitlement theory. The dangers of this sort of superficial judicial rationalization once prompted Justice Holmes to speak of the "petty larceny of the police power." 1 Holmes-Laski Letters 456-57 (Howe ed. 1953). In a less cryptic analysis, Holmes, in the famouse case of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), seemed to be insisting that the definition of "property" as it is used in the federal constitution can never be made by reference to the states' police power, for if the "police power" is to control the definition of what is and what is not "property," then the constitutionally guaranteed institution of property will not longer exist:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without just compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment . . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

Id. at 415. *See* Sax, *Takings, Private Property and Public Right*, 81 YALE L.J. 149, 150-51 (1971); *see* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 61-76 (1964). *See generally* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

141. This is a distillation of Justice White's position in Arnett v. Kennedy. In his separate opinion, concurring in part and dissenting in part, Justice White argued that although states may define property, the Constitution alone defines the requisites of due process. 416 U.S. at 185. See note 45 *supra*.

142. U.S. CONST. amend. XIV § 1.

143. McKane v. Durston, 153 U.S. 684, 687-88 (1894).

144. *Id.*

145. 351 U.S. 12 (1956).

146. *Id.* at 19.

state is required to furnish its children with a public education.[147] If a school system is established, however, *Brown v. Board of Education*[148] and its progeny dictate much about how the system must be organized.[149]

The problem with these examples is that they serve only to demonstrate the force of the equal protection clause in situations where a specific constitutional violation has already occurred. They do not establish a prophylactic right to procedural protection—a right designed to prevent violations from occurring. To be of any help to a litigant such as Bishop, who claims to have been fired not because of race or financial status but because of arbitrariness, the equal protection clause must be construed as a source of some procedure protection. An arbitrary act is not the same thing as a discriminatory act. For equal protection purposes, a discriminatory act is an act committed for an impermissible reason. An arbitrary act is capricious. It is, in effect, committed for no reason at all.[150] Even the most lenient standard of judicial scrutiny under the equal protection clause requires that government action have some rational basis.[151] At the very least, government must have a reason for what it does to a person.[152]

Bishop v. Wood, however, seems to proceed on the belief that a city can fire its policemen for no reason at all. In addition to being the logical terminus of the *Bishop* rationale,[153] this belief is given clear expression in the opinion itself. According to Justice Stevens, Officer Bishop held his job at the "will and pleasure of the city."[154] The obvious question is whether an

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147. *Cf.* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35-39 (1973).

148. 349 U.S. 294 (1955).

149. *But cf.* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

150. *See generally* Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

151. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949).

152. In Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976), a very similar attack on *Bishop* is made, by arguing that administrators should always be compelled to state the reasons for their actions. *Id.* at 74-80. Professor Rabin notes that due to the mechanical either/or jurisprudence which has characterized entitlement theory since *Roth*, undue attention has been focused on full dress evidentiary hearings. Thus, when such hearings were balked at by the Court, the tendency was to throw out all other procedural protection with them. Lower thresholds of due process, particulary a simple requirement of a reasoned explanation, should be maintained even when a full dress hearing is overly burdensome. *Id.* at 87. A major problem with *Bishop*, of course, is that it leaves no room for his kind of flexibility.

153. Because the state can set whatever procedural safeguards it pleases, it is free to establish no procedural safeguards at all. See notes 41-42 *supra* and accompanying text.

154. 426 U.S. at 345. The recent case of Mount Healthy City School Dist. v. Doyle, 97 S. Ct. 568 (1977) (Rehnquist, J.) confirms that the Court does in fact hold to the premise that public employees may be fired for "no reason whatever." *Id.* at 574. The case involved a school teacher who was not rehired. A letter from the school superintendent stated that the decision was made for two reasons. First, the teacher had called a local radio station to read on the air a memorandum relating to teacher dress and appearance. Second, the teacher allegedly made obscene gestures to students in the process of quelling a disturbance in the school cafeteria. The

action taken in pursuit of the city's "will and pleasure" contravenes the requirement that the city's action be rationally based.

In answering this question, it is useful to begin by positing that employment "at will" is employment in which the employee can be fired at any time. If he can be fired at any time, however, then he must also be dismissable without "cause" or "reason." If the employer had to wait for a reason to arise before dismissing an employee, then by definition the employee could not be fired at any time. But to say that the employer may fire the employee "without reason" does not mean that the employer literally need have no reason at all; it must be assumed that some reason will always exist for the dismissal of an employee. The "reason" may be nothing more than the employer's indigestion; but if the word is used synonymously with "cause," a reason will always exist. Reflection reveals that the statement that the employer "does not need a reason" means that the employer does not need to *state* what his reasons are.

The next question is why a government employer would wish not to state its reasons for firing an employee. It can only be because it knows that its reasons are not permissible.[155] If Bishop was truly fired for reasons relevant to his performance as a police officer, the state would have had nothing to lose in stating what those reasons were. But if the real cause of Bishop's dismissal was his race, his religion, or the police chief's indigestion, the state would truly have been handicapped by disclosure.[156] "[I]t is not burdensome to give reasons when reasons exist . . . . It is only where the government acts improperly that procedural due process is truly burdensome."[157] The only government "interest" served by allowing the state to fire employees at its "will and pleasure" is the preservation of license to act arbitrarily.

Court read *Roth* for the proposition that when state law does not require "cause" or "reason" for dismissal, the state is under no constitutional duty to explain its actions. *Id.* at 575. The *Doyle* case also narrows even further the doctrine of unconstitutional conditions. For although the petitioner could plainly point to the fact that he was fired in part because he exercised a protected first amendment right, *id.* at 574, the Court held that he should not be reinstated if the school board would have fired him anyway.

The rub, of course, is that the Court had already stated that Doyle could have been fired for "no reason whatever." *Id.* If he could have been fired for "no reason," how can the petitioner prove that he would not have been fired but for his exercise of first amendment rights? The district court attempted to resolve this problem by ruling that Doyle should be reinstated if his protected conduct played a "substantial part" in the decision. *Id.* at 574-75. The Supreme Court rejected this approach, however, and ruled that Doyle should not be reinstated unless he could show that his conduct was a "motivating factor" in the decision. *Id.* at 576.

155. Considerations of cost and efficiency do not arise at this hypothetical juncture, for all that is required is a simple statement of the reasons for dismissal.

156. Such disclosure would subject the state to suit along the lines of Elrod v. Burns, 427 U.S. 347 (1976), see notes 103-06 *supra* and accompanying text.

157. Board of Regents v. Roth, 408 U.S. at 591 (Marshall, J., dissenting).

So far, this analysis of procedure as a function of equal protection has centered on the prevention of impermissible government action. There is a broader aspect to equal protection, however, which is embodied in the notion that government action must not only be permissible, it must also be consistent. It is a basic tenet of equal protection that persons similarly situated must be similarly treated.[158] If, as far as they can be measured, the performances of police officers Adams and Baker are identical, the equal protection clause requires that they receive identical treatment. If they are to receive different treatment the burden should be on the government to demonstrate how they are different. If the police chief is free to fire Adams and retain Baker, and is obliged to tell Adams nothing more than "You're fired but I'm not going to tell you why," the value of consistency is lost and equal protection is rendered illusory.[159]

The requirements of rationality and consistency lead to another much thornier problem. Although it may safely be supposed that the equal protection clause does require the minimum procedural step of informing interested parties of the reasons behind government action, it is far from clear what is required beyond that minimum. Burdens begin to accumulate if the police chief is required to state his reasons seven days in advance of his action, if he must defend the veracity of statements with evidence of some kind, or if he must allow the officer to attack the evidence and offer evidence of his own. Each of these steps will surely be demanded, and once one is admitted, the others seem inexorably to follow. The arguments for the complainant are obvious. What good is an official explanation if there is no opportunity to challenge the truthfulness of the explanation or the accuracy of its supporting facts? What good is the right to challenge the explanation without sufficient time to prepare the challenge? And what good is time to prepare without a proper forum in which to present the case?

Pressure for more elaborate safeguards is not the only product of the initial recognition of procedural rights. The instant a court denies government the power to act without an explanation, it has put itself in a position where it cannot avoid imposing substantive administrative standards. The requirement for an explanation of official action ineluctably leads to a second requirement that the explanation given be sufficient to justify the action taken. When a court says that turbulence in the police chief's digestive tract is not enough to justify firing a subordinate, it automatically begins to write a common law of public employment standards. In deciding what is irrelevant to the decision whether to hire or fire a government

158. Tussman & TenBroek, *supra* note 150, at 344.

159. *See* K. DAVIS, DISCRETIONARY JUSTICE 170 (1967): "[W]hat is justice in any particular case may not be determined by considering only the one case but must be determined in the light of what is done in comparable cases. If equality of treatment is one ingredient of justice, one cannot know whether penalizing B is just without looking at A's case—and C's and D's."

worker, the court simultaneously narrows the government's choice as to what is relevant. If the police chief fires officer Adams but retains Baker, and explains his action by saying that Adams' hair was too long, the court cannot decide the case without deciding whether hair length is a legitimate criterion on which to base termination actions.[160] Whichever way it rules, it creates substantive law which binds the employment relationship.[161]

Thus, anything beyond a simple requirement that reasons be stated produces two corollary effects. First, the Court must determine how much procedural protection a given interest deserves; then it must decide what substantive considerations are relevant to administrative decision affecting that interest. The burdens imposed by use of this approach are offset by the fact that each additional procedural requirement strengthens the equal protection clause by making arbitrary and discriminatory action easier to detect. No claim is made that the balance is easy to strike, but a decision should not be avoided because it is difficult. The equal protection clause is a limitation on the power of the states, and the Court must supply substance to that limitation. Although the Court may legitimately choose to set the level of limitation very low, it may not legitimately choose to avoid setting the level at all. To the extent that it attempted such avoidance, *Bishop* cannot be defended. By concentrating on the definition which individual interests are given by state law, the Court has elevated form over substance and has shunted aside the balancing of interests which is essential to principled equal protection analysis.

D. *Due Process and the Separation of Powers*

The equal protection clause is not the sole constitutional restraint on the power of state and federal legislatures to define the boundaries of liberty and property. A second and perhaps more compelling limitation is supplied by the concept of the separation of powers. If its future decisions give ever wider application to democratic due process theory, the Court will effectively have renounced (at least in part) one of the paramount responsibilities of the judiciary under our system of government—the duty to check excesses of the majority when they become embodied in legislative enactments. The first impulse of the men who set out to frame our constitutional government of limited powers was not to draw a document enumerating certain individu-

160. *See* Kelley v. Johnson, 425 U.S. 238, 244-49 (1976), in which the Supreme Court found itself confronted with precisely this dilemma:

> Neither this Court, the Court of Appeals, nor the District Court is in a position to weigh the policy arguments in favor of and against a rule regulating hairstyles. . . . The constitutional issue to be decided by these courts is whether petitioner's determination that such regulations should be enacted is so irrational that it may be branded 'arbitrary . . . .'

Id. at 248.

161. Comment, *supra* note 42, at 103-07.

al rights, but to draw a document that fractionalized the structure of government itself.[162] Instead of focusing on the prerogatives individuals were to retain, the framers concentrated on the power government was to be given and how that power was to be allocated. A central component of their design was the concept of separation of powers.

The size and influence of administrative agencies have made governmental power far more potent and pervasive in 1977 than it was in 1789.[163] At the same time, the burgeoning complexities of modern technological society have necessitated the creation of agencies with highly concentrated power and combined legislative, executive and judicial functions.[164] For the most part, courts have been content to overlook classical notions of separation of powers and approve both the magnitude and structure of administrative power, intervening only when that power is used to transgress a specific constitutional right.[165] It has therefore become customary to think of checks on administrative power only in terms of the interface between that power and individual rights.

A revisit to the doctrine of separation of powers reveals, however, that it retains much of its original vitality, and that it is fundamentally inconsistent with the theory of democratic due process. The doctrine is based on shrewd insights into human nature and political reality which, if anything, have more relevance now than in 1789. Two assertions concerning the doctrine of separation of powers are crucial: first, that it is anchored in an independent and active judicial branch; and second, that judicial supervision over procedure is the *sine qua non* of that independence and activism.

It should never be forgotten that at the heart of the constitutional division of power there lies a profound pessimism about the inclinations of people who govern. Madison, for all his egalitarianism, was unwilling to put the preservation of liberties in the hands of the democratic process alone.[166] As he said in writing to Jefferson, "Wherever the real power lies,

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162. James Madison, for example, did not initially focus his energies on adoption of a bill of rights, *see* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 5 THE WRITINGS OF JAMES MADISON 269 (G. Hunt ed. 1904), but on governmental organization. *See, e.g.*, THE FEDERALIST Nos. 10, 51 (J. Madison).

163. *See* Reich, *supra* note 2, at 733-39.

164. B. SCHWARTZ & H. WADE, LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES 29-30 (1972).

165. W. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 43 (1941).

166. THE FEDERALIST No. 51 (J. Madison). This pessimism has never been expressed more clearly than in Madison's THE FEDERALIST No. 51:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people, is no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

there is the danger of oppression . . . . Wherever there is an interest and power to do wrong, wrong will generally be done, and no less readily by a powerful and interested party than by a powerful and interested prince."[167]

Jefferson wrote to Madison in response that the most effective way to hold governmental power in check was through a strong and independent judiciary.[168] This faith in an independent judiciary greatly influenced Madison,[169] and it became a pervasive theme among other defenders of the Constitution, including Alexander Hamilton:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[170]

Hamilton was not afraid to concentrate great power in the executive and legislative branches of government so long as the courts retained their independence as a check on that power. The question which must be asked about the democratic due process theory is clear: has it attempted to retain the first half of Hamilton's political design—the concentration of extensive power in government—without heeding his warning that strong administrative power must be checked by strong judicial supervision?

The answer to this question should begin with the notation that as the realm of administrative power has expanded, courts, administrators and scholars alike have continually emphasized the importance of a corresponding growth in administrative procedure.[171] This emphasis has not been articulated in terms of any individual's right to procedure; rather, it has been expressed as concern over what kind of posture a government in a free society should take in its dealings with citizens. Great pressures exist to make modern government as large, but also as efficient and flexible, as possible. Yet it has long been recognized that these elements in combination—enormous size, a desire for efficiency, and structural flexibility—are precisely the elements that lead to the arbitrary abuse of power. The development of administrative law has therefore been characterized not by

167. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 5 WRITINGS OF MADISON, *supra* note 162, at 272-73.

168. Letter from Thomas Jefferson to James Madison (March 15, 1789), *reprinted in* 14 THE PAPERS OF THOMAS JEFFERSON 659 (1958).

169. *See* 1 ANNALS OF CONG. 439 (1789).

170. *See* THE FEDERALIST No. 78 (A. Hamilton).

171. Williams, *Fifty Years of the Law of the Federal Administrative Agencies and Beyond*, 29 FED. BAR J. 267, 267-77 (1970).

anxiety about the existence of administrative power itself, but about the controls which exist to contain that power.

Only two Supreme Court cases in seventy years have invalidated the transfer of power to an agency.[172] It is telling that in one of them, the *Schechter Poultry* case, Chief Justice Hughes would heavily emphasize the absence of procedural safeguards.[173] Although the non-delegation doctrine has been largely dormant since *Schechter*,[174] Chief Justice Hughes' concern over administrative procedure has proven to be one of the most important continuing issues in administrative law. There has in fact been a compromise in constitutional theory.[175] In return for a relaxed interpretation of the non-delegation doctrine, the courts have exacted more demanding procedural safeguards.[176] The focus of the courts should no longer be on standards; it should be on the "totality of protection against arbitrariness."[177]

It should be clear from the foregoing discussion that efficiency, flexibility, and strength have never been the dominant values under the constitutional scheme. The imposition of procedural restraints and the fractionalization of power are both inherently non-utilitarian. As Chief Justice Warren once noted, the separation of powers "was obviously not instituted with the idea that it would promote governmental efficiency."[178] By forcing government to work against itself, the separation of powers doctrine sacrifices more efficient administration to the overriding objective of fair administration.

The theory of democratic due process cannot be reconciled with these long-standing principles. It violates both the classic doctrine of a separation of powers, which is grounded in an independent judiciary, and its modern variant, grounded in external procedural safeguards. Analysis of "individual rights" aside, democratic due process permits exactly what the separation doctrine is meant to forbid: one branch of government is allowed to decide for itself what stance it will take in relation to the individual. Enormous power is wielded by those who control the disbursement of government largess. If that power is fractionalized so that an independent judiciary

172. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

173. *See* 295 U.S. at 533.

174. *But see* Buckley v. Valeo, 424 U.S. 1, 118-40.(1976).

175. *See* Nutting, *Congressional Delegations Since the* Schechter *Case*, 14 MISS. L.J. 350, 366-67 (1942).

176. This movement has been spearheaded by the efforts of Professor Davis, who has repeatedly called for a revitalized non-delegation doctrine in which the primary emphasis is on procedural protection. Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 726 (1969).

177. K. DAVIS, *supra* note 6, § 2.10 at 52.

178. United States v. Brown, 381 U.S. 437, 443 (1965). *See also* Buckley v. Valeo, 424 U.S. 1, 118-40 (1976).

stands ready to ensure its administration in accordance with effective procedural safeguards, there is adequate protection against the arbitrary exercise of that power. If, however, the power is concentrated and unfettered by such an external restraint, it is bound to lead to the very abuses which the constitutional convention was determined to prevent.

Recent history confirms that human nature and its reaction to power have undergone little change since 1789. What has changed is the opportunity for the darker side of that nature to work abuses on the everyday lives of citizens. As miniscule as the role of government was in 1789, the framers nonetheless sought to envelop it in an elaborate system of checks and balances, and to supplement that system with a Bill of Rights composed largely of procedural safeguards. It is difficult to understand how those devices can justifiably be abandoned at the very moment in history when governmental power is at its apex. If they are abandoned, whether in the name of efficiency or democracy, the price will be great. Undivided against itself, government will move more quickly, and there will be less procedure to encumber it, but arbitrary and discriminatory action must necessarily increase.[179] As Justice Douglas once observed, it is no accident "that most of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat."[180]

III. CONCLUSION

The analysis employed by the Court in the unassuming case of *Bishop v. Wood* is deceptively simple: to invoke the due process clause one must have a protected interest at stake; to have a protected interest one must have an entitlement under state law; the dimensions of that entitlement are measured by the procedures which the state establishes to guard the interest. Application of the analysis, however, produces powerful and undesirable results. Constitutional inquiry is vitiated under *Bishop*, and procedural protection becomes totally a function of statutory grant.

It is unclear at present whether the Court is willing to extend democratic due process analysis beyond the field of public employment.[181] Nevertheless, the democratic due process doctrine possesses an inherent expansiveness. It is predicated on the unbridled power of the states to define the concepts "liberty" and "property," and those concepts are broad enough to encompass a wide variety of government largess. Equally susceptible of broader application is the *Bishop* Court's announcement that the federal judiciary is not the forum in which the countless daily decisions of local administrators are to be scrutinized.

179. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

180. Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

181. See notes 78-85 *supra* and accompanying text.

In the very expansiveness of the doctrine, however, lie its most basic deficiencies. Because it is grounded in the technical definitions given to "property" and "liberty" by the states, it exalts form over substance. *Bishop* is an attempt to justify a choice between competing interests without really addressing the relative importance of those interests. Furthermore, because the logical extension of the doctrine would permit the states to withhold procedural protections altogether, it invites arbitrary administrative action in contravention of the equal protection clause. By granting supervision of procedural rights to the legislatures and by countenancing the unsupervised delegation of executive, legislative and judicial functions to one entity, the doctrine emasculates the concept of fractionalized, limited power. Democratic due process takes a well-developed judicial concept, historically utilized as a check on legislative and executive power, and transforms it into a powerful tool for the exercise of those powers unbridled by meaningful procedural restraints. In the context of government largess, the Court may well have read the due process clause out of the Constitution, relegating it to a fate similar to that visited upon the man in Stephen Crane's poem:

> A man said to the universe,
> "Sir, I exist!"
> "However," replied the universe,
> "The fact has not created in me
> A sense of obligation."[182]

182. THE PORTABLE STEPHEN CRANE 548 (J. Katz ed. 1969).