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Henry Paul Monaghan
Columbia Law School, monaghan@law.columbia.edu

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OF "LIBERTY" AND "PROPERTY"*

Henry Paul Monaghan†

After a century of experience, we are now thoroughly accustomed to viewing the fourteenth amendment as imposing upon the experimentation otherwise permitted in our fifty separate "laboratories" limitations that do not materially differ from those fastened upon the national government by the bill of rights.¹ The history of this evolution is far too well known to justify rehearsing here even in the barest outline.² But it bears noting that few, if any, observers believe that the language of the amendment has played a significant role in this historical evolution. Here, as elsewhere, "[b]ehind the words . . . are postulates which limit and control."³

The governing postulates, to be sure, have shifted over time, ranging from conceptions of vested rights and laissez-faire economics to more recent concerns for representative democracy, equality, and individual dignity. But postulates, not textual analysis, have been the impelling force behind the various theories used to justify application of most of the specific guarantees of the bill of rights to the states as part of the "liberty" secured by the due process clause.⁴ Similarly, postulates, not language, have been at the root of the apparently unending controversy over the extent to which the Supreme Court may properly invoke the amendment to constitutionalize values not readily inferable from the constitutional text, structure, or history.⁵

Whatever the governing set of ideological postulates, they have rendered largely unimportant, except as a forensic matter, any

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† Professor of Law, Boston University School of Law. B.A. 1955, University of Massachusetts; LL.B. 1958, Yale University; LL.M. 1960, Harvard University.

¹ Compare this view with the initial view of the amendment announced in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

² The standard treatment remains E. CORWIN, *LIBERTY AGAINST GOVERNMENT* (1948).

³ *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934).

⁴ See, e.g., Dixon, *The "New" Substantive Due Process*, 1976 B.Y.U. L. REV. 43, 64-69 (1976). See generally G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 506-47 (9th ed. 1975). Ludwig v. Massachusetts, 96 S. Ct. 2781 (1976), potentially the most recent round in the continuing controversy, carefully skirts the basic issues. *Id.* at 2787.

⁵ Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 44-45 (1975).

distinction between equal protection and substantive due process.⁶ To be sure, the greater appeal of equal protection in terms of current constitutional and political theory is apparent. But for all practical purposes, the equal protection clause forbids few discriminations that are not similarly forbidden by the due process clause of the fifth amendment.⁷ That fact will become increasingly clear as the noxious odor long surrounding the concept of substantive due process steadily dissipates.⁸ In reality, then, the history of the fourteenth amendment has always been the history of the due process clause—so far, that is, as it can be viewed as the history of any textual provision.

For decades the crucial fourteenth amendment battles have been fought over the substantive validity of action taken by the states. This has occasioned considerable controversy both within and without the Court over whether some individual interests might weigh more heavily than others for constitutional purposes.⁹ But these well-publicized disputes have concealed at least one important area of agreement. Save for Mr. Justice Harlan's singular insistence that voting in state elections is an interest not encompassed by the first section of the fourteenth amendment,¹⁰ there seems to have been an overriding consensus that every individual "interest" worth talking about is encompassed within the "liberty"

⁶ L. HAND, *THE BILL OF RIGHTS* 56 (1958). *But see* Linde, *Judges, Critics, and the Realist Tradition*, 82 *YALE L.J.* 227, 233-35 (1972) (arguing that, for advocates of judicial "realism," "beneficial" results might follow from treating the two clauses as not identical). *See also* A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 70 (1976).

⁷ *E.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103-04 (1976); *Examining Bd. v. Flores De Otero*, 426 U.S. 572, 599-601 (1976); *Mathews v. De Castro*, 97 S. Ct. 431, 432 n.1 (1976). Mr. Justice Jackson's widely admired concurrence in *Railway Express v. New York*, 336 U.S. 106, 111-12 (1949), asserting that due process permanently disables a state from enacting legislation while equal protection requires only that the legislation be generalized is plainly wrong. Due process is often concerned only with the discrimination created by federal statutes. *Hampton v. Mow Sun Wong*, *supra*. *See also* *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973). Equal protection analysis is concerned with assessing the validity of certain governmental ends. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969). The equal protection clause is also quite capable of raising essentially procedural due process issues. *See, e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

⁸ *Roe v. Wade*, 410 U.S. 113 (1973), is the most dramatic illustration of the reemergence of substantive due process. Substantive due process has always had academic admirers who spend considerable time and inventiveness in efforts to justify and limit the concept. *See generally* Grey, *Do We Have An Unwritten Constitution?*, 27 *STAN. L. REV.* 703 (1975); Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 *U.C.L.A. L. REV.* 689 (1976); Tushnet, *The Newer Property: Suggestions For The Revival of Substantive Due Process*, 1975 *SUP. CT. REV.* 261. *But see* Dixon, *supra* note 4.

⁹ *See, e.g.*, *Massachusetts Bd. of Retirement v. Murgia*, 96 S. Ct. 2562, 2569-90 (1976) (dissenting opinion, Marshall, J.).

¹⁰ *Oregon v. Mitchell*, 400 U.S. 112, 152-219 (1970) (dissenting in part, Harlan, J.).

and "property" secured by the due process clause and thus entitled to some constitutional protection, if only that of the "baseline requirement of 'rationality.'"¹¹ The "right-privilege" distinction, the last barrier to such a consensus, has completely fallen.¹² That doctrine had been invoked to justify a denial of due process scrutiny of some types of governmental conduct in the public sector; for example, since there was no independent "right" to welfare payments, their denial, standing alone, did not implicate any constitutional value. So ran the argument, at least. But the logic of this argument was flawed. Whether they constituted "rights" or not in some technical sense, the "entitlement" interests created by statutory law could still amount to "liberty" or "property" in the constitutional sense.¹³ The "right-privilege" doctrine's lack of solid theoretical underpinning resulted in its erratic enforcement and, ultimately, its demise.¹⁴

Most importantly, the criterion for determining whether an interest deserved due process clause protection involved a simple pragmatic assessment of its "importance" to the individual. *Bell v. Burson*,¹⁵ decided in 1971, represented the high-water mark of this approach. In sustaining a procedural due process objection to a state automobile license suspension statute, the Court hurried over the threshold question of whether the clause was applicable at all. The Court simply observed that a license "may become essential in the pursuit of a livelihood,"¹⁶ and then said that its suspension "thus involves state action that adjudicates important interests of the licensees."¹⁷

Bell wholly eschewed a tight, textually-oriented examination of the interests secured by the due process clause. The Court could have said that the license was sufficient to qualify as "property," or that a suspension of an individual's freedom to drive was a restriction on his "liberty." The Court said neither; the importance of the

¹¹ Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 928 (1973).

¹² See, e.g., *Elrod v. Burns*, 96 S. Ct. 2673, 2684 n.15 (1976) (plurality opinion); *Perry v. Sindermann*, 408 U.S. 593, 596-98 (1972).

¹³ As Justice Holmes once trenchantly noted: "Such words as 'right' are a constant solicitation to fallacy." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

¹⁴ For an analysis of the erratic reach of the doctrine—which was applied even to bar claims made with respect to specific constitutional rights such as freedom of speech—before its total collapse, see Van Alstyne, *The Demise of the Right-Privilege Distinction In Constitutional Law*, 81 HARV. L. REV. 1439 (1968). See also Van Alstyne, *Cracks in the New Property*, 62 CORNELL L. REV. 445 (1977).

¹⁵ 402 U.S. 535 (1971).

¹⁶ *Id.* at 539.

¹⁷ *Id.* There were no dissents, but three justices silently concurred only in the result. *Id.* at 543.

interest alone sufficed, and "importance" was determined as a matter of federal, not state, law. Whatever else may be said of *Bell*, it fitted comfortably with current standing doctrine in its recognition that "injury in fact" normally constituted a constitutionally sufficient predicate for the invocation of federal judicial power.¹⁸ And it is fair to say that when *Bell* was decided there were few lawyers, on or off the bench, who had serious problems with its pragmatic approach to deciding what individual interests implicated the due process clause.

But in fact *Bell's* latitudinarian approach to "liberty" and "property" was soon eroded. New postulates that limit and control pressed for recognition, and they now find at least partial expression in a more restrictive conception of what constitutes constitutional "liberty" and "property." Those postulates are clear enough. Rightly or wrongly, a majority of the present Court is struggling to place limits on the level of federal superintendence of the operations of state and local government, a struggle which has occurred largely in the context of "section 1983" actions.¹⁹ That statute creates a federal right of action for state conduct which deprives a person of "any rights, privileges, or immunities secured by the Constitution."²⁰ Under its aegis, aggressive and inventive lawyers have brought a staggering range of complaints to the courts. From their perspective, they are simply attempting to "constitutionalize" the realm of state and local government. But, quite plainly, a majority of the Court rejects this approach and seems determined to prevent the escalation of every grievance against state and local government into a constitutional claim.²¹

Read literally, section 1983 incorporates every "liberty" or "property" interest protected by the fourteenth amendment. Accordingly, statutory explication necessarily becomes constitutional exegesis as well. With increasing frequency, the Court has concluded that neither "liberty" nor "property" has been threatened by state action and hence no section 1983 claim has been stated. *Morrissey v. Brewer*,²² a due process challenge to parole revocation procedures decided in the term following *Bell*, laid the groundwork. In passing upon the constitutional challenge, the Court did mention the importance of the individual interest, but it stressed

¹⁸ *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37-39 (1976).

¹⁹ 42 U.S.C. § 1983 (1970).

²⁰ *Id.* (emphasis added).

²¹ *E.g.*, *Meachum v. Fano*, 96 S. Ct. 2532, 2540 (1976); *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976); *Paul v. Davis*, 424 U.S. 693, *rehearing denied*, 425 U.S. 985 (1976).

²² 408 U.S. 471 (1972).

that "[t]he question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within . . . the 'liberty or property' language"²³ of the due process clause. This language was repeated later in the term in *Board of Regents v. Roth*,²⁴ where, for the first time, a divided Court rejected a procedural due process claim because it implicated neither "liberty" nor "property." The "range of interests protected by procedural due process,"²⁵ said the Court, is "broad indeed,"²⁶ but "not infinite."²⁷

The analytical shift worked by *Roth* is significant. Prior to *Roth*, Supreme Court definitions of "liberty" and "property" had amounted to taking the words "life, liberty or property" as a unitary concept embracing all interests valued by sensible men. After *Roth*, however, each word of the clause must be examined separately; so examined, we find that they do not embrace the full range of state conduct having serious impact upon individual interests. For *Roth's* emphasis on the need for careful analysis of the "nature of the interest at stake"²⁸ has not proved to be an isolated phenomenon. Indeed, in the last term, this concern reached almost epidemic proportions. Several decisions expressed doubt as to whether the challenged state conduct interfered with "liberty" or "property,"²⁹ and the lack of a protectible interest proved decisive in three important cases. In *Paul v. Davis*,³⁰ a sharply divided Court held that state defamation of a private individual "standing alone and apart from any other governmental action"³¹ did not implicate any "liberty" protected by the due process clause. The five-man majority argued that "reputation alone, apart from some more tangible interests" lay outside the range of liberties protected by

²³ *Id.* at 481.

²⁴ 408 U.S. 564, 570-71 (1971). In *Roth* "[w]e . . . held that the determining factor is the nature of the interest involved rather than its weight." *Meachum v. Fano*, 96 S. Ct. 2532, 2538 (1976).

²⁵ 408 U.S. at 570.

²⁶ *Id.* at 572.

²⁷ *Id.* at 570. The Court specifically rejected the view that the collateral consequences, in terms of reduced job mobility, of the decision not to rehire were enough to implicate due process. *Id.* at 574 n.13.

²⁸ *Id.* at 571 (emphasis in original).

²⁹ In *Kelley v. Johnson*, 425 U.S. 238, 244 (1976), for example, the Court was only willing to assume *arguendo* that liberty was implicated by hair-length regulation as a condition of police employment. *See also* *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668, 680-81 (1976) (dissenting opinion, Stevens, J.); *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976).

³⁰ 424 U.S. 693, *rehearing denied*, 425 U.S. 985 (1976).

³¹ 424 U.S. at 694.

the fourteenth amendment.³² This decision would have created no great surprise in 1876; one hundred years later, however, it can be expected to generate considerable negative response.³³ *Paul* was followed by *Meachum v. Fano*,³⁴ where, in a six to three decision, the Court held that a state prisoner attacking the procedures surrounding his transfer from a less restrictive to a more restrictive prison asserted no "liberty" interest.³⁵ Sandwiched between those cases came the five to four decision in *Bishop v. Wood*,³⁶ which denied that any "property" interest was implicated in the termination of the employment of a nonprobationary public employee.

The analytical framework of these decisions represents an important and acknowledged break with traditions developed over the last half century which appeared to be firmly embedded in our constitutional order. These decisions, therefore, demand a new assessment of the nature of the interests secured by the due process clause. We must disinter long buried history, and examine anew the criteria for giving meaning to the "blind concepts" of "liberty" and "property."³⁷

³² *Id.* at 701.

³³ See, e.g., Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 322-38 (1976); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 86-104 (1976).

³⁴ 96 S. Ct. 2532 (1976).

³⁵ *Id.* at 2538.

³⁶ 426 U.S. 341 (1976). The Court also rejected a "liberty" claim on the authority of *Roth. Id.* at 348.

³⁷ Fried, *Two Concepts of Interests: Some Reflections On The Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963).

In focusing upon "liberty" and "property," I do not minimize the future importance of giving some content to the word "life." But that is a subject requiring separate treatment. I offer a few preliminary comments here. We are at the beginning of an attempt to form a new public consensus—or rather, a new public philosophy—on the meaning of life and death, a problem forced upon us by developments in modern technology. See Steele & Hill, *A Legislative Proposal for a Legal Right to Die*, 12 CRIM. L. BULL. 140 (1976). This development necessarily implicates the guarantee of "life" contained in the due process clause.

The common-law definition of "life" was entirely in accord with the existing medical technology: life ended with failure of heart and breath. The adequacy of this definition raised some questions, particularly in the context of euthanasia. But the necessity for a coherent definition of life has, in our time, become vastly more acute because modern science has invented "life"-prolonging medical devices. A body can be kept "alive"—heart beating, breathing secure—long after cognitive functions have been wholly and irreversibly destroyed. Several states have responded to this phenomenon by redefining death in terms of brain activity. Does the use of the new criterion to justify withdrawal of life-supporting devices deprive a person of "life" within the meaning of the due process clause? It is difficult for me to believe that state law definitions of life should have any role in giving content to that word for purposes of the due process clause. The mind, to say nothing of the spirit, boggles at the notion that a person may, for constitutional purposes, be "alive" in one state but "dead" when moved across a state line. If life-sustaining support can validly be withdrawn from a patient, it is not because that person is not "alive" within the meaning

I

LIBERTY

A. *Historical Origins*

The importance of the due process clause as a restriction on state conduct has rested in large measure upon a spacious conception of the word "liberty." Prior to the Civil War, as Judge Hough noted in his 1918 Irvine Lecture on this subject, there was little evidence that due process "liberty" meant anything more than freedom from personal restraint.³⁸ This was certainly the common-law understanding of the term. For Blackstone, "liberty"—"the power of locomotion . . . without imprisonment or restraint, unless by due course of law"³⁹—was only one of the three "abso-

of the fourteenth amendment but because, in the circumstances, the withdrawal is not a deprivation of due process. And this is not the only, indeed, perhaps not even the most important, context in which the issue arises. For some of these devices, such as kidney machines, are scarce resources, and the demand may exceed the supply. To what extent, and under what criteria, are such machines to be used on persons in the condition of Karen Ann Quinlan? See Note, *Due Process in the Allocation of Scarce Lifesaving Medical Resources*, 84 YALE L.J. 1734 (1975).

We may yet come to recognize that a grey area exists, where some persons, while not totally dead, are not fully alive either, and that their interests may, in some circumstances, be subordinated to the interests of those whose consciousness is not irreversibly destroyed. This is a frightening thought, one with profound moral and legal implications. But it is a thought, I fear, which we will be unable to avoid as the "new biology" develops ever more elaborate life-sustaining devices. The Court will, in any event, be forced to provide some content for the word "life," something it (unsuccessfully) sought to avoid in the abortion cases. Epstein, *Substantive Due Process By Any Other Name*, 1973 SUP. CT. REV. 159, 167-81. My own view is that whatever the ultimate substantive and procedural resolutions, "life" in the due process clause encompasses the common-law definition. That is clearly the historical understanding, since there could be no other. But I recognize that the Court has forsaken history in other situations where it seemed controlling.

³⁸ Hough, *Due Process of Law—To-Day*, 32 HARV. L. REV. 218, 222-23 (1918). Generally, this concern with freedom from personal restraint did not include an assessment of the validity of the substantive reasons for the restraint, only the adequacy of the procedure. For an excellent discussion, see Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses In The Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365 (1891). This is not to overlook the fact that, at least until 1830, many judges appealed to extra-constitutional theories such as natural law to question the substantive validity of governmental action. Justice Chase's opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), is the most famous example. See also *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). Although there is some disagreement (see Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419-20 (1973)), this mode of thinking does not seem to have been tied to the due process clause, but to general reasoning about the nature of society and government. In any event, from about 1830-1860, this mode of reasoning fell into discard. See E. CORWIN, *supra* note 2, at 58-115.

³⁹ I W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND: OF THE RIGHTS OF PERSONS *134.

lute rights of every Englishman."⁴⁰ The others were the right of property and the right of personal security,⁴¹ the latter term, incidentally, including "reputation."⁴² The Blackstonian conception of liberty is both purely negative—*i.e.*, freedom from governmental interference—and limited. It is not the equivalent of an all encompassing "right to be let alone";⁴³ it is a right to be let alone *only* with respect to one's bodily movement.⁴⁴ It is the kind of interest, roughly speaking, that common-law courts protected in habeas corpus and false imprisonment actions.

Following the Civil War, the bar, always, as de Tocqueville said, "eminently conservative and anti-democratic,"⁴⁵ and enchanted with notions of natural law and Herbert Spenser's Social Darwinian restrictions on state legislation, sought some textual vehicle for imposing limits upon the rapidly increasing state legislation that, in its view, interfered with the "right of property." The bar increasingly seized upon the due process clause, a text appearing in both the federal and state constitutions, and urged that it "might be construed so as to include within [its] scope all civil rights pertaining to the individual."⁴⁶ "Liberty," in particular, "seemed an especially convenient vehicle into which to pack all kinds of rights."⁴⁷

The bar triumphed, first in the state courts, then in dissenting opinions in the Supreme Court, and finally in the full Court.⁴⁸ *Allgeyer v. Louisiana*⁴⁹ explicitly repudiated the proposition that "liberty" embraced "only the right of the citizen to be free from the

⁴⁰ *Id.* at *128.

⁴¹ *Id.* at *129.

⁴² *Id.* at *134. The common law did not conceive of "reputation" as a property interest.

⁴³ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion, Brandeis, J.).

⁴⁴ "Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." W. BLACKSTONE, *supra* note 39, at *134.

⁴⁵ A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 285 (Bradley ed. 1953). For an argument that the bar is not much better today, see J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976).

⁴⁶ Warren, *The New "Liberty" Under The Fourteenth Amendment*, 39 HARV. L. REV. 431, 439 (1926). Invocation of the general language of the due process clause simply gave textual articulation to a practice that, at one time, was more frankly extraconstitutional.

⁴⁷ *Id.* See also note 38 and accompanying text *supra*.

⁴⁸ On the influential role of the bar, see B. TWISS, *LAWYERS AND THE CONSTITUTION* 18-173 (1942).

⁴⁹ 165 U.S. 578 (1897).

mere physical restraint of his person."⁵⁰ The Court began in earnest the famous "gradual process of judicial inclusion and exclusion,"⁵¹ but it was an entirely one-way process. Decision after decision sustained a broad, inclusive conception of the word "liberty."⁵² In 1916, in *Butler v. Perry*,⁵³ Mr. Justice McReynolds said that fourteenth amendment "liberty" "was intended to preserve and protect fundamental rights long recognized under the common law system."⁵⁴ *Meyer v. Nebraska*,⁵⁵ decided in 1923, summarized the development. Once again speaking through Justice McReynolds, the Court stated that "liberty"

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 at common law as essential to the orderly pursuit of happiness by free men.⁵⁶

This definition assumes that the due process clause itself creates rights; freedom of contract, for example, becomes a right of constitutional, rather than state law, origin. And although this approach does not, as a matter of logic, exclude the possibility of still additional liberties being created by state law, the broad sweep of the liberties created by the due process clause itself left that possibility a dormant one.⁵⁷

Accordingly, for nearly a half century, controversy has focused upon the adequacy of the justification offered by the state for interference with admitted constitutionally created liberties, and not on the threshold issue of whether any "liberties" were threatened by the state action. For example, none of *Roe v. Wade*'s⁵⁸ vigorous critics had any doubt that a woman's freedom to choose an abortion at least *implicates* a constitutional liberty. "Of course" it does, writes Professor Ely, as does "anyone's freedom to do what he

⁵⁰ *Id.* at 589.

⁵¹ *Davidson v. New Orleans*, 96 U.S. 97, 104 (1878).

⁵² The history is well told in Warren, *supra* note 46, at 454-64.

⁵³ 240 U.S. 328 (1916).

⁵⁴ *Id.* at 333.

⁵⁵ 262 U.S. 390 (1923).

⁵⁶ *Id.* at 399 (emphasis added).

⁵⁷ As we shall see, the expanded definition of "liberty" swallowed up "property" and made inevitable the application of the specifics of most of the bill of rights to the states. See text accompanying notes 187-201 *infra*.

⁵⁸ 410 U.S. 113 (1973).

wants.”⁵⁹ So viewed, the “liberty” of the due process clause had been transformed over time from a specific freedom from interference with locomotion to a general right of private autonomy. In that process the language and theory of the opinions seemed to absorb at the very least all the Blackstonian rights of personal security, including reputation.⁶⁰ Those rights, protected by the common law from private interference, were transformed into liberties protected from governmental interference—unless the government adequately justified its actions, a question going to the merits and not to a threshold inquiry into the applicability of the due process clause.⁶¹ In so summarizing the cases I do not wish to fall into what, for these purposes, is an irrelevant semantic argument over whether this “liberty” is a wholly negative conception—a right to be let alone.⁶² But I think that such a conception is generally accurate. For, in the main at least, this conception did not embrace affirmative claims for governmental money, property, or employment.⁶³

B. *A Note on Language*

The ascription of a content to “liberty” beyond that of simple freedom from physical restraint was a necessary predicate for the concept of due process as a restraint upon the substance of legislation. That result is, I recognize, far too thoroughly embedded in our constitutional jurisprudence to be now called into question. But for me, giving a substantive content to “liberty” raises most acutely the question of whether the language of the Constitution has much to do with constitutional law. One has the impression that many political scientists and some lawyers do not think so. Leonard Levy puts this thesis sharply: “Justices who look to the

⁵⁹ Ely, *supra* note 11, at 935. For a philosophical discussion of the idea, and references to sources, see J. RAWLS, A THEORY OF JUSTICE § 32 (1971). Undoubtedly because of myopic vision, I do not see that discussion at the level of philosophy is of much relevance here.

⁶⁰ The decisions in this regard had absorbed the protection granted citizens by the Massachusetts Body of Liberties of 1641, which provided that “no mans honour or good name shall be stayned” by government. SOURCES OF OUR LIBERTIES 148 (R. Perry ed. 1959).

⁶¹ See Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1366 n.18 (1973).

⁶² See I. BERLIN, FOUR ESSAYS ON LIBERTY xxxvii-lxii, 122-72 (1969). See also L. HAND, THE SPIRIT OF LIBERTY 144-54 (3d ed. 1960).

⁶³ One must be careful not to overplay a negative-positive distinction. For example, restrictions on government employment are now assumed at least to implicate some “liberty” interest even though, on the state level, they were generally analyzed in equal protection terms. Compare Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99 (1916), with cases cited in note 7 *supra*.

Constitution for more than a puzzling, if majestic, phrase might just as well turn to the comic strips for all the guidance they will find on how to decide most of the great cases that involve national public policy"⁶⁴ But most lawyers are far from comfortable with this conception, since, in the end, it denies any distinction between law and politics.⁶⁵ The absence of such a distinction, in turn, raises grave questions as to the legitimacy of judicial review in a democracy.⁶⁶

Any serious effort to mark some boundary between law and politics must take into account the constitutional text. A textual exegesis at least confines judgment—the judicial construction must be capable of being related to the text and to the structure it creates.⁶⁷ This, of course, still leaves a wide margin for judicial activity. At the minimum it permits application of the Constitution to new situations involving "the sorts of evils the framers meant to combat and . . . their twentieth century counterparts."⁶⁸ But even this premise does not justify giving a *substantive* content to "liberty," for the evils that the clause was designed to prevent involved interferences with the freedom from personal restraint. Nor does the so-called "two-clause" theory provide a satisfactory justification. Professor Corwin formulates that theory in these terms:

[I]t will be generally found that words which refer to governing institutions, like "jury," "legislature," "election," have been given their strictly historical meaning, while words defining the subject-matter of power or of rights like "commerce," "liberty," "property," have been deliberately moulded to the views of contemporary society.⁶⁹

This "two-clause" theory has won significant judicial and academic acceptance as an accurate representation of the Framers' intent.⁷⁰

⁶⁴ L. LEVY, *AMERICAN CONSTITUTIONAL LAW* 1 (1966).

⁶⁵ Wechsler, *The Courts And The Constitution*, 65 COLUM. L. REV. 1001, 1009-10 (1965).

⁶⁶ See Monaghan, *supra* note 61, at 1363 n.3. See also Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693 (1976).

⁶⁷ See generally Ely, *supra* note 11, at 928-37. On the relationship between text and structure, see Monaghan, *supra* note 5, at 13 n.72 (commenting on C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969)).

⁶⁸ Ely, *supra* note 11, at 929. See Gaffney, *History and Legal Interpretation: The Early Distortion of the Fourteenth Amendment by the Gilded Age Court*, 25 CATH. U.L. REV. 207, 215-16 (1976).

⁶⁹ Corwin, *Judicial Review in Action*, 74 U. PA. L. REV. 639, 659-60 (1926), quoted in P. BREST, *THE PROCESS OF CONSTITUTIONAL DECISION-MAKING* 117 (1975).

⁷⁰ See, e.g., *Williams v. Florida*, 399 U.S. 78, 125 n.11 (1970) (dissenting opinion, Harlan, J.); P. BREST, *supra* note 69, at 117-18. See also *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972).

But in the area of substantive due process, it ignores the crucial fact that the broad definition of "liberty" (and therefore of due process) is wholly a *judicial* creation. Charles Curtis writes:

Take the phrase "due process of law." It is perhaps the prime example of a large generality in our Constitution which has gathered meaning from experience. But who made it a large generality? Not they. We did. When they put it into the Fifth Amendment, its meaning was as fixed and definite as the common law could make a phrase. . . . We turned the legal phrase into common speech and raised its meaning into the similitude of justice itself.⁷¹

If one agrees with Professor Corwin, that the "debates in Congress on the [fourteenth] amendment leave one in little doubt of the intention of its framers to nationalize civil liberty in the United States"⁷² through the privileges and immunities clause, then ascribing a substantive content to due process is perhaps a defensible way of correcting the original sin of the *Slaughter-House Cases*.⁷³ But if one finds the opposite conclusion far more probable,⁷⁴ then expanding "liberty" beyond freedom from personal restraint poses one of the most unsettling problems in constitutional theory. How can this extension be justified as a legitimate mode of constitutional interpretation?⁷⁵ I do not know. But, like others,⁷⁶ I must accept reality: this judicial expansion of "liberty" is now far too central a part of our constitutional order to admit of reassessment. Indeed, loosened from the fetters of original intent and fortified by judicial precedent, I readily accept *Roth's* proposition that "[i]n a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."⁷⁷

C. *Substantive Due Process As Equal Protection*

Substantive due process fell on hard times in the New Deal days, but not because of any general dissatisfaction with an expansive concept of "liberty." The objections were, rather, that the courts

⁷¹ Curtis, *Review and Majority Rule*, in SUPREME COURT AND SUPREME LAW 177 (E. Cahn ed. 1954).

⁷² E. CORWIN, *supra* note 2, at 118.

⁷³ 83 U.S. (16 Wall.) 36 (1872).

⁷⁴ See, e.g., Bickel, *Citizenship In The American Constitution*, 15 ARIZ. L. REV. 369, 373-80 (1973).

⁷⁵ See G. GUNTHER, *supra* note 4, at 567.

⁷⁶ See, e.g., *Whitney v. California*, 274 U.S. 357, 373 (1927) (concurring opinion, Brandeis, J.); P. BREST, *supra* note 69, at 169-70.

⁷⁷ 408 U.S. at 572.

continually rejected completely rational state justifications for legislation that interfered with an admitted liberty to engage in free enterprise.⁷⁸ The Warren Court's invocation of the equal protection clause as the dominant textual vehicle for expressing its constitutional doctrines was, of course, partly influenced by the stench then surrounding the whole concept of substantive due process.⁷⁹ But there was more to it than that. The equal protection clause possessed a unique appeal because egalitarian notions underlay so much of the Warren Court's thinking about the nature of both the substantive and procedural restraints imposed by the Constitution.⁸⁰

Once freed from its historical moorings in race discrimination,⁸¹ the language of the equal protection clause apparently obviates any threshold need for inquiry into the nature of the interests it protects. Equal protection analysis traditionally, and still dominantly, focuses on the adequacy of the justification offered for state classifications affecting (principally) state-created interests.⁸² The common understanding is that the acceptability of the means-end connection is ascertained by federal standards alone.⁸³

⁷⁸ For representative comments see the articles collected in ASSOCIATION OF AMERICAN LAW SCHOOLS, 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW 693-732 (1938). See also McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. It is useful to compare these articles with the earlier attacks on viewing "liberty" as dealing with anything beyond freedom from personal restraint. See, e.g., Shattuck, *supra* note 38; Warren, *supra* note 46, at 439-40.

⁷⁹ But the Warren Court invoked due process when that was the only avenue to reach the desired result. See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁸⁰ A. COX, THE WARREN COURT 5-8 (1968). See also P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 98-169 (1970). The language of the moribund privileges and immunities clause could have provided the doctrinal foundation for the developments associated with due process and equal protection. But the clause long ago became an "idle provision." Compare McGovney, *Privileges or Immunities Clause, Fourteenth Amendment*, 4 IOWA L. BULL. 219, 220-21 (1918), with Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U:L.Q. 405.

⁸¹ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). The Court noted: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." *Id.* at 81.

⁸² For recent examples of the traditional analysis, see *Massachusetts Bd. of Retirement v. Murgia*, 96 S. Ct. 2562 (1976); *City of New Orleans v. Duke*, 96 S. Ct. 2513 (1976); *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283 (1976), *But see* G. GUNTHER, *supra* note 4, at 657-65. State interference with interests created by federal law can more comfortably be analyzed in preemption terms; a state's interference with the law of another state may be analyzed in terms of the full faith and credit and commerce clauses. See Monaghan, *supra* note 5, at 14 n.78, 17.

⁸³ See *Massachusetts Bd. of Retirement v. Murgia*, 96 S. Ct. 2562, 2569-70 (1976) (cases cited in dissenting opinion of Marshall, J.).

The Warren Court's most enduring equal protection legacy was the addition of a "second tier" to the traditional analysis, a tier where a rigorous justification for challenged state classifications was demanded.⁸⁴ Whatever its merits, the second tier's "fundamental right-fundamental interest" strand did require an analysis of the interests protected by the clause, and raised some interesting questions about the relationship between state and federal law.

"Fundamental rights" were, of course, not conceived of as interests having their source in state law. The sole office of the equal protection clause in this context was to trigger strict scrutiny. But whatever the ideological appeal in invoking the mesmerizing language of equal protection, there was, analytically, no necessity for doing so. If the right, such as freedom of speech, constituted part of the "liberty" protected by the due process clause, inadequately justified discriminatory state law would, as Mr. Justice Harlan noted, violate due process.⁸⁵ If the federal right bound the states prior to the adoption of the fourteenth amendment, as did the right to travel, any conflicting state law would be displaced by the supremacy clause without the need for an intermediate reference to the fourteenth amendment.⁸⁶

The "fundamental interest" strand is more complex. The Court has now firmly shut the door on efforts to subject state legislation affecting housing, welfare, education, and so forth, to the rigors of "strict scrutiny."⁸⁷ Our concern here is with the nature of the rejected interests. Perceptive commentators assert that the claims made were not viewed as involving independent constitutional "rights," such as freedom of speech or religion, but rather as implicating fundamental "interests."⁸⁸ To a considerable extent this framework imposes a retrospective unity on untidy data. The claims were advanced in different forms. Sometimes they were asserted to be "rights" having the same status as the textually specified ones.⁸⁹ Sometimes they were viewed somewhat less grandly as adopted stepchildren of acknowledged constitutional

⁸⁴ The second tier legacy is still with us. *See, e.g.*, *Massachusetts Bd. of Retirement v. Murgia*, 96 S. Ct. 2562, 2566-67 (1976); *Mathews v. Lucas*, 96 S. Ct. 2755, 2761-63 (1976).

⁸⁵ *Shapiro v. Thompson*, 394 U.S. 618, 659 (1969) (dissenting opinion, Harlan, J.).

⁸⁶ *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

⁸⁷ *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), and *Dandridge v. Williams*, 397 U.S. 471 (1970), are the decisive precedents.

⁸⁸ *See, e.g.*, G. GUNTHER, *supra* note 4, at 659; P. BREST, *supra* note 69, at 805, 809.

⁸⁹ *E.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (voting in state election).

rights.⁹⁰ And sometimes the claims were made in terms of constitutionally created fundamental "interests."⁹¹ Interestingly, no one seems to have argued that although the "fundamental" character of various "interests" is determined by federal standards, those interests must have been initially created by state law.⁹² The Court has now promised not to invent new nontextually oriented or non-structurally based rights,⁹³ and so the Court is not likely to cast further light on the nature of these "fundamental interests" in the near future.⁹⁴

Many recent equal protection cases have arisen from controversies involving voting in state elections.⁹⁵ The constitutional framework seemed to treat the right to vote in state elections as one created by state law, with various constitutional amendments prohibiting specified types of discriminations.⁹⁶ But despite Mr. Justice Harlan's protestations,⁹⁷ the equal protection clause has been used as a general warrant for invalidating restrictions not covered by the specific voting amendments.⁹⁸ This has generated several interesting theories which wholly or partially free voting in state elections from its moorings in state law. Mr. Justice Stewart asserts that the equal protection clause itself creates "the substan-

⁹⁰ *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

⁹¹ *Lindsey v. Normet*, 405 U.S. 56, 73 (1972).

⁹² Professor Michelman's "minimum protection for just wants" theory seems to me to proceed on the premise that these wants are not only to be determined by wholly federal standards but indeed have their origin in the fourteenth amendment. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through The Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

⁹³ *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973). *Rodriguez*, of course, follows *Roe v. Wade*, 410 U.S. 113 (1973). See also *Massachusetts Bd. of Retirement v. Murgia*, 96 S. Ct. 2562, 2566 (1976).

⁹⁴ Fundamental interest analysis is not entirely a matter of historical interest. It appears again in somewhat modified form in Mr. Justice Marshall's famous "sliding scale" approach to equal protection analysis, which requires judicial assessment of the importance of the interest affected by state actions. See, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 96 S. Ct. 2562, 2568-73 (1976) (dissenting opinion, Marshall, J.). See also Coven & Fersh, *Equal Protection, Social Welfare Litigation, and the Burger Court*, 51 NOTRE DAME LAW. 873 (1976). At one point or another, a majority of the Court's present members had apparently endorsed this test in one form or another. See G. GUNTHER, *supra* note 4, at 660-61 & n.9. But recent equal protection clause cases pay it no heed. See, e.g., cases cited in note 82 *supra*.

⁹⁵ For a comprehensive collection of materials, see T. EMERSON, D. HABER & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1481-1606* (3d ed. 1967).

⁹⁶ See, e.g., *Pope v. Williams*, 193 U.S. 621, 632 (1904). The Court stated: "The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments."

⁹⁷ See *Oregon v. Mitchell*, 400 U.S. 112, 152 (1970) (Harlan, J., dissenting in part).

⁹⁸ E.g., *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969).

tive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process"⁹⁹ of representation, a theory bred from an interesting mating of federal and state laws. Several decisions refer to voting as a "fundamental right," without indicating how such a right can properly be inferred from the text, or from the structure and relationships created by the Constitution.¹⁰⁰ In any event, a "fundamental right" analysis makes reference to the equal protection clause unnecessary, as do the occasional suggestions that the right to vote is a "penumbral" aspect of the constitutional guarantee of freedom of speech.¹⁰¹

State law, therefore, plays no significant role in the interpretation of the equal protection clause: even where interests are created by state law, their importance for equal protection purposes and the adequacy of the justifications for the state law are assessed by federal standards. This may have importance in the future because the equal protection clause, unlike due process, does not require an initial showing that "life, liberty, or property" is at stake.

D. *The Narrowing of Liberty: "The Gradual Process of . . . Exclusion"*

After three decades, it is once again fashionable to invoke the language of substantive due process.¹⁰² And, following *Goldberg v. Kelly*,¹⁰³ there has been an enormous explosion of litigation raising issues of procedural due process.¹⁰⁴ It comes as no real surprise, therefore, that judicial effort to limit the reach of the due process clause should, in part, find expression in limiting conceptions as to the nature of the "liberty" the clause protects.

*Board of Regents v. Roth*¹⁰⁵ began that process in earnest. A nontenured teacher asserted that the lack of procedural safeguards governing the decision whether to rehire him violated due process. The Court began its examination of his claim by quoting *Meyer's* broad definition of liberty,¹⁰⁶ and added grandly that "[i]n a Con-

⁹⁹ *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 n.2 (1973) (concurring opinion, Stewart, J.). See also *id.* at 34 n.74 (opinion of the Court).

¹⁰⁰ *But see* *Pope v. Williams*, 193 U.S. 621, 632 (1904).

¹⁰¹ See T. EMERSON, D. HABER & N. DORSEN, *supra* note 95, at 848-49. See also *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁰² See note 8 and accompanying text *supra*.

¹⁰³ 397 U.S. 254 (1970).

¹⁰⁴ For a summary of most of the major Supreme Court cases, see K. DAVIS, *ADMINISTRATIVE LAW OF THE 1970's* 241-76 (1976).

¹⁰⁵ 408 U.S. 564 (1972).

¹⁰⁶ See notes 55-57 and accompanying text *supra*.

stitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."¹⁰⁷ Broad—but, as previously noted, not "infinite."¹⁰⁸ The gradual process of exclusion had begun. *Roth* rejected the contention that, standing alone, termination of a specific public employment interfered with either "liberty" or "property." As to the "liberty" claim, said the Court, no stigma had been imposed by the decision not to rehire, nor had the Regents "invoke[d] any regulations to bar the respondent from all other public employment in state universities."¹⁰⁹ The Court concluded that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."¹¹⁰

Roth permits the states to operate a probationary system of public employment, free from claims that decisions made in the day-to-day operation of the system constitute deprivations of the due process rights of individuals affected by those decisions. That result is certainly defensible. Judgments concerning retention of probationary employees are often highly personal and subjective, and the imposition, in the name of due process, of an adversary procedure into that retention process is a dubious proposition.¹¹¹ But the road taken by the Court opens to broader and more difficult vistas. *Roth's* logic necessarily applies to substantive due process even though it is a procedural due process case in form. Since the probationary employee lacks a "liberty" or "property" interest, there is no basis under the due process clause for a substantive due process requirement that a state's conduct meet even the "base line requirement of rationality." This problem, perhaps, is not acute when a state is involved, given the existence of the equal protection clause. But what of probationary employees of the national government? The textual basis for imposition of the rational basis standard in such a case is not apparent.¹¹²

¹⁰⁷ 408 U.S. at 572.

¹⁰⁸ *Id.* at 570.

¹⁰⁹ *Id.* at 573.

¹¹⁰ *Id.* at 575. *Roth* may profitably be compared with *Greene v. McElroy*, 360 U.S. 474 (1959), where the Court stated: "The right to hold specific private employment . . . [is] 'liberty' and 'property' . . ." *Id.* at 492.

¹¹¹ This is an area where, in part, we may prefer to operate without rules and formal structures. See generally L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 490-94 (1965). See also *Meachum v. Fano*, 96 S. Ct. 2532, 2540 (1976).

¹¹² To say that there is an independent substantive right (or liberty) to be free from "arbitrary" governmental action is unconvincing. One could just as readily assert that there is an independent substantive right (or liberty) to be free from unfair procedures. More importantly, this argument confuses the scope of review under the due process clause with

Roth's importance, however, should not be overstated. *Roth's* companion case, *Perry v. Sindermann*,¹¹³ emphasized that public employees are deprived of "liberty" if discharged for reasons that would violate *specific* constitutional guarantees, such as freedom of speech, a position from which the Court has not wavered.¹¹⁴ More importantly, *Hampton v. Mow Sun Wong*,¹¹⁵ following the *Roth* caveat, held the due process clause to be applicable to a civil service regulation barring aliens from access to a class of public employment. Unfortunately, the Court has not adequately explained why the discharge of a specific public employee does not activate the due process clause, while "a rule which deprives a discrete class of persons of an interest in liberty on a wholesale basis" does.¹¹⁶ One is tempted to say that the liberty protected by due process operates only at wholesale, not retail.¹¹⁷ But even that comfortable generalization would fail as a description so long as the holding of *Greene v. McElroy*,¹¹⁸ that "the right to hold *specific* private employment . . . free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of [due process]," survives *Roth*.¹¹⁹ In any event, in the public sector the Court perceives a material distinction between the right to seek employment and the right to hold a job forever.¹²⁰

Liberty, then, although not confined simply to a negative freedom from personal restraint, is not synonymous with the freedom to do everything one wishes, at least where the wish is that the government continue to provide one with money, property, or employment. Still, *Roth* raised no serious question about *Butler v.*

the initial question of whether the clause is applicable at all. The Court is, however, apparently unconcerned with all of this. See, e.g., *Mathews v. De Castro*, 97 S. Ct. 431, 432 n.1 (1976).

¹¹³ 408 U.S. 593 (1972).

¹¹⁴ See, e.g., *Elrod v. Burns*, 96 S. Ct. 2673 (1976); *Paul v. Davis*, 424 U.S. 693, 710 n.5, rehearing denied, 425 U.S. 985 (1976).

¹¹⁵ 426 U.S. 88 (1976).

¹¹⁶ *Id.* at 102-03. See also *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976). In *Mathews v. Diaz*, 426 U.S. 67 (1976), the Court unanimously upheld the exclusion of certain aliens from supplemental medical insurance under medicare. The Court assumed, without discussion, that an interest sufficient to trigger due process scrutiny was involved.

¹¹⁷ *Board of Regents v. Roth*, 408 U.S. 564, 573-74 (1972), asserts that in such cases the "injury" is greater. But once the focus shifts from the "importance" of the individual interest to the "nature" of that interest it is not clear why the extent of the injury matters.

¹¹⁸ 360 U.S. 474 (1959).

¹¹⁹ *Id.* at 492 (emphasis added). See also *Hampton v. Mow Sun Wong*, 426 U.S. 88, 120 (1976) (dissenting opinion, Rehnquist, J.).

¹²⁰ See text accompanying notes 91-100 *supra*.

Perry's¹²¹ conception of "liberty" as a negative "right to be let alone," an idea embracing all the interests in personal security (including freedom from defamation), which had been protected from private interference by the common-law courts. Continued governmental employment, after all, hardly constituted one of those "fundamental rights long recognized under the common law system."¹²² But other decisions have begun to weaken *Butler*. In *Kelley v. Johnson*,¹²³ the Court, speaking through Mr. Justice Rehnquist, only assumed arguendo that "liberty" was implicated by a requirement that a policeman's hair be trimmed as a condition of his employment.¹²⁴ Then *Paul v. Davis*¹²⁵ was decided.

E. *Paul v. Davis*

In *Paul* the plaintiff complained that a circular sent by local police officials to stores during the Christmas season defamed him by describing him as an "active shoplifter." The plaintiff asserted that this conduct denied him procedural due process because he had not been given notice and a hearing before the circular was sent. The court of appeals upheld the claim, relying upon the Supreme Court's decisions in *Roth* and *Wisconsin v. Constantineau*¹²⁶ to support the proposition that state defamation of a private person implicated a constitutional "liberty." In *Constantineau* the Court had invalidated on due process grounds a state statute that allowed a sheriff to label publicly an individual an alcoholic by posting his name in a public place, without giving him prior notice and a hearing. The Court noted that the challenged procedure denied the individual more than just the opportunity to purchase alcoholic beverages within city limits: the posting was an act of defama-

¹²¹ 240 U.S. 328 (1916).

¹²² *Massachusetts Bd. of Retirement v. Murgia*, 96 S. Ct. 2562 (1976).

¹²³ 425 U.S. 238 (1976).

¹²⁴ *Id.* at 244. Since the Court was not required to pass on the question, there was no discussion of whether such a requirement as a condition of employment would at least implicate fundamental rights long recognized by the common law, at least when the common law is read with the doctrine of unconstitutional conditions. If *Kelley* really does not involve a protected interest, there will be some anomalies for the layman. Hair-length regulations in public schools may still be reviewed as an arbitrary restriction on the student's "property" right to attend school. See *Goss v. Lopez*, 419 U.S. 565 (1975). Cf. *New Rider v. Board of Educ.*, 414 U.S. 1097 (1973), *denying cert. to* 480 F.2d 693 (10th Cir.) (dissenting opinion, Douglas, J.) (suggesting hair-length regulations violate students' first amendment right of free speech).

¹²⁵ 424 U.S. 693, *rehearing denied*, 425 U.S. 985 (1976).

¹²⁶ 400 U.S. 433 (1971).

tion.¹²⁷ In language subsequently quoted with approval in *Roth*,¹²⁸ the Court said that “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”¹²⁹

But in *Paul*, the Court characterized this same language as ambiguous and supportive of the respondent’s claim only if “read that way.”¹³⁰ The majority then proceeded to distinguish a long line of decisions which had recognized the standing of a plaintiff to complain about governmental defamation. The Court concluded that in all those cases the defamation standing alone was insufficient to implicate a liberty interest; instead, all involved an interference with some specific constitutional guarantee or with some other “more tangible” interest created by state law. The Court cavalierly distinguished *Constantineau* by noting that the state defamation there involved—posting by the sheriff—had the legal effect of cutting off the plaintiff’s prior state-created right to buy liquor, a factor which, the Court failed to add, played an obviously trivial role in the decision of that case.¹³¹ The Court’s re-rationalization of the earlier cases is wholly startling to anyone familiar with those precedents. In many ways I find this *Paul*’s most disturbing aspect. Fair treatment by the Court of its own precedents is an indispensable condition of judicial legitimacy.

Taken at face value, *Paul* would radically reorient thinking about the nature of the “liberty” protected by the due process clause. The case’s rationale would confine the *federal content* of “liberty” to specific constitutional guarantees and to the *Roe* right of privacy, and, perhaps, to the Framers’ understanding of liberty as freedom from personal restraint.¹³² Otherwise, interests “attain this constitutional status [as liberty] by virtue of the fact that they

¹²⁷ *Id.* at 435-36. It had generally been assumed as the clearest case that a plaintiff had standing to complain of governmental action if the wrong would have amounted to a tort if committed by a private person. Indeed, defamation was cited in the leading work as a prototypical example. See P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 154 (2d ed. 1973) [hereinafter cited as *HART & WECHSLER*]. Presumably, that line of authority remains intact, so long as a constitutionally protected right or an independent “tangible” interest is at stake.

¹²⁸ 408 U.S. at 573. See also *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975).

¹²⁹ 400 U.S. at 437.

¹³⁰ 424 U.S. at 708. *But see* *Codd v. Velger*, 45 U.S.L.W. 4175, (U.S. Feb. 27, 1977) (apparently preserving *Roth* holding).

¹³¹ *Id.* at 707. For additional criticism, see Shapiro, *supra* note 33, at 326; *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 93 n.44 (1976).

¹³² 424 U.S. at 710 n.5 (bill of rights); *id.* at 712-13 (privacy).

have been initially recognized and protected by state law,"¹³³ and it is only state conduct "officially removing the interest from the recognition and protection previously afforded by the State, which [is] sufficient to invoke [due process] procedural guarantees."¹³⁴ This language suggests that any state conduct *imposing a new legal disability* on any prior freedom (including a presumably general right to be let alone) would implicate "liberty" in the constitutional sense. For instance, under this new theory, freedom of contract claims would still implicate due process liberty but under a different rationale. Heretofore, that freedom had been viewed as part of the "liberty" independently created by the due process clause. Under *Paul*, however, a state action interfering with that liberty could be challenged only if a new state-imposed disability "officially remov[ed] the interest from the recognition and protection previously afforded"¹³⁵ it by state law. But standing alone, defamation does not qualify as such a "liberty" because the victim of the defamation suffers no additional legal disabilities.¹³⁶ The plaintiff in *Paul* could vote, drive his vehicle, and buy liquor—all just as before the defamatory act.¹³⁷

Paul's rule might also exclude claims by victims of physical assault by state officers, since the victim labors under no new legal disabilities. There is the possibility that the detention necessary for the assault will be viewed as an interference with the historical Blackstonian definition of "liberty" as freedom from personal restraint. But even if the detention is held to implicate "liberty," can a

¹³³ *Id.* at 710.

¹³⁴ *Id.* at 711. Of course, the liberty interest could be created by federal statutory or decisional law.

¹³⁵ *Id.* In theory the challenge would be available only to those who had the right before the challenged restriction came into effect. Thus, children born after a restriction became effective could not claim an interference with their liberty.

¹³⁶ The Court argued that:

Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest . . . [has not] worked any change of respondent's status as theretofore recognized under the State's laws.

Id. at 711-12. This is not well put by the Court. I think that state libel law is a "guarantee of present enjoyment of reputation," the unjustified invasion of which results in tort damages. And I do not see that this is any less true simply because there is no "change of respondent's status"—at least in the Court's sense that the respondent suffered no new legal disabilities. The real explanation for the result is in the last sentence of the quotation.

¹³⁷ See also *Sullivan v. Brown*, 544 F.2d 279, 283-84 (6th Cir. 1976); *Edelberg v. Illinois Racing Bd.*, 540 F.2d 279, 285 (7th Cir. 1976).

court then award damages for the accompanying assault? If so, the assault damages are parasitic in character, and it is hardly satisfying to rationalize their award on these terms. Long ago, a noted commentator observed that "[t]he treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is to-day recognized as parasitic will, forsooth, to-morrow be recognized as an independent basis of liability."¹³⁸ An alternative theory—that the assault constitutes the imposition of punishment without trial¹³⁹ and therefore violates a specific constitutional right—is open to the objection that such reasoning rests on a patent fiction. Moreover, such reasoning inadequately distinguishes *Paul*, since defamation could just as easily be characterized as punishment without trial.

However read, *Paul's* difficulties are deep ones. Even if the Court was free to view the question before it as an open one, it was surely not compelled to reject freedom from defamation as a protected interest. And, in a "Constitution for a free people," it is an unsettling conception of "liberty" that protects an individual against state interference with his access to liquor but not with his reputation in the community.¹⁴⁰ To the extent that this is an area for judicial exercise of the "sovereign prerogative of choice,"¹⁴¹ the Court's choice seems to cut sharply against the grain of our political-constitutional order with its central emphasis on individual dignity. One does not need the authority of Blackstone for the proposition that without one's reputation "it is impossible to have the perfect enjoyment of any other advantage or right."¹⁴² Moreover, the Court's reasoning ignores the social nature of human personality. For, as Isaiah Berlin observed in a famous essay on the meaning of "liberty," "am I not what I am, to some degree, in virtue of what others think and feel me to be?"¹⁴³ Finally, and most importantly, the Court's theory ignores the spiritual character of human personality. Defamation is a serious

¹³⁸ T. STREET, 1 THE FOUNDATIONS OF LEGAL LIABILITY 470 (1906).

¹³⁹ *Screws v. United States*, 325 U.S. 91 (1945).

¹⁴⁰ It may well be that a state could constitutionally abolish all defamation actions in suits between private parties. It does not follow that a state which has taken such a step could then itself engage in defamation without implicating fourteenth amendment values.

¹⁴¹ O. HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 239 (1920).

¹⁴² W. BLACKSTONE, *supra* note 39, at *134. For the effect of the defamation at issue in the *Paul* case on the plaintiff, see *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 100-01 n.85 (1976), in which Davis is quoted as stating: "Now, five years later . . . I am broke, without employment, emotionally sick and in a state of anxiety."

¹⁴³ I. BERLIN, *FOUR ESSAYS ON LIBERTY* 155 (1969).

assault upon an individual's sense of "self-identity," and has from ancient times been viewed as "psychic mayhem."¹⁴⁴ Accordingly, the Court's conclusion that such an assault implicates no constitutionally protected interest stands wholly at odds with our ethical, political, and constitutional assumption about the worth of each individual.

Mr. Justice Rehnquist's opinion does more than repudiate the long-standing tradition of an expansive reading of the word "liberty" as a matter of federal law. The opinion seems to have completely reversed the logic of *Butler*,¹⁴⁵ and instead to have proceeded from the premise that if the challenged conduct would constitute a common-law tort by a private person, it cannot constitute an interference with the "liberty" protected by the fourteenth amendment. Thus, the more reprehensible and subject to legal redress the conduct, the freer the state is to engage in it—at least until that conduct bumps up against some specific constitutional guarantee or the hodge-podge right of privacy. Indeed, unless those latter rights are implicated, the state need not even comply with the base line requirement of rationality, until, that is, the state's conduct imposes some new legal disability, however trivial.

Mr. Justice Rehnquist begins his opinion by observing that if Paul's complaint had been made against a private party there "would have [been] nothing more than a claim for defamation under state law."¹⁴⁶ He then frames the central issue in the case as whether the due process clause "should *ex proprio vigore* extend to him [the plaintiff] a right to be free of injury wherever the State may be characterized as the tortfeasor."¹⁴⁷ To state the thesis, he argues, is enough to condemn it, for it "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."¹⁴⁸ The thrust of Justice Rehnquist's concern is unclear. He seems to assume that the tortious character of the state official's conduct, if proved, would of necessity *establish* a constitutional violation. Thus, he writes: "Respondent's construction would seem almost necessarily to result in every legally cognizable [state-inflicted] injury . . .

¹⁴⁴ Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 158 (1955). The meaning of personal identity is a central concern of much modern philosophical and psychological writing. See, e.g., Note, *The Limits of State Intervention: Personal Identity and Ultra-Risky Actions*, 85 YALE L.J. 826, 834-42 (1976).

¹⁴⁵ See text accompanying note 54 *supra*.

¹⁴⁶ 424 U.S. at 698.

¹⁴⁷ *Id.* at 701.

¹⁴⁸ *Id.*

establishing a violation of the Fourteenth Amendment."¹⁴⁹ This is plainly wrong. An invasion of a common-law interest only *implicates* a constitutional "liberty." Whether, once implicated, there has been an impermissible deprivation of that interest is an entirely separate question. Resolution of that question depends not on the law of torts, but on such matters as the nature of the invasion, its magnitude, and the character of the justification asserted. Thus, ordinarily, negligent conduct by the state would implicate liberty or property interests but would not, given the fourteenth amendment's concern with protecting the individual from the *abuse* of governmental power, constitute a deprivation of these interests.¹⁵⁰ In any event, whether or not the conduct complained of was illegal under state law—or under the common law of torts—would not be dispositive of the merits of the constitutional claim, a point which Mr. Justice Rehnquist himself expressly notes at the beginning of his opinion.¹⁵¹

*Meachum v. Fano*¹⁵² followed *Paul*. At issue was a challenge to the constitutional sufficiency of the procedures surrounding the transfer of a state prisoner to a more restrictive prison. The challenge was rejected. The Court observed that the prisoner had not urged that any specific constitutional right had been violated; that the generalized "liberty" of due process was no longer implicated after the lawfulness of the original decision to commit was established;¹⁵³ and finally, that state law created no independent liberty interest.¹⁵⁴

Precisely where these decisions leave us is by no means clear. *Roth*, *Paul*, and *Meachum* have narrowed the content of "liberty." Taken together, they seem to have some common core: loss of a specific job, of a specific prison location, or of reputation does not, *given the countervailing interests at stake*, materially impede an individual's "freedom to do what he wants." But the victim of defamation finds his options closed in fact, if not in theory; and jobs are not fungible, except perhaps in economics textbooks. I do not

¹⁴⁹ *Id.* at 699.

¹⁵⁰ Thus the negligent destruction of property, as in *Dalehite v. United States*, 346 U.S. 15 (1953), while implicating a constitutional interest, would not ordinarily constitute a "deprivation" of that interest within the meaning of the due process clause. *But see* *Fox v. Sullivan*, 539 F.2d 1065 (5th Cir. 1976).

¹⁵¹ 424 U.S. at 699-701. *See also* *Cooper v. California*, 386 U.S. 58, 60-61 (1967) (legality of seizure under state law not dispositive of constitutional issues); *accord*, *South Dakota v. Opperman*, 96 S. Ct. 3092, 3098 (1976).

¹⁵² 96 S. Ct. 2532 (1976).

¹⁵³ *Id.* at 2538.

¹⁵⁴ *Id.* at 2538-40.

doubt that the Justices realize all this. Nonetheless, the pressure to keep these cases out of the federal courts was great, and so a compromise was struck. Rather than facing the balancing question at the merits stage, the Court struck a compromise at the definitional stage. But it has struck this balance on the uncritical assumption that every federal interference with state government undermines the values embodied by federalism. This is hardly self-evident. A constitutional norm that denies the states power to defame unjustly their citizens does not seem to undercut any important federalism value,¹⁵⁵ particularly since federalism as an institutional arrangement is concerned with the maximization of individual liberty.¹⁵⁶ There are, indeed, instances when federal intervention might constitute a "positive instrument of federalism."¹⁵⁷ In any event, even if Supreme Court intervention in some way diminishes federalism, those costs must be weighed against any resulting gains. A constitutional norm prohibiting state defamation positively reinforces the fundamental fourteenth amendment concern for individual dignity. Moreover, that amendment was intended to alter the previous federal-state balance, a point which Mr. Justice Rehnquist expressly recognized for a unanimous Court later in the term in *Fitzpatrick v. Bitzer*.¹⁵⁸

F. The "New Liberty"

The Burger Court's attempt to formulate postulates of self-denial is understandable, if not acceptable. But why the Court has embarked on this difficult route of constitutional exegesis remains unclear. Surely, when read in light of its historical origins and the demands of "Our Federalism," section 1983 could have been read less than literally—read so as not to embrace all the interests encompassed by the "liberty" (and "property") of the due process clause.¹⁵⁹ Nor would *Bivens v. Six Unknown Named Agents of Federal*

¹⁵⁵ Federalism is one of the major devices by which our ocean-spanning continent hopes to "reconcile unity with diversity." Abraham, *Effectiveness of Governmental Operations*, 426 ANNALS AM. ACAD. POLITICAL & SOG. SCI. 81, 94 (1976).

¹⁵⁶ For a description of the importance the Founders placed on "liberty," see Diamond, *The Declaration and the Constitution: liberty, democracy & the Founders*, 41 THE PUBLIC INTEREST 39 (1975).

¹⁵⁷ See Note, *Theories of Federalism and Civil Rights*, 75 YALE L.J. 1007, 1017-24, 1029-33 (1966).

¹⁵⁸ 96 S. Ct. 2666, 2670-71 (1976). The Court there discussed the increased powers of Congress over the states, but of course the amendment also augments judicial power.

¹⁵⁹ See Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965). Professor Shapo was criticized in McCormack, *Federalism and Section 1983*:

*Bureau of Narcotics*¹⁶⁰ compel the Court to fashion "common law" damage or equitable remedies against state and municipal officials.¹⁶¹ In the short run, the level of federal interference with state and municipal conduct would be reduced by closing the doors of the federal trial courts to plaintiffs asserting certain types of claims.¹⁶² This, in turn, would give legal scholars time to probe the ultimate constitutional questions involved. The scholars, of course, could not "solve" the ultimate problems, but their research and analysis might help by more clearly focusing debate on the underlying problems and their alternative solutions.

This stop-gap solution would not permanently avoid the underlying constitutional questions. Plaintiffs excluded from federal trial courts would sue in the state courts complaining that the state's conduct had unconstitutionally deprived them of the due process guarantee of "liberty" (or "property"). Eventually the Court would be forced to pass upon the constitutional decisions made by the state courts. This leads me to express my views on the ultimate issues.

The real difficulty perceived by the Court is not so much with the intrusions into the province of the states by the federal trial courts as institutions, but rather with two related substantive constitutional concerns. The first concern has more relevance in cases dealing with "property" than with "liberty," but is applicable to both. This concern grows out of *Goldberg v. Kelly's*¹⁶³ much criticized insistence upon adversary proceedings, absent exigent cir-

Limitations on Judicial Enforcement of Constitutional Protections (pt. 1), 60 VA. L. REV. 1, 8-10 (1974). I recognize that the present Court shows no disposition to read the post-Civil War statutes narrowly. See, e.g., *Runyon v. McCrary*, 96 S. Ct. 2586 (1976). Nonetheless, statutory language cast in constitutional terms need not be read to embody the full range of constitutional interests. E.g., HART & WECHSLER, *supra* note 127, at 870-73; Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1353-55 (1969).

¹⁶⁰ 403 U.S. 388 (1971). See also Monaghan, *supra* note 5, at 24 & n.125.

¹⁶¹ See *Aldinger v. Howard*, 96 S. Ct. 2413 (1976). See also Note, *Damage Remedies Against Municipalities For Constitutional Violations*, 89 HARV. L. REV. 922, 935-51 (1976). If § 1983 preempts judicial remedial power, the difficult question remains as to whether the congressional denial of the remedy is unconstitutional, and the extent to which the answer to this question is affected by the fact that state courts provide an alternative forum. These questions are, of course, beyond the compass of this Article.

¹⁶² Jurisdiction could not be grounded on the basis of *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), because § 1983 and other civil rights statutes would, by implication, be taken to limit the full scope of any otherwise existing nondiversity jurisdiction authority of the federal courts. But see *Wheeldin v. Wheeler*, 373 U.S. 647, 659-60 (1963) (dissenting opinion, Brennan, J.). See also *Aldinger v. Howard*, 96 S. Ct. 2413 (1976).

¹⁶³ 397 U.S. 254 (1970).

cumstances, *before* governmental actions adversely affecting individual interests occur.¹⁶⁴ Although the Court has, for all practical purposes, repudiated the broad scope of the hearings apparently mandated by *Goldberg*,¹⁶⁵ it remains obsessed with the notion of "some kind" of a prior hearing. "When protected interests are implicated," said the *Roth* Court, "the right to some kind of prior hearing is paramount."¹⁶⁶ But prior hearings might well be dispensed with in many circumstances in which the state's conduct, if not adequately justified, would constitute a common-law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff, and this procedural consequence would be quite harmonious with the substantive view that the fourteenth amendment encompasses the same liberties as those protected by the common law.¹⁶⁷ This view, if accepted, would have disposed of the procedural due process objection in *Paul*.¹⁶⁸ And it would require overruling *Constantineau*, since, in my view, the heart of the complaint was defamation, not restriction of access to liquor.¹⁶⁹ Moreover, it may be, as Judge Friendly has observed, that the whole concept of prior hearing in the area of mass administrative justice should be reconsidered, at least where there are other "non-adversary" internal administrative controls to monitor and check administrative abuse.¹⁷⁰ Due process might mean no process, at least no formal adversary process.¹⁷¹

I do not pursue these inquiries here because they are wide of my primary concern. I mention them only because I think that *Goldberg's* insistence upon prior hearings is at the root of a consid-

¹⁶⁴ For a useful general summary of most of the cases and relevant articles, see K. DAVIS, *supra* note 104, at 242-47, 260-68. See also Monaghan, *supra* note 5, at 24-26.

¹⁶⁵ See *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975).

¹⁶⁶ 408 U.S. at 569-70 (footnote omitted). But see *Mathews v. Eldridge*, 424 U.S. 319, 333-34 (1976).

¹⁶⁷ Monaghan, *supra* note 61, at 1366 n.18.

¹⁶⁸ 424 U.S. 693, *rehearing denied*, 424 U.S. 985 (1976).

¹⁶⁹ The common-law courts were most reluctant to grant an injunction when the legal question was whether the circulation of defamatory material constituted defamation. Thus, they generally denied injunctive relief against such conduct. By analogy, no prior administrative hearings would be required.

¹⁷⁰ Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267 (1975). See K. DAVIS, *supra* note 104, at 702; Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841, 864-70 (1976).

¹⁷¹ This concept is, in fact, already solidly reflected in our thinking. Some infractions of liberty or property are too minor to require any process whatever. See *Goss v. Lopez*, 419 U.S. 565, 587-89 (1975) (dissenting opinion, Powell, J.). See also K. DAVIS, *supra* note 104, at 266-67; *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 102-03 (1976). But see Wilkinson, *Goss v. Lopez: The Supreme Court As School Superintendent*, 1975 SUP. CT. REV. 25, 35-36.

erable part of the Court's concern. But alteration of our present conceptions of procedural due process will alleviate only part of the Court's doubts, for substantive due process is also at stake. In *Paul*, for example, the plaintiff could have waived any procedural objections and argued that the false and defamatory character of the police circular constituted a denial of substantive due process. When considered in substantive due process terms, *Paul's* analysis discloses its strongest appeal, at least as long as section 1983 is assumed to incorporate the full range of constitutionally protected interests. Surely the fourteenth amendment cannot require that state officials be right in all cases at all times. To continue the development of section 1983 privilege defenses will not solve this problem, for they are applicable only to damage claims and not to requests for injunctive relief.¹⁷² Moreover, unless the privilege is absolute, some litigation is necessary, and *Paul* seems animated by the desire to avoid *any* litigation of these claims.

But *Paul's* apparent solution—to make constitutional protection attach only if the invasion implicates some trivial state-created interest—does not have much to commend it in terms of the underlying postulates of our political and constitutional order. *Paul's* solution involves far too costly a sacrifice of important values. In a "Constitution for a free people," *Paul* provides an unacceptable answer to the question of the *constitutional* status of a person who is a victim of intentional, unjustified defamatory statements perpetrated by state officials,¹⁷³ and, perhaps more generally, to the question of the constitutional status of the citizens' Blackstonian right of personal security.¹⁷⁴ Despite the high premium I place on *stare decisis* even in constitutional cases, I think that *Paul* should be overruled. The Court could fashion a constitutional law of public defamation, drawn in part from the complex state of the common-law rules, as it has done with respect to defamation of public figures.

If not overruled, *Paul* should be read as narrowly as possible. However, I cannot confidently proffer a satisfactorily principled

¹⁷² See *Barr v. Matteo*, 360 U.S. 564 (1959); *Howard v. Lyons*, 360 U.S. 593 (1959). See generally *Davis*, *supra* note 104, at 573-604. *Paul* contained a prayer for injunctive relief.

¹⁷³ *Paul*, it should be recalled, was decided against the backdrop of *state* law that presumably provided some basis for relief against wholly unjustified state-sponsored defamation.

¹⁷⁴ The constitutional right of privacy can, of course, protect much of the ground previously occupied by the law of defamation. Note also the possibility of expanding the largely group-based rule of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), to cases of individual discrimination. See generally *Oyler v. Boles*, 368 U.S. 448 (1962); Note, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961).

limiting conception. Perhaps *Paul* can be held inapplicable where the injury to the "right of personal security" is more than imposition of a stigma. Perhaps wholly unjustified defamation of an individual with the purpose and effect of inflicting unjustifiable mental suffering can still be treated as an invasion of the "liberty" of "personal security" within the ambit of the due process clause. The crucial wrong is not so much in reducing a man's reputation—which is all that the common law protected¹⁷⁵—but in its additional impact upon his personality. If interference with an individual's bodily integrity implicates "liberty," I see very little justification for the conclusion that interference with an individual's psychic integrity—his personality—is not also protected, at least if we seriously believe that "[i]n a Constitution for a free people . . . the meaning of 'liberty' must be broad indeed."¹⁷⁶

The word "liberty" could and, given our constitutional traditions, should be read to embrace intangible interests beyond that of privacy. More specifically, it should be read to embrace what the tort law is now in the process of proscribing: namely, *any* governmental conduct which so invades a decent respect for a person's personal integrity that, if not fairly justified, the result would outrage public sensibility.¹⁷⁷ Dean Prosser puts it well: "One who, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress . . . is subject to liability . . ." ¹⁷⁸ That the statements are defamatory may constitute evidence of the invasion, but this is not decisive; indeed, even true statements gratuitously publicized might invade an individual's right of personal security. This standard is simply a modern embodiment of the once widely accepted principle that the Constitution prohibits all governmental conduct contrary to fundamental principles of "ordered liberty."¹⁷⁹ Applied in a disciplined manner, this standard would not give the Court a roving commission to impose nonconstitutionally based values on the states.¹⁸⁰ Nor would it convert the due process clause into a body of federal tort law.¹⁸¹ And measured against this standard, the plaintiff in *Paul* arguably did not

¹⁷⁵ "The law [of defamation] went wrong from the beginning in making the damage and not the insult the cause of action." F. POLLOCK, TORTS 181 (15th ed. 1951).

¹⁷⁶ Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

¹⁷⁷ H. KALVEN & C. GREGORY, TORTS 974-75 (2d ed. 1969).

¹⁷⁸ PROSSER, *Insult and Outrage*, 44 CALIF. L. REV. 40, 43 (1956). See also RESTATEMENT (SECOND) OF TORTS § 46 (1965).

¹⁷⁹ Palko v. Connecticut, 302 U.S. 319, 325 (1937).

¹⁸⁰ Monaghan, *supra* note 5, at 44-45.

¹⁸¹ Professor Shapo has advanced a similar view of § 1983. See Shapo, *supra* note 159, at 320-29.

state a prima facie case.¹⁸² The wording of the particular police circular left something to be desired, but a case can be made for the proposition that it does not violate fundamental traditions of our law for the police to notify businesses during the Christmas season that a person is suspected of being an active shoplifter.

II

PROPERTY

A. *In General*

One need not be a disciple of Charles Beard to recognize the Framers' enchantment with the "rights of property."¹⁸³ But it is apparent that the Framers hoped to secure those rights less by constitutional prohibitions than by the creation of a strong national government with control over commerce.¹⁸⁴ The new government, moreover, was to have a representative structure designed to secure a considerable place for the "responsible sort" in the Senate, the Presidency, and the national courts.¹⁸⁵ But this scheme proved insufficient to meet the increasing interference with the "rights of property" that occurred at the state level as the nineteenth century passed, and thus the rise of substantive due process doctrines designed to protect those property rights followed.¹⁸⁶ Interestingly, during this period social and political theorists increasingly emphasized that the protection of economic interests was an aspect of "liberty,"¹⁸⁷ rather than "property," a conception ultimately adopted by the Supreme Court.¹⁸⁸ The right to acquire, own, and use

¹⁸² Accordingly, no question of privilege arose. See generally Hochman, "Outrageousness" and Privilege in the Law of Emotional Distress—A Suggestion, 47 CORNELL L.Q. 61 (1961).

¹⁸³ For an illuminating discussion of the Beard view, see ESSAYS ON THE MAKING OF THE CONSTITUTION (L. Levy ed. 1965).

¹⁸⁴ See the materials excerpted in W. LOGKHART, Y. KAMISAR & J. CHOPER, THE AMERICAN CONSTITUTION 177-81 (4th ed. 1975).

¹⁸⁵ Greene, *Values and Society in Revolutionary America*, 426 ANNALS AM. ACAD. POLITICAL & SOC. SCI. 53, 60-61 (1976). For a comprehensive treatment see G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 471-564 (1969).

¹⁸⁶ See notes 45-46 and accompanying text *supra*.

¹⁸⁷ Coker, *American Traditions Concerning Property and Liberty*, 30 AM. POLITICAL SCI. REV. 1 (1936).

¹⁸⁸ Freedom of contract was, for example, part of the "liberty" protected by due process. *Lochner v. New York*, 198 U.S. 45 (1905). Freedom of contract was, however, also treated as "property." *E.g.*, *Coppage v. Kansas*, 236 U.S. 1, 14 (1915); *Adair v. United States*, 208 U.S. 161, 172 (1908); *Holden v. Hardy*, 169 U.S. 366, 391 (1898).

property became an aspect of the broad "liberty" secured by due process.¹⁸⁹

Given this history, it is hardly surprising that in the past little attention has been paid to the definition of "property" for due process purposes. Although there are cases which can be read to the contrary, time seems to have yielded a consensus that the due process clause itself does not "create" any property interests.¹⁹⁰ Those interests must be located in some other source, principally state law. Like the contract clause,¹⁹¹ therefore, the due process clause threw a federal constitutional shield around property interests initially created by state law.¹⁹²

The existence, *vel non*, of "property" seldom raised any issue reaching the Supreme Court in the first half of the twentieth century. In the few cases raising the question, the Court accepted the state court's determination as to whether certain interests had been created by state law, as long as that determination had a "fair and substantial" basis in state law.¹⁹³ This limited review ensured that federal constitutional protection for state-created interests was not undermined by state court manipulation of legal doctrine.

The "fair and substantial basis" rule, it is important to emphasize, is entirely consistent with the principle that there is a federal *content* to the word "property." To be sure, the *interests* must be initially created by state law,¹⁹⁴ and on that question the state court's assessment is nearly, although not absolutely, controlling. But the state court's *characterization* of those "interests" is another matter altogether. The difference between the existence of an interest—a matter of state law—and its significance—a matter of federal law—is firmly established in other areas of law.¹⁹⁵ In the past, this distinction has received little explicit attention in constitutional cases.¹⁹⁶ It is the implicit premise of the now discredited

¹⁸⁹ "As late as the turn of the last century justices were not yet distinguishing between liberty and property; in the universes beneath their hats liberty was still the opportunity to acquire property." Hamilton, *Property—According to Locke*, 41 YALE L.J. 864, 877 (1932).

¹⁹⁰ *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944).

¹⁹¹ U.S. CONST. art. 1, § 10.

¹⁹² HART & WECHSLER, *supra* note 127, at 500-02. The contrary view of the cases expressed in Tushnet, *supra* note 8, at 267-77, rejecting any role for state law seems to me to be in error both on the basis of principle and authority.

¹⁹³ *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43 (1944); HART & WECHSLER, *supra* note 127, at 502-04.

¹⁹⁴ The "interests" could also be created by some other source, such as federal law, or that of a foreign state.

¹⁹⁵ HART & WECHSLER, *supra* note 127, at 489-94.

¹⁹⁶ For a recent example, see *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 97 S. Ct. 421, 425 n.5 (1976).

"freedom of contract cases," which clearly assumed a federal content of the word in holding that a person's interest in gainful employment constituted "property" (as well as "liberty").¹⁹⁷ But those cases, it must be admitted, hardly focus on the relevant issues here.¹⁹⁸ More in point are the cases that marked the demise of the "right-privilege" distinction. Although some of the interests asserted in those cases may not have fitted very comfortably within the common-law conceptions of property, they nonetheless constituted part of the system of "entitlements" so important in the twentieth century. And given the purposes behind the protection of "property," the word may fairly be held to embrace new forms of property as they emerge.¹⁹⁹ However the "new property"²⁰⁰ interests might have been characterized by state law, the Court correctly proceeded on the implicit premise that they were substantial enough to qualify as "property" for due process purposes.²⁰¹

Recent decisions of the Supreme Court address the underlying issue more directly. The problem first arose in *Roth*,²⁰² where the Court held that nontenured teachers have a sufficient "property" interest in their employment to entitle them to some kind of pro-

¹⁹⁷ See cases cited in note 188 *supra*.

¹⁹⁸ An examination of these cases shows that they proceed on the premise that it is "obvious" that a property interest is involved. See also *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 680 (1976) (dissenting opinion, Stevens, J.):

[T]hroughout this litigation everyone has assumed, without discussing the problem, that the Due Process Clause does apply [and thus property is involved]. Both reason and authority support that assumption.

Subject to limitations imposed by the common law of nuisance and zoning restrictions, the owner of real property has the right to develop his land to his own economic advantage.

Id. at 681 (footnote omitted).

¹⁹⁹ Monaghan, *supra* note 61, at 1380.

²⁰⁰ Reich, *The New Property*, 73 YALE L.J. 733 (1964). See also Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976).

²⁰¹ See also contract clause cases cited in note 188 *supra*. In those cases the Court recognized that, although state law creates contract interests, it can make an independent judgment on what the state law is. The question is whether the Court is under an obligation to treat as contract under art. 1, § 10, all agreements that state law treats as contracts. With respect to "quasi contracts," the answer is clear. Kauper, *What is a "Contract" Under the Contracts Clause of the Federal Constitution*, 31 MICH. L. REV. 187, 193-97 (1932). But if the contract is a valid consensual agreement under state law, the answer is uncertain. The authorities cited in Merrill, *Application of the Obligation of Contract Clause to State Promises*, 80 U. PA. L. REV. 639 (1932), seem to support the view that some consensual agreements valid under state law are not contracts within art. 1, § 10. But some of the contracts therein discussed were void under federal law, and as to the remainder the Court seemed, in large part, to be either interpreting state law or applying general contract law theories. The latter approach does not survive *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

²⁰² 408 U.S. 564 (1972).

cedural due process only if state law has created "a legitimate claim of entitlement."²⁰³ This results, said the Court, because property interests "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" ²⁰⁴ *Bell v. Burson's*²⁰⁵ focus on the "importance" of the interest, a criterion easily satisfied by terminated public employees, no longer sufficed.

Roth's analytical foundation is defensible, for the Court apparently proceeded on the premise that although interests are created by state law, their characterization as "property" for due process purposes is determined by federal standards.²⁰⁶ And *Roth's* companion case, *Perry v. Sindermann*,²⁰⁷ emphasized that "property" in the constitutional sense embraces the broad range of interests secured by "existing rules or understandings."²⁰⁸ Moreover, a person's interest in a "benefit" qualifies "if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit."²⁰⁹

Claims of entitlement were readily found. In *Arnett v. Kennedy*,²¹⁰ a federal employee who could be discharged only for "just cause," challenged the procedural sufficiency of his pre-termination hearings. A divided Court sustained the procedures, although no individual opinion commanded the assent of more than three Justices. Significantly, however, all nine Justices agreed that the employee had a sufficient property interest to trigger due process scrutiny. In *Goss v. Lopez*,²¹¹ a majority of the Court concluded that a student's right to attend public school was a "legitimate entitlement" sufficient to constitute "property"—thereby subjecting school suspension procedures to due process scrutiny.²¹²

²⁰³ *Id.* at 577.

²⁰⁴ *Id.*

²⁰⁵ 402 U.S. 535 (1971). See text accompanying note 15 *supra*.

²⁰⁶ The "words 'liberty' and 'property' . . . must be given some meaning." 408 U.S. at 572.

²⁰⁷ 408 U.S. 593 (1972).

²⁰⁸ *Id.* at 601.

²⁰⁹ *Id.* This view seems to treat the crucial issue of legitimate entitlements as a question of law, rather than one of constitutional fact. Thus, I do not believe that the Court is really concerned with the expectations of the holder of the entitlement. *But see The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 98-99 (1976).

²¹⁰ 416 U.S. 134 (1974).

²¹¹ 419 U.S. 565 (1975).

²¹² *Id.* at 574. The dissent apparently did not dispute that technically a "property" interest was at stake. *Id.* at 585-86 (dissenting opinion, Powell, J.). See *Wilkinson, supra* note 171, at 25, 48-50.

And finally, in *Mathews v. Eldridge*,²¹³ the Court, in rejecting a procedural due process challenge to pre-termination procedures for social security disability payments, said: "[T]he interest of an individual in continued receipt of these benefits is a statutorily created 'property' interest protected by the Fifth Amendment."²¹⁴

The foregoing decisions apparently absorbed as constitutional "property" most of the twentieth century entitlements. The sole exception was that a state could, under *Roth*, create a probationary period in public employment (and perhaps elsewhere) without thereby creating a "property" (or "liberty") interest. This exception allowed the states a procedural flexibility unhampered by federally prescribed notice and hearing requirements. Mr. Justice Rehnquist's three-man plurality opinion in *Arnett*, however, suggested additional possibilities. In form, his opinion was not directed to the definition of the word "property" but only to the scope of the procedural protection for what was admittedly a property interest. It advanced the startling view that an entitlement derived from a statute is inherently limited by the procedures for its termination contained in the statute creating the entitlement.²¹⁵ The thrust of this analysis, however, is to break down any distinction between substance and procedure and to assert that, in some contexts at least, procedural safeguards are themselves indispensable aspects of the "property" itself. There is probably nothing inherently illogical in this approach. "Property" may be viewed as merely a series of discrete rights and powers, the property teacher's "bundle of sticks." And there is no a priori reason to exclude "procedural sticks" from the bundle.²¹⁶ But our legal traditions strongly oppose this mode of analysis. In countless contexts we distinguish between substance and procedure, and subject the procedural aspects of "property" rights to independent constitutional scrutiny.²¹⁷ Moreover, the fundamental premises behind the treating of "entitlements" as property argue against disregarding

²¹³ 424 U.S. 319 (1976).

²¹⁴ *Id.* at 332. See also *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 n.2 (1976).

²¹⁵ 416 U.S. at 152-55. Prior to the Civil War, however, there was much support for the view that due process and legislative process were synonymous forms. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 460 (1911). Thus, properly enacted statutes that limited the scope of a property right would have been prima facie constitutional under the due process clause. This view, that the clause was only a restriction on the executive and the courts, has long since gone by the boards.

²¹⁶ Van Alstyne, *supra* note 14, at 1451-54.

²¹⁷ Mr. Justice Rehnquist's view still does not command a majority. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975).

distinctions between substance and procedure. Be that as it may, it is not far removed from Mr. Justice Rehnquist's mode of thinking to conclude that an individual can have no "substantive" property interest under state law, but at best only an interest that certain prescribed procedures be followed.²¹⁸ *Bishop v. Wood*,²¹⁹ decided last term, comes close to so holding.

B. *Bishop v. Wood*

In *Bishop* petitioner alleged he was a permanent employee within the meaning of a local ordinance, and brought a section 1983 action in federal court complaining that he had been discharged without receiving procedural due process. The terms of the local ordinance provided:

*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.*²²⁰

Despite this language the district court concluded, on the basis of the sparsest state court authority, that under North Carolina law the petitioner "held this position at the will and pleasure of the city."²²¹ The Fourth Circuit affirmed by an equally divided court,²²² and its decision was affirmed by the Supreme Court by a narrow five to four majority.

Mr. Justice Stevens framed the decisive constitutional issue in the following terms: "[T]he sufficiency of the claim of entitlement must be decided by reference to state law. . . . Whether such a guarantee has been given can be determined only by an examination of the particular statute or ordinance in question."²²³ He admitted that "[o]n

²¹⁸ But I do not see that there is a federal right to have the procedures followed. See *Ryan v. Aurora Bd. of Educ.*, 540 F.2d 222, 228-29 (6th Cir. 1976).

²¹⁹ 426 U.S. 341 (1976).

²²⁰ *Id.* at 344 n.5 (quoting MARION, N.C., PERSONNEL ORDINANCE, art. II, § 6) (emphasis added).

²²¹ *Id.* at 345 (quoting *Bishop v. Wood*, 377 F. Supp. 501, 504 (W.D.N.C. 1973)). The case would seem to have been an obvious one for abstention. See *Bellotti v. Baird*, 96 S. Ct. 2857 (1976).

²²² *Bishop v. Wood*, 498 F.2d 1341 (4th Cir. 1974).

²²³ 426 U.S. at 344-45 (emphasis added) (footnote omitted).

its face the ordinance on which petitioner relies may fairly be read as conferring such a guarantee," but he relied on the courts below for the alternative conclusion that the state law created "*no right to continued employment* but merely condition[ed] an employee's removal on compliance with certain specified procedures."²²⁴ To the majority, that proved fatal to petitioner's case.

Under *Bishop* there should in principle be no constitutional barrier to prevent a state, by clear statement, from denying the existence of a "right to continued" public employment, attendance at public schools, or welfare benefits and from then asserting that the procedures actually afforded by the state with respect to any discontinuance are all that it need accord. Indeed, lacking any substantive interest, it seems, for example, that any discontinued employee or welfare recipient would not possess an independent constitutional due process right to insist that the state comply with its own specified procedures. If so, the "right-privilege" distinction is back in full bloom.

Bishop is wrongly reasoned, or at least wrongly phrased. The Court erred in thinking that the "sufficiency of the claim of entitlement must be decided by reference to state law." The nature and character of the entitlement is surely "decided by reference to state law," but not its "sufficiency" to constitute a "legitimate" entitlement and therefore "property" in the constitutional sense. An illustration clarifies this. Suppose that a state motor vehicle statute invested automobiles with all the attributes of property as that term is generally understood, but also provided that no person who bought a car after the statute was passed would be deemed to have a "right to continued" ownership as against the state. If the state were suddenly to confiscate automobiles for revenue purposes, surely the Supreme Court, upon assessing the state law, would conclude that the owner's interest had sufficient attributes of "property" at least to implicate the due process clause.²²⁵

The entitlement cases are no different. A state-funded welfare or pension system can qualify as "property," as *Mathews v. Eldridge*²²⁶ reaffirms. That an entitlement can constitute "property" is not altered, as *Bishop* seems to assume, simply because the state law

²²⁴ *Id.* at 345 (emphasis added).

²²⁵ *E.g.*, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). See also the line of cases commencing with *Fuentes v. Shevin*, 407 U.S. 67 (1972), holding that the right to a hearing before repossession of a chattel does not turn upon who has title under state law.

²²⁶ 424 U.S. 319 (1976).

also provides that there is "no right to continued receipt." There are few, if any, "continued" rights to receive entitlements. Welfare programs and public jobs can be abolished, after all. *But while they are in general existence*, they can constitute "property" for the individual. *Flemming v. Nestor*,²²⁷ a case involving the validity of a termination of social security benefits, proves particularly instructive in this regard. The Court there declined to hold that individual interests in these programs constituted "accrued property rights," because to do so would deprive the Social Security System "of the flexibility and boldness in adjustment to ever-changing conditions which it demands."²²⁸ But the absence of a right to continued receipt of the benefits did not mean that the interest was not within the ambit of the due process clause: "The interest of a covered employee . . . is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause."²²⁹

The absence of a "continuing right" is not, therefore, entitled to the weight attached to it by the Court. Still, the case of public employment is perhaps the hardest analytically, since even now we are not accustomed to viewing continuance in specific public employment as an entitlement of the same order as welfare payments. It would, indeed, have been possible to say that such an interest in specific public employment could never constitute "property" in the constitutional sense, but *Roth*, *Perry*, and *Arnett* foreclose any such categorical position. *Roth* formulated a different mode of analysis by analogizing interests in public employment to other forms of entitlements. Like its counterparts in the "liberty" area, *Roth* does reflect some balancing, with the Court making a normative judgment based upon the reasonable expectations of the public employee and the state's need for flexibility in areas where judgments are often intuitive. But the mode of analysis is the application of independent federal standards to state-created interests.

Bishop poses a unique problem—a state law which on the surface has an essentially contradictory character. The first two sentences of the *Bishop* ordinance look remarkably like the "just cause" statute in *Arnett*.²³⁰ So viewed, *Bishop* raises several important issues. The conversion of a "just cause" provision into its opposite as a matter of state law raises substantial issues under the traditional

²²⁷ 363 U.S. 603 (1966).

²²⁸ *Id.* at 610.

²²⁹ *Id.* at 611.

²³⁰ 5 U.S.C. § 7501(a) (1970), *quoted in* *Arnett v. Kennedy*, 416 U.S. 134, 140 (1974).

“fair and substantial support” test, at least where the employee gains his nonprobationary status before the “conversion.” In this aspect, therefore, *Bishop* raises the question of the Supreme Court’s scope to independently determine the content of state law in order to enforce federal constitutional guarantees.²³¹ But such an inquiry need not be undertaken. It is enough to focus on the *significance* of the state law as it stood at the time *Bishop* was decided. The state had, in effect, denied “tenure” protection to a class of persons not normally viewed as “probationary.” *Bishop* mistakenly assumed that the statutory language providing that there was “no continued right to its receipt” was decisive. But that should be only one factor in a principled analysis. Unless a state court had held that the ordinance’s term “permanent” meant “probationary,” the Supreme Court could have properly reasoned that the interest in *Bishop* was of sufficient magnitude to constitute “property.” Such an employee was, after all, different from the employee in *Roth* who was hired for a fixed period; he had reached a step in state employment that for some purposes presumably differentiated him from the purely probationary employee. That additional stature seems to me to be enough to constitute “property.”

C. *The Implications of Bishop v. Wood*

If *Bishop* is to be followed, it seems to stand for the following proposition: a statute or ordinance which, facially or as construed, requires only that an employee receive a “statement of reasons” does not, as a matter of federal constitutional law, give him an interest significantly distinguishable from *Roth* to constitute “property” within the meaning of the due process clause. The only point at which such an interest reaches the “property” level for constitutional purposes occurs when the state law restricts termination to grounds of “individualized cause,” as in *Arnett*.²³² Even if read this

²³¹ The Court has thus far concluded that, unlike the “independent judgment” rule of the contract clause cases, its authority is restricted to the “fair and substantial basis” rule, unless perhaps a contract claim is made under the due process clause or contract clause. See HART & WECHSLER, *supra* not 127, at 501-05. In practice the tests come close to converging, because in contract clause cases great deference is paid to the view of the state court. *Id.* at 501-02.

²³² See *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass’n*, 426 U.S. 482, 488 n.2 (1976). *Thurston v. Delke*, 531 F.2d 1264, 1272 (5th Cir. 1976); *Huntley v. Community Sch. Bd.*, 543 F.2d 979 (2d Cir. 1976).

I am most reluctant to conclude that the existence of state-provided procedural safeguards is enough to show that a “property” interest has been created. Where the government is not under a constitutional obligation to provide procedural protections because of the absence of a “property” interest, the provision of sensible safeguards ought not to

narrowly, however, the case could have far-reaching consequences. It might be argued that under *Bishop* the state would be restrained by generalized procedural due process only with respect to existing relationships interruptible only for cause.²³³ A state eager to maximize its freedom from due process scrutiny in the public sector (for example, with respect to public welfare or public employment), arguably need only restructure any program along temporal lines. At the expiration of a specific period the "property" interest would end, and accordingly, a state decision not to continue the benefit—or more accurately, not to recommence it—would seemingly not involve any "property" interest.

I doubt, however, that such a danger will materialize. The Court's doctrine is still flexible enough to permit a holding that a present legal relationship, interruptible only for cause, plus a practical expectancy of its continuance, might constitute "property." *Bishop*, after all, involved a relationship which, *at all times*, was one that existed only at will. But if the state legislature is willing to go further and to restructure its programs so that they are entirely "at will" under state law, *Bishop's* logic cannot be escaped. No "property" interest has been created, and thus no due process is required unless some "liberty" interest is also threatened. I hope that the political process can act partially to restrain the state legislatures from redesigning their programs in "at will" terms,²³⁴ and I believe that the state courts are not likely to seize upon ambiguous state law to reach such a result with respect to interests that sensible men value. Moreover, the "liberty" protected by the due process clause will, as we have seen, often be involved even if "property" is not.

CONCLUSION

The Court's present "gradual process of exclusion" probably has not resulted in much narrowing of the "liberty" and "property" protected by due process. Indeed, it may only result in the creation of a technical barrier, infrequently and erratically invoked to exclude cases from the Court's docket, so that the rules will in time be perceived as arbitrary.²³⁵ But the cases are capable of broader

result in the penalty (in the state's view) of triggering the applicability of the due process clause. Plainly, any such theory might be counter-productive, for the state's only option in that case would be to provide no procedural safeguards whatsoever.

²³³ See, e.g., note 124 *supra*.

²³⁴ E.g., *Moody v. Daggett*, 97 S. Ct. 274, 282 n.8 (1976) (noting that Congress has provided statutory right to parole revocation hearing).

²³⁵ *Codd v. Velger*, 45 U.S.L.W. 4175 (U.S. Feb. 27, 1977), apparently assumes that a probationary public employee has a right to a name-clearing administrative hearing

mischief,²³⁶ particularly *Bishop v. Wood*. They are capable of generating doctrine and results that are inconsistent with the long-standing conceptions about the meaning of "liberty" and "property" in a "Constitution for a free people." Accordingly, I hope that the Court will not proceed much further in the direction suggested by *Paul* and *Bishop*.

where defamation is alleged. Among the difficulties with the holding is that the Court does not explain how the *Roth* rationale survives *Paul*. See note 130 and accompanying text *supra*. Since a probationary employee has no "liberty" interest in *specific* public employment, it is not clear how he differs from an ordinary citizen when he complains of defamation.

²³⁶ See Van Alstyne, *supra* note 14, at 1458-64.