State-Created Property and Due Process of Law: Filling the Void Left by Engquist v. Oregon Department of Agriculture

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STATE-CREATED PROPERTY AND DUE PROCESS OF LAW: FILLING THE VOID LEFT BY ENGQUIST V. OREGON DEPARTMENT OF AGRICULTURE

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I. INTRODUCTION

In Engquist v. Oregon Department of Agriculture, the Supreme Court significantly limited the reach of the Equal Protection Clause as a tool for public employees to challenge their treatment by state officials.\(^1\) The case arose when Anup Engquist, an employee of the Oregon Department of Agriculture (the ODA), sued the ODA and her supervisors after she was laid off.\(^2\) Ms. Engquist sought to rely on the Supreme Court's equal protection ruling in Village of Willowbrook v. Olech,\(^3\) among other grounds for relief.\(^4\) In Olech, the village of Willowbrook demanded a thirty-three-foot easement from the Olechs as a condition of connecting their house to the municipal water supply.\(^5\) The Olechs brought an equal protection suit, in which Ms. Olech offered to show that others in a similar situation had been obliged to grant only a fifteen-foot easement.\(^6\) The Court held that the Olechs' complaint was "sufficient to state a claim for relief," and that an equal protection claim could successfully be raised by a "class of one," where the plaintiff alleges that he or she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."\(^7\)

Armed with Olech, Ms. Engquist challenged her dismissal under the "class-of-one" theory and won a substantial jury verdict.\(^8\) Ms. Engquist argued that she was fired not because of her race, national origin, or sex—as would ordinarily be argued in an equal protection claim—but "simply for 'arbitrary, vindictive, and malicious reasons.' " The Court of Appeals reversed the jury verdict, finding that the class-of-one theory did not apply to Ms. Engquist's case.\(^9\) The Supreme Court heard the case on appeal, in which Chief Justice

\(^1\) 128 S. Ct. 2146 (2008).
\(^2\) Id. at 2149.
\(^3\) Id. at 2150.
\(^5\) Id. at 563.
\(^6\) Id.
\(^7\) Id. at 564–65.
\(^8\) Engquist, 128 S. Ct. at 2150. Engquist asserted other state and federal claims as well, but the only issue decided by the Supreme Court was the viability of the class-of-one equal protection claim. Id. at 2148–50.
\(^9\) Id. at 2148.
Roberts, writing for the majority, affirmed. He explained that the class-of-one suit is unavailable to plaintiffs like Ms. Engquist because “employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify.” The Chief Justice reasoned that, by contrast, Olech provided “a clear standard against which departures, even for a single plaintiff, could be readily assessed.” Thus, the Engquist Court held that the “class-of-one” theory of equal protection has no place in the public employment context.

The Engquist holding, however, likely extends to claims other than those involving public employment. One can think of many “forms of “state action . . . which by their nature involve discretionary decisionmaking.” Under Engquist’s reasoning, class-of-one equal protection claims may be excluded when the challenged state action involved an “array of factors” which influenced the decision and lacked a clear standard, such as that which made the Olechs’ class-of-one claim successful.

This Article addresses whether someone in Ms. Engquist’s position has a substantive constitutional alternative to the class-of-one theory for pursuing claims of wrongful treatment after the Engquist decision. Although state law or a federal statute may offer some protection, we are only concerned with federal constitutional rights. We conclude that the best alternative arises from the Due Process Clause.

It is well settled that some state benefits—building permits, liquor licenses, and certain jobs—are forms of property protected by the Due Process Clause. Case law and commentary on the Due Process Clause generally focus on two elements to find a violation:

10 Id.
11 Id. at 2154.
12 Id. at 2153.
13 Id. at 2148–49.
14 Id. at 2154.
16 The Due Process Clause grants procedural rights only to persons whose life, liberty, or property are at stake. U.S. CONST. amend. XIV, § 1.
first, whether a given benefit amounts to property, and second, what procedural safeguards must be provided before the state takes the benefit away.\textsuperscript{17} In the wake of Engquist, yet another issue may come to the fore—whether the plaintiff may assert a substantive due process claim in addition to a procedural due process claim. Few litigants have asserted substantive due process claims in recent years, possibly for two reasons: first, an equal protection class-of-one claim was available until taken away by Engquist, and second, because the Court has expressed reluctance to expand the scope of substantive due process if an alternative is available.\textsuperscript{18} Because Engquist has severely limited the availability of the class-of-one claim, a compelling case can be made for expanding the scope of substantive due process.

Consider the following hypothetical case:

Amy is a tenured professor at a state university. As a tenured professor, she may only be fired for cause under state law. On these facts, it is settled law that Amy has a state-created property interest in her position. Joe, the

\textsuperscript{17} A recent example of the Court's property jurisprudence is Town of Castle Rock v. Gonzales, in which the Court held that the plaintiff had no property interest in enforcement of a restraining order. 545 U.S. 748, 768 (2005). There is also an extensive body of scholarship regarding the Court's property jurisprudence. See, e.g., Thomas W. Merrill, The Landscape of Constitutional Property, 86 VA. L. REV. 885 (2000) (evaluating property jurisprudence under Due Process Clause and Takings Clause); Timothy P. Terrell, "Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L.J. 861, 861 (1982) (discussing government entitlements and their status as protected property under Due Process Clause, and arguing Court should adopt "a more rigorous definition of property").

The most recent Supreme Court decision discussing the procedural requirements of the Due Process Clause is Wilkinson v. Austin, 545 U.S. 209 (2005). Wilkinson involved a deprivation of liberty rather than property, but the Court does not distinguish between the two for purposes of procedural due process. Wilkinson reaffirms the basic principles first enunciated in an earlier property case, Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Wilkinson, 545 U.S. at 224–25.

\textsuperscript{18} See Graham v. Connor, 490 U.S. 386, 393–95 (1989) (favoring Fourth or Eighth Amendment grounds for relief over substantive due process grounds); see also Albright v. Oliver, 510 U.S. 266, 287–88 (1994) (Souter, J., concurring) ("We are . . . required . . . to exercise care whenever we are asked to break new ground in [the] field of substantive due process." (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992))). Our argument is not to the contrary. Rather, we maintain that on certain facts there may be no alternative to the substantive due process theory. Moreover, the Court recognizes that in such circumstances, substantive due process is the appropriate avenue for relief. See County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998) ("Substantive due process analysis is therefore inappropriate in this case only if respondents' claim is 'covered' by the Fourth Amendment.").
school president, informs her that a student has accused her of violating the school’s sexual harassment policy. School authorities investigate the charge, and Amy is afforded a hearing before Joe to determine whether she should be dismissed. For the sake of isolating the substantive issue, let us assume that she receives all of the procedural protections demanded by the Due Process Clause. At the hearing, Amy undermines the credibility of the accuser, presents witnesses who provide her with an airtight alibi, and generally makes a compelling case that the accusations are false. Nonetheless, Joe rules that she has violated the policy, revokes her tenure, and fires her. Amy sues Joe and the university, seeking an injunction against dismissal on the ground that termination would deprive her of her state-created property without due process of law.

For the sake of isolating the issue of whether Amy may assert a substantive claim, we assume that Joe deliberately fired Amy for reasons of his own, or for no reason at all, but without cause—that is, he fired Amy with insufficient evidence of incompetence, insubordination, criminal misconduct, or other grounds that would justify dismissal. We also set aside theories of recovery that rely on specific provisions of the Bill of Rights, such as the First Amendment right of free speech. Nor are we concerned with the

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19 In Coronado v. Valleyview Public School District 365-U, for example, a student was expelled from school for two semesters for participating in a gang fight in the school’s lunchroom. 537 F.3d 791, 792 (7th Cir. 2008) (per curiam). In his suit against school officials, Coronado relied on Goss v. Lopez, 419 U.S. 565 (1975), which recognized access to public education as a property interest. Coronado, 537 F.3d at 795. Coronado’s motion for a preliminary injunction was denied, however, because he received notice and a meaningful opportunity to be heard, and due process required no more. Id. at 796-97.

20 See Merrill, supra note 17, at 960 (discussing definition of cause).

21 The leading Supreme Court cases on public employee free speech rights are Pickering v. Board of Education, 391 U.S. 563, 568 (1968), which establishes a balancing test between the interests of the employee and employer, and Connick v. Myers, 461 U.S. 138, 150-51 (1983), which emphasizes that the state’s interest as employer weighs heavily in the Pickering balance. Thus, the free-speech basis for recovery has become less available in recent years. See, e.g., Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding no First Amendment protection for speech that is part of employee’s job); Houskins v. Sheahan, 549 F.3d 480, 491 (7th Cir. 2008) (holding internal complaint was not protected speech).
substantive due process protection of liberty, such as the freedom of intimate association\textsuperscript{22} or the right to personal security from physical harm caused by conduct that shocks the conscience.\textsuperscript{23}

We argue that the Due Process Clause affords not only procedural but also substantive protection to Amy's state-created property interest in keeping her job. Furthermore, while our hypothetical involves government employment, our thesis extends to a whole range of state-created property interests, including, among other things, building permits and liquor licenses. This type of due process claim has received no systematic attention from the Supreme Court, and the lower federal courts are divided. The only circuit court case discussing the matter in detail is McKinney v. Pate, in which the Eleventh Circuit ruled against the plaintiff's substantive theory of recovery.\textsuperscript{24} In our view, McKinney is wrongly decided, and the issue urgently requires a thorough airing.

Part II of this Article lays the foundation for the argument by briefly describing the Supreme Court's state-created property doctrine. Parts III and IV then make the case for substantive, as well as procedural, protection for these rights. Finally, Part V discusses the specific substantive constitutional norms that ought to govern state-created property rights. Part VI offers our final conclusion.

II. STATE-CREATED PROPERTY AND THE DUE PROCESS CLAUSE

To persons unfamiliar with the doctrine defining which interests are property protected by the U.S. Constitution, there is no apparent similarity between a tenured position at a university; a restraining order; or termination from a job only for cause, and land, chattels, or the intangible interests in financial instruments that constitute property in everyday life and in the common law. Indeed, there was


\textsuperscript{23} See County of Sacramento v. Lewis, 523 U.S. 833, 853–55 (1998) (rejecting imposition of liability on police officer for injuring innocent person in course of high-speed chase, but indicating that liability would be appropriate if officer's conduct met "shock the conscience" test).

\textsuperscript{24} 20 F.3d 1550, 1567 (11th Cir. 1994) (en banc).
a time when the Supreme Court would have characterized a plaintiff's interest in the enforcement of a tenure policy at a university as a gratuitous benefit from the government or employer. The Court would have characterized it as a "privilege" and dismissed the plaintiff's case after a cursory glance at the pleadings. But property, like other terms drawn from ordinary language to express constitutional values, has come to mean more than land and chattels.

A. BOARD OF REGENTS V. ROTH: THE "NEW PROPERTY"

Over the past forty years, property has become a term of art with a specialized meaning in constitutional litigation. The Supreme

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25 See, e.g., Bailey v. Richardson, 341 U.S. 918, 918 (1951) (upholding, by an equally divided court, the district court's determination that government employment is a privilege, not a right).


27 See, e.g., Hanoch Dagan, The Craft of Property, 91 CAL. L. REV. 1517, 1532 & n.88 (2003) ("Property is an artifact, a human creation that can be, and has been, modified in accordance with human needs and values."); Henry Paul Monaghan, Of "Liberty" and "Property," 62 CORNELL L. REV. 405, 436 (1977) ("Given the purposes behind the protection of "property," the word may fairly be held to embrace new forms of property as they emerge."). Similarly, the liberty protected by the Fifth and Fourteenth Amendments "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." Lawrence, 539 U.S. at 562. Among other things, liberty also embraces the right to personal security and bodily integrity. See Ingraham v. Wright, 430 U.S. 651, 673 (1977) ("The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' " (quoting Myer v. Nebraska, 262 U.S. 390, 399 (1923))); Hart v. Sheahan, 396 F.3d 887, 891 (7th Cir. 2005) ("The 'liberty' that the due process clauses secure against deprivation without due process of law includes . . . the right to bodily integrity.").

Speech that qualifies for First Amendment protection includes some but not all of what would be called speech in ordinary language, as well as some acts that would not qualify as speech in ordinary language. See Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 HARV. L. REV. 1765, 1773 (2004) ("That the boundaries of the First Amendment are delineated by the ordinary language meaning of the word 'speech' is simply implausible."). Seizure, for purposes of the Fourth Amendment, includes the use of force to subdue a fleeing or recalcitrant suspect. Graham v.
Court has recognized property rights in jobs, licenses, and other benefits granted by state and federal statutory law and administrative practice. With the growth of the administrative state in the mid-twentieth century, the danger of government abuse of authority grew ever larger and state-granted benefits became increasingly important to the welfare of individuals. As a result, critics of unbridled state power called for the establishment of procedural safeguards for these benefits as a form of property, and the Supreme Court responded. The leading case, and the starting point for analysis of the doctrine protecting state-created property, is Board of Regents v. Roth. David Roth was a college teacher on a one-year contract. After the college informed Roth that it would not renew his contract, Roth brought a § 1983 suit, alleging that "the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law." The Supreme Court ruled that Roth had no property interest in his teaching position that was protected by procedural due process and therefore no right to notice and a hearing.


See Charles E. Reich, The New Property, 73 YALE L.J. 733, 733 (1964) ("Increasingly, Americans live on government largess—allocated by government on its own terms, and held by recipients subject to conditions which express 'the public interest.'").

For the most powerfully argued, and the most influential, critique, see generally id. See supra notes 28–30 and accompanying text. For a description of the evolution of the property prong of the Due Process Clause, see Edward L. Rubin, Due Process and the Administrative State, 72 CAL. L. REV. 1044, 1048–69 (1984).

408 U.S. 564 (1972).

Id. at 566.


Roth, 408 U.S. at 569.

Id. at 578–79.
The importance of Roth lies in the reasons the Court gave for denying Roth's claim. First, it rejected the "right-privilege" distinction established in its earlier cases. Second, despite finding Roth had no property interest in his employment, the Court declined to issue a blanket rule against recognizing property rights in benefits obtained from the state. Instead, it set forth a test for distinguishing between two types of benefits—those to which the beneficiary had a legitimate claim of entitlement and those to which the beneficiary did not. "To have a property interest in a benefit," the Court explained, "a person ... must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Whether someone has a legitimate claim of entitlement depends on the law governing access to the benefit:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

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39 Id. at 576-77. For more on the right-privilege distinction, see supra note 26 and accompanying text.

40 Roth, 408 U.S. at 577.


42 Roth, 408 U.S. at 577. Governments may choose whether to set up benefit programs in such a way as to create entitlements. See David A. Super, The Political Economy of Entitlement, 104 COLUM. L. REV. 633, 640-58 (2004) (exploring positive and negative effects of various approaches).

State law may also create liberty interests. This typically occurs with regard to prisoners or others who have lawfully been deprived of personal freedom, and usually the liberty interest will be created by legislation, but other state-law directives may also suffice. For an example that is somewhat analogous to the "property" claim in Town of Castle Rock v. Gonzalez, 545 U.S. 748 (2005), see Walters v. Grossheim, 990 F.2d 381, 384 (8th Cir. 1993). Even when not directly stated, when the state grants prisoners some degree of liberty, the prisoners may acquire state-created liberty interests. See Sandin v. Conner, 515 U.S. 472, 484 (1995) (finding that state-created liberty interests "will be generally limited to freedom from restraint which ... imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life"). Applying this principle, the Court recently held that Ohio...
This test for a legitimate claim of entitlement barred Roth’s claim because the terms of Roth’s contract “made no provision for renewal whatsoever,” and he therefore “secured absolutely no interest in re-employment for the next year.”

Moreover, neither state law nor university rules supported any expectation of renewal. The Roth decision indicates that the employment-as-property inquiry is likely to be very fact intensive.

The Court drove this point home in a companion case to Roth, Perry v. Sindermann. Sindermann, like Roth, was a college teacher whose one-year contract was not renewed. But, unlike Roth, Sindermann argued that his interest in renewal, “though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration.” Specifically, he offered to prove that the college’s practice had been to renew teaching contracts such as his. For the purpose of ruling on the college’s motion for summary judgment, the Court held that the plaintiff may, on the basis of “the policies and practices of the institution,” establish a legitimate claim of entitlement. Furthermore, the Court stated that legitimate reliance is governed by an objective test, and “a mere subjective ‘expectancy’ is [not] protected by procedural due process.”

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43 Roth, 408 U.S. at 578.
44 Id.
45 408 U.S. 593 (1972).
46 Id. at 595.
47 Id. at 599–600.
48 Id. at 600. Sindermann claimed to have relied on a provision of the teacher handbook which stated, inter alia, that faculty members should “feel that [they have] permanent tenure as long as [their] teaching services are satisfactory ....” Id.
49 Id. at 603 (internal quotation marks and citation omitted). Since Perry, some courts have held that a property interest can be based on “mutually explicit understandings” between the employee and a supervisor. Cf. Crull v. Sunderman, 384 F.3d 453, 464–65 (7th Cir. 2004) (ruling against plaintiff because she failed to “support her assertion of mutually explicit understanding of continued employment by offering statements from someone who could bind” her employer).
50 Perry, 408 U.S. at 603. See also Nunez v. Simms, 341 F.3d 385, 391 (5th Cir. 2003) (applying an objective test).
B. DEFINING "LEGITIMATE EXPECTATIONS"

Taken together, Roth and Perry established the principle that, for constitutional purposes, property consists of more than the land, chattels, and intangibles covered by the common law. These cases held that government benefits may amount to property within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendments if the law governing them gives rise to legitimate expectations of continuance. The companion cases set up a doctrinal framework for determining whether a given government benefit qualifies as property entitled to due process protection. Usually, though not always, the governing law will be state law—hence the characterization of this type of property as "state-created" property interests. It is this type of protected constitutional right on which we focus.

The Supreme Court has elaborated these principles and applied them to a variety of claimed property interests. In the employment context, the Court has established that those government employees who may be fired only for cause have a property interest in their positions that entitles them to due process. Whether the employee...
has a claim of entitlement is "decided by reference to state law... [and] an examination of the particular statute or ordinance in question." 54

The Supreme Court has sometimes taken a narrow view of state-created property. In Bishop v. Wood, a city ordinance governing the plaintiff–employee's employment authorized his dismissal "if he fails to perform work up to the standard of his classification, or if he is negligent, inefficient, or unfit to perform his duties." 55 The plaintiff challenged his termination claiming the ordinance conferred on him a permanent classification that, combined with his period of service, gave him a protected property interest under the Due Process Clause. 56 The Supreme Court, however, interpreted the ordinance as making the plaintiff an at-will employee 57 who had no property interest in his job as a police officer. 58

In other cases, the Supreme Court has declined to extend constitutional property claims. In Paul v. Davis, the plaintiff argued that a state official "deprived him of his constitutional rights" by distributing flyers announcing the plaintiff to be an active shoplifter when in fact the plaintiff's shoplifting charge had been dismissed. 59 The Court found that the plaintiff did not have a valid constitutional claim because "reputation alone, apart from some more tangible interests such as employment, is [n]either 'liberty' [n]or 'property' [and is not] by itself sufficient to invoke the procedural protection of

a contract with a state entity can give rise to a property right protected under the Due Process Clause [such as] 'where the contract itself includes a provision that the state entity can terminate the contract only for cause.'" (quoting Unger v. Nat'l Residents Matching Program, 928 F.3d 1392, 1399 (3d Cir. 1991)).

55 Id. at 344.
56 Id. at 341.
57 Id. at 345. The Supreme Court relied on the district court judge to provide an interpretation of the ordinance since it had no guidance from a North Carolina state court. Id.
58 Id. at 345–47. The Bishop decision has not deterred lower courts from finding that at-will employment gives rise to a property interest in circumstances that are difficult to distinguish from Bishop. See, e.g., Relford v. Lexington-Fayette Urban County Gov't, 390 F.3d 452, 460 (6th Cir. 2004) (finding property interest in job where dismissal was authorized for "inefficiency, misconduct, insubordination, or violation of law involving moral turpitude" (internal quotation marks omitted)). For recent lower court opinions strictly applying the at-will principle, see Galloza v. Foy, 389 F.3d 26, 33–34 (1st Cir. 2004); Crull v. Sunderman, 384 F.3d 453, 460 (7th Cir. 2004); Thomas v. Town of Hammonton, 351 F.3d 108, 113 (3d Cir. 2003); and Eddings v. City of Hot Springs, 323 F.3d 596, 601 (8th Cir. 2003).
The Court distinguished the plaintiff's claim from that in Wisconsin v. Constantineau, where the plaintiff claimed a stigma to her reputation as a result of a flyer declaring she could not be sold alcohol. The Court reasoned that in Constantineau, the posting by the state official "deprived the individual of a right previously held under state law"—that is, the right to purchase or obtain alcohol—and that the plaintiff in Davis had not suffered a similar deprivation.

More recently, the Court in Town of Castle Rock v. Gonzales denied the plaintiff's claim that she had a property interest in the enforcement of a restraining order against her estranged husband. The Court began by pointing out that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." It then found that a "well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes," reasoning that when an arrest is impractical, Colorado's restraining order statute requires only that officers "seek a warrant." Thus, Ms. Gonzales could not "specify the precise means of enforcement" required by the Colorado restraining order statute. The "practical necessity of discretion in enforcing her restraining order fatally undermined Ms. Gonzales' claim to an entitlement, because "[s]uch indeterminacy is not the hallmark of a duty that is mandatory."
While the Court took a narrow view of property in Bishop, Davis, and Castle Rock, it has taken more expansive views in other cases. In Goss v. Lopez, the Court declared that state laws guaranteeing access to primary and secondary schooling gave the students a property interest in education.\(^7\) This holding was in response to a class action filed by Ohio public school students who had been suspended from school, without a hearing, for ten days for misconduct.\(^2\) In finding that the students had a protected property interest in their public school education, the Court emphasized that Ohio had chosen to confer this benefit and that the Ohio public schools could not take away the students' property interests without adhering to the "minimum procedures required" by the Due Process Clause.\(^7\) Consequently, "students facing suspension . . . must be given some kind of notice and afforded some kind of hearing."\(^7\)

The Court held in Logan v. Zimmerman Brush Co., another employment case, that property embraces an unadjudicated state-law cause of action.\(^7\) In Logan, the plaintiff was purportedly fired because of his physical disability.\(^6\) A state law, the Illinois Fair Employment Practices Act, provided the plaintiff with the right to appeal termination at a hearing within 120 days after the employee brought a charge of unlawful conduct.\(^77\) The hearing was actually scheduled for 125 days later, depriving the commission of jurisdiction to hear it.\(^78\) The Court held that the commission's failure to comply with the 120-day requirement violated the Due Process Clause because the plaintiff had a property interest in that process.\(^79\) The Court further emphasized that the employee's property right was not in the existence of the process but rather in the proper administration of that process.\(^80\)

\(^2\) Id. at 569–70.
\(^7\) Id. at 574.
\(^74\) Id. at 579.
\(^75\) 455 U.S. 422, 430–32 (1982).
\(^6\) Id. at 424–25.
\(^77\) Id. at 422.
\(^78\) Id. at 426–28.
\(^79\) Id. at 428–33.
\(^80\) Id.
Finally, in *Atkins v. Parker*, the Court found that recipients of food stamps had a property interest in their continuance, though the government retained the power to modify or abandon the program. Specifically, the plaintiffs challenged the notice they received from the state agency regarding changes in federal law that could reduce or eliminate the food stamps the plaintiffs received. The Court, declaring the notice adequate, distinguished between “procedural fairness of individual eligibility determinations” and “legislatively mandated substantive change in the scope of the entire food-stamp program” and held that in the latter situation, the “legislative process provides all the process that is due.” Nonetheless, the Court found food-stamp benefits to be statutory entitlements that are treated as property protected by the Due Process Clause.

Lower federal courts have decided many more property cases than the Supreme Court. They have found property interests in liquor licenses; state medical insurance coverage; business licenses; and, where a business began operating before a license was required, “the continued operation of an existing business.” Even a building permit can be property, if under state law it may not be canceled except for a good reason—a legal norm often expressed by the term

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81 472 U.S. 115, 128–29 (1985) (“[T]he . . . entitlement [to welfare benefits] did not include any right to have the program continue indefinitely at the same level, or to phrase it another way, did not include any right to the maintenance of the same level of property entitlement.”).
82 Id. at 119–20.
83 Id. at 116.
84 Id. at 128.
86 See, e.g., Hamby v. Neel, 368 F.3d 549, 559 (6th Cir. 2004) (holding plaintiffs had a property interest in medical plan for which they hoped to qualify).
88 Women’s Med. Prof’l Corp. v. Baird, 438 F.3d 595, 611 (6th Cir. 2006).
89 Woodwind Estates v. Gretkowski, 205 F.3d 118, 123 (3d Cir. 2000).
90 Some lower courts have held that applicants for benefits, as well as current beneficiaries, may have property interests in the benefits, but the Supreme Court has not addressed the issue. For a recent assessment of the case law, see Kapps v. Wing, 404 F.3d 105, 115 (2d Cir. 2005). For one case that distinguishes between applicants and beneficiaries, see Spinelli, 2009 WL 2413929, at *6.
At least one federal court has held that a "constant, consistent pattern" of decisions by administrative law judges as to appropriate reimbursement rates under Medicare can create a property interest on the part of physicians in the rates the administrative law judges deem appropriate.92 Another court held that a professor may have a property interest not only in his employment, but also in his position in a specific department.93 Another court found that a psychiatrist had a property interest in clinical staff privileges at the Manhattan Psychiatric Clinic, because of provisions in the clinic's bylaws and its policy and procedure manual which guaranteed such privileges.94 Yet another court determined that an inmate has a property right in the funds in his institutional account such that the funds cannot be assessed by prison authorities without notice and a hearing.95 Ultimately, the case law among the lower courts has borne out the Supreme Court's assertion in Logan that "the types of interests protected as property are varied and, as often as not, intangible, relating to the whole domain of social and economic fact."96

III. SHOULD STATE-CREATED PROPERTY RECEIVE SUBSTANTIVE CONSTITUTIONAL PROTECTION?

Most due process cases, both in the Supreme Court and lower federal courts, address two issues: whether in a given situation, the plaintiff has a property interest, and given that the plaintiff has a property interest, what type of procedural process the plaintiff is entitled to. In light of the Court's decision in Engquist, we think that a third issue may also arise: whether, in a given situation, the

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91 Courts often use the phrase "for cause" across the whole range of state-created property interests. Thomas Merrill argues that "because the phrase 'for cause' is a term of art with special relevance in employment cases, it may be desirable to express the root idea behind for-cause removal somewhat more broadly." He suggests "a phrase such as 'specific condition justifying termination' rather than 'for cause.'" Merrill, supra note 17, at 960.
93 See, e.g., Hulen v. Yates, 322 F.3d 1229, 1243 (10th Cir. 2003) (holding this was true when faculty manual guaranteed department placement).
94 Greenwood v. N.Y. Office of Mental Health, 163 F.3d 119, 122 (2d Cir. 1998).
95 Burns v. Pa. Dep't of Corr., 544 F.3d. 279, 291 (3d Cir. 2008).
state has deprived the plaintiff of a substantive right to property. Under our proposed approach, a plaintiff would begin by establishing that the plaintiff has a state-created property interest within the framework of federal constitutional standards. We argue that the plaintiff who holds state-created property may raise two constitutional claims: (a) that the plaintiff's right to procedural due process was denied and (b) that the plaintiff was denied substantive due process. In this Part, we examine both how this substantive due process claim would arise and potential problems with the claim.

A. THE SUPREME COURT ON SUBSTANTIVE DUE PROCESS

The Supreme Court has not resolved the status of substantive due process in the state-created property context. There is, however, a recent Supreme Court case that could be read as having decided the issue in favor of substantive due process. In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, Buckeye sought to build a low-income housing complex. After Buckeye had purportedly met the building permit requirements, public opposition to the planned development began to grow. The city council still approved the plan, but the city engineer delayed issuance of the permits pending the voting results of a city referendum that, if passed, would repeal the ordinance under which the council had approved the permits. This referendum repealing the ordinance passed.

Buckeye then sued the city and several city officials under § 1983, arguing that Buckeye had a state-created property interest in obtaining building permits once it had satisfied the conditions mandated by state law, and that the city and its officials deprived Buckeye of that right when they allowed the referendum to go forward rather than issuing Buckeye the permits. The claim was

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97 See Olim v. Wakinekona, 461 U.S. 238, 250 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.").
99 Id.
100 Id. at 192.
101 Id.
102 Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls, 263 F.3d 627, 641 (6th Cir. 2001).
litigated under substantive due process, and the Sixth Circuit
awarded relief on this ground.\textsuperscript{103} In reversing the Sixth Circuit's
judgment on this issue, the Supreme Court declined to rule on the
existence of a state-created property interest, and addressed the
merits of the substantive due process claim.\textsuperscript{104} Characterizing the
circumstances of the case as an executive action case,\textsuperscript{105} the Court
held that "the city engineer's refusal to issue the permits while the
petition was pending in no sense constituted egregious or arbitrary
government conduct."\textsuperscript{106}

One implicit premise of this ruling is that a substantive due
process theory would succeed in the event the city engineer's refusal
had been shown to be sufficiently egregious or arbitrary. The Court
did not merely assume for the sake of argument that the substantive
due process theory was available. A fairer reading of the opinion is
that the Court took for granted that a substantive due process
theory applied to that type of case. It cannot be said, however, that
\textit{Buckeye} unambiguously resolves the issue. For example, the
Eleventh Circuit in \textit{McKinney v. Pate}\textsuperscript{107} ruled against substantive
due process several years before \textit{Buckeye}, and the Eleventh Circuit
has not changed its position in the wake of the Supreme Court's
decision in \textit{Buckeye}.\textsuperscript{108}

B. \textit{MCKINNEY V. PATE: THE LEADING CASE AGAINST SUBSTANTIVE
STATE-CREATED PROPERTY RIGHTS}

Lacking explicit guidance from the Supreme Court,\textsuperscript{109} many lower
courts have paid little attention to the substantive dimension of

\textsuperscript{103} \textit{Id.} at 641-44.
\textsuperscript{104} \textit{Buckeye}, 538 U.S. at 198.
\textsuperscript{105} The Court has held in prior cases that in a substantive due process claim where the
offending actor is a government executive, "only the most egregious official conduct can be said
\textsuperscript{106} \textit{Buckeye}, 538 U.S. at 198.
\textsuperscript{107} 20 F.3d 1550 (11th Cir. 1994) (en banc).
\textsuperscript{108} See \textit{infra} Part III.B.
\textsuperscript{109} See \textit{Butler v. Rio Rancho Pub. Sch. Bd. of Educ.}, 341 F.3d 1197, 1200 n.3 (10th
Cir. 2003) ("[T]he Supreme Court has not decided whether a state created property right like
the right to a public education triggers substantive due process guarantees."); see also
David H. Armistead, Note, \textit{Substantive Due Process Limits on Public Officials' Power to
of guidance from Supreme Court on substantive due process claims).
cases like Amy's hypothetical case. Those courts that have addressed the issue are divided on the question of whether the holders of state-created property are entitled to substantive constitutional safeguards under the Due Process Clause. Moreover, few litigants frame their due process cases in substantive terms, partly because an equal protection class-of-one claim was available until Engquist, and partly because the Court has expressed reluctance to expand the scope of substantive due process if an alternative is available. Unfortunately, courts that do recognize substantive due process claims typically do not defend their positions. Perhaps the most extensive treatment of the normative issue is found in McKinney, a case that rejected the substantive due process theory. Accordingly, any defense of the substantive theory must first address the McKinney decision.

1. McKinney's Holding. Millard McKinney was a county building official in Osceola County, Florida. He had a property interest in the position because, under state law, he could only be removed for cause. Though his performance evaluations were excellent, the Board of County Commissioners asked him to resign. When he refused, the board fired him, charging that he "had failed to provide direction to his department and that, as a result, the performance of the Building Division staff was deficient." One of the board members who voted to terminate McKinney worked for a construction subcontractor, and McKinney asserted that the board member was biased against McKinney "because of McKinney's strict enforcement of the county's building codes," that the "charges against [him] were pretextual and that the Board therefore fired [him] without reason."

10 See supra Part I for hypothetical.
11 Compare McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc) (rejecting substantive due process theory), with Herts v. Smith, 345 F.3d 581, 587 (8th Cir. 2003) (accepting substantive due process theory).
12 See supra note 18 and accompanying text.
13 20 F.3d at 1553.
14 Id. at 1554.
15 Id.
16 Id.
17 Id. at 1554 n.4.
18 Id. at 1554.
19 Id. at 1555.
Sitting en banc, the Eleventh Circuit abandoned some of its precedent and held that McKinney's facts did not “give rise to a substantive due process claim.”120 In the McKinney opinion, Chief Judge Tjoflat discusses Bishop v. Wood121 and Cleveland Board of Education v. Loudermill122 in reaching the court's decision.123 He states:

Supreme Court precedent demonstrates that an employee with a property right in employment is protected only by the procedural component of the Due Process Clause, not its substantive component. Because employment rights are state-created rights and are not “fundamental” rights created by the Constitution, they do not enjoy substantive due process protection.124

But Bishop and Loudermill do not in any measure support the proposition for which they are cited. Judge Tjoflat correctly describes Bishop as a case in which the Court found neither a “property interest protected under the Fourteenth Amendment” nor a “constitutionally protected interest in liberty.”125 Because the

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120 Id. at 1553. The specific holding in McKinney was that state-created rights in employment are not covered by substantive due process. Id. Later Eleventh Circuit cases have extended the doctrine to other types of state-created property. See, e.g., Lewis v. Brown, 409 F.3d 1271, 1273 (11th Cir. 2005) (“The list of state-created rights is not limited to tort and employment law, and has been held by this Court to include land-use rights like the zoning restrictions at issue here.”).

121 426 U.S. 341 (1976). For a discussion of Bishop, see supra notes 54–58 and accompanying text.

122 470 U.S. 532 (1985). Loudermill involved a § 1983 claim brought by terminated school district employees. Id. at 536. The Court found the employees did possess “property rights in continued employment.” Id. at 539. However, the Court held that the “pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the [applicable] statute” that the plaintiffs received, was all the process that was due. Id. at 547–48.

123 McKinney, 20 F.3d at 1559–60.

124 Id. at 1560.

125 Id. at 1559. In Bishop, the plaintiff asserted that the dismissal violated his Fourteenth Amendment liberty because “the reasons given for his discharge were false.” 426 U.S. at 349. Shortly before Bishop, the Supreme Court had rejected that reasoning in Paul v. Davis, 424 U.S. 693 (1976). Only where the reasons for the dismissal are made public does the plaintiff have a case under Paul. Id. at 701–02. In Bishop, “the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private.” 426 U.S. at 348 n.12.
plaintiff in Bishop held neither a property nor a liberty interest in his position, the question of whether state-created property receives substantive constitutional protection did not arise and the Court did not have to address it. Similarly, in Loudermill, the issue was whether the plaintiff had a property interest in his job, and if yes, whether the plaintiff was afforded procedural due process in connection with his dismissal. Again, substantive due process was not an issue in the case. Given that the Court did not address substantive due process in either Bishop or Loudermill, it is difficult to see how the Eleventh Circuit felt its analysis of these cases supported the conclusion that substantive due process was not an available claim.

2. Questioning the Eleventh Circuit’s Argument. The core of McKinney’s reasoning is that substantive due process does not protect state-created property rights, but rather only rights created

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126 See Bishop, 426 U.S. at 344–49 (finding no such interests).
127 See Loudermill, 470 U.S. at 538–41 (discussing whether plaintiff had “property right in continued employment”).
128 See id. at 542–48 (discussing nature of process afforded plaintiff).
129 See id. at 540–46 (explaining that “categories of substance and procedure are distinct” and analyzing on procedural grounds). In McKinney, Judge Tjoflat offers two other “distinct and important” reasons for foreclosing substantive due process claims for violations of state-created rights. McKinney, 20 F.3d at 1560. First, Judge Tjoflat opines that the “second error” in the Eleventh Circuit’s prior case law was “that it allows a terminated employee to sue in federal court under § 1983 before the employee utilizes appropriate, available state remedial procedures.” 20 F.3d at 1560. For this proposition, Judge Tjoflat cited Zinermon v. Burch, 494 U.S. 113 (1990), which holds that certain procedural due process claims cannot be brought until the plaintiff has pursued available state remedies. McKinney, 20 F.3d at 1560 (citing Zinermon, 494 U.S. at 125–26). But Zinermon quite explicitly distinguishes between substantive and procedural due process, and it reaffirms the settled law that, as to a substantive due process claim, “the constitutional violation actionable under § 1983 is complete when the wrongful action is taken.” 494 U.S. at 125. Only after it is established that no substantive due process claim is available could Zinermon be relevant to McKinney. To argue that Zinermon supports the rejection of substantive due process is to reason in a circle.

Judge Tjoflat’s third “distinct and important” reason for repudiating the earlier Eleventh Circuit law is that it “provides an inappropriate remedy to pretextually terminated employees.” McKinney, 20 F.3d at 1560. The appropriate remedy for procedural violations, he explains, is “not damages calculated on the employee’s potential earnings for the rest of his or her working life, but rather procedural, equitable remedies: reinstatement and a directive that proper procedures be used in any future termination proceedings.” Id. This is, of course, an accurate account of damages for procedural due process violations. It is, however, inapposite to the point for which it is advanced in McKinney because it does nothing toward undermining the proposition that, in the proper circumstances, a substantive due process theory of recovery may also be available.
by the Constitution. Judge Tjoflat distinguishes between two types of rights protected by the Fourteenth Amendment:

The substantive component of the Due Process Clause protects those rights that are fundamental, that is, rights that are implicit in the concept of ordered liberty. The Supreme Court has deemed that most . . . of the rights enumerated in the Bill of Rights are fundamental; certain unenumerated rights (for instance the penumbral right of privacy) also merit protection . . . . A finding that a right merits substantive due process protection means that the right is protected against certain government actions regardless of the fairness of the procedures used to implement them.

This discussion leads Judge Tjoflat to conclude that "areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because 'substantive due process rights are created only by the Constitution.' " Judge Tjoflat cites Bishop and Roth as the employment cases and Daniels v. Williams as the tort case supporting this distinction between rights that receive substantive due process protection and those that do not.

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130 McKinney, 20 F.3d at 1560.
131 Id. at 1556 (citations and internal quotation marks omitted). For example, in Flaskamp v. Dearborn Public Schools, 385 F.3d 935, 938 (6th Cir. 2004), a teacher was fired because she had an affair with a recent graduate and subsequently brought a suit claiming a violation of her fundamental right of intimate association. The Sixth Circuit upheld the school board's decision, stating that "the board's action did not 'directly and substantially' affect Flaskamp's right of intimate association and that the board did not act in an unreasonable manner in addressing the issue." 385 F.3d at 943.
132 McKinney, 20 F.3d at 1556 (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229 (1985) (Powell, J., concurring)). In Ewing, Justice Powell indeed makes it clear that he would not extend substantive protection to state-created property rights. 474 U.S. at 229. This is not concerning, however, because he wrote this opinion alone in a case where the Court was unanimous. Id.
133 474 U.S. 327 (1986). The Daniels Court relied prominently on the fact that the government officer's behavior was negligent, as opposed to willful, in denying the plaintiff's due process claim. Id. at 331.
134 McKinney, 20 F.3d at 1556.
Bishop and Roth are indeed public employment cases, but neither of them addressed substantive protection for state-created property. Bishop held that the plaintiff did not have a "legitimate expectation" of continued employment and hence no property right; Roth focused on procedural due process and said nothing one way or the other about substantive rights. Daniels v. Williams is indeed a tort case in which the Court ruled that official negligence could not support a substantive due process claim. But the Daniels Court did not foreclose the substantive due process approach for more egregious harms, and the Court in County of Sacramento v. Lewis—a case decided four years after McKinney—belied Judge Tjoflat's taxonomy by authorizing substantive due process recovery in certain cases.

The McKinney court's inability to find precedent on point supporting its holding is neither surprising nor, standing alone, fatal to its ruling. An argument for a contrary outcome would face the same difficulty, largely because of the Supreme Court's failure to address the substantive due process issue in a systematic way. The Court's inattention to the scope of substantive protection for state-created property rights is regrettable, because it raises basic issues regarding "the troubled boundary between individual man and the state." In a world in which government is "a major source of wealth," the power of the state is significantly augmented as the scope of constitutional protection of state-created property diminishes. However the question is resolved, it deserves to be aired far more fully than it is in McKinney.

135 See supra note 129 and accompanying text.
137 See supra notes 33–42 and accompanying text.
138 Daniels, 474 U.S. at 331–33.
139 County of Sacramento v. Lewis, 523 U.S. 833, 834 (1998) (stating police officer may be liable to motorist injured in police chase if conduct "shocks the conscience"). Relying on an earlier Eleventh Circuit case, Judge Tjoflat asserted that official actions that "shock the conscience" do not give rise to substantive due process claims. McKinney, 20 F.3d at 1556 n.7 (citing Gilmore v. City of Atlanta, 774 F.2d 1495, 1511 n.21 (11th Cir. 1985) (en banc) (Tjoflat, J., concurring in part and dissenting in part), cert. denied, 476 U.S. 115 (1986)). The Supreme Court repudiated Judge Tjoflat's dictum in Lewis, 523 U.S. at 834.
140 Reich, supra note 31, at 733.
141 Id.
IV. SUBSTANTIVE RIGHTS IN STATE-CREATED PROPERTY

Let us return to Amy's case. The basic issue raised by this hypothetical is whether Amy, though afforded procedural protection, may nonetheless object to her dismissal from the university on the ground that she holds a substantive right not to be fired unless there is sufficient evidence of cause. We attempt here to resolve the conflict among lower courts and provide needed guidance because in the event Amy succeeds, not only will she save her job, but her case will have a broader impact.

A holding in Amy's favor would imply that the state, in undertaking to deprive a person of state-created property, is constrained by some burden of proof. That is, the state would have to satisfy the cause requirement, which gave rise to Amy's state-created property right. Such a burden of proof already falls on the state in criminal cases, as established by In re Winship. The Supreme Court, in Kansas v. Crane, stated that "proof of serious difficulty in controlling behavior" would be necessary in certain civil commitment proceedings that deprive persons of liberty. As the Court recognized in Crane, the substantive norm that the state may not deprive a person of liberty is a protected right. We argue that state-created property deserves similar protections.

Recognizing substantive protection for Amy's right would impose a burden of proof on the state and establish conditions, in addition to the procedural requirements, for taking away state-created property rights. We use Amy's hypothetical to illustrate in broad terms what is at stake in resolving the question of whether the Due Process Clause guarantees state-created property rights substantive, as well as procedural, protection. If the Due Process Clause provides

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142 See supra Part I for Amy's hypothetical case.
143 397 U.S. 358, 361–64 (1970) (discussing "proof beyond a reasonable doubt" standard in criminal cases, and finding that the standard is used to protect liberty of defendant and to command respect of community).
144 534 U.S. 407, 413 (2002). See also Brock v. Seling, 390 F.3d 1088, 1091 (9th Cir. 2004) (finding that Crane requires "only 'some' showing of an abnormality that makes it 'difficult, if not impossible for the dangerous person to control his dangerous behavior'") (citing Crane, 534 U.S. at 411).
145 See 534 U.S. at 409 ("This case concerns the constitutional requirements substantively limiting the civil commitment of a dangerous sexual offender . . . .").
only procedural safeguards, and Amy is afforded those safeguards, she has no constitutional grounds for complaining about the substantive deprivation she suffers when she is fired. If, however, the Due Process Clause obliges the state to produce some quantum of evidence demonstrating that there is cause for her dismissal, then Amy’s state-created property right in her job necessarily must receive substantive protection under the Due Process Clause.

We have kept our hypothetical as simple as possible in order to avoid complications that may distract attention from the central issue of whether courts should erect substantive constitutional bulwarks against the deprivation of state-created property rights. While Amy’s case includes the basic features of many substantive state-related property cases, other cases vary from her case along two dimensions. First, the plaintiff may advance a more complex constitutional claim, asserting not merely that the evidence was insufficient (which is our focus), but that the adverse decision was based on animus toward her, was arbitrary, or manifested callous indifference to her rights.146 We will argue that Amy should win in all of these cases. Second, the issue of substantive safeguards arises not only in the employment context, but also in connection with the whole range of state-created property: building permits, zoning variances, and liquor licenses. Thus, under our reasoning, plaintiffs in all of these cases should have access to the substantive theory of recovery.

A. MAKING THE CASE FOR SUBSTANTIVE PROTECTION

The holding in McKinney rests on two premises: that the state-law pedigree of property justifies less constitutional protection;147 and that process and substance can properly be divorced from one another, with the former receiving constitutional protection but the

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147 See McKinney v. Pate, 20 F.3d 1550, 1556 (1994) (holding substantive due process does not apply to state-created rights). For a somewhat different, or at least less definitive distinction, between fundamental property rights—which receive substantive due process protection—and other property rights—which do not—see Independent Enterprises v. Pittsburgh Water and Sewer Authority, 103 F.3d 1165, 1179–80 (3d Cir. 1997).
Thus, two challenges exist for plaintiffs like Amy in establishing a valid substantive due process claim for state-created property. First, Amy must show that substantive protection extends not only to fundamental rights conferred by the Constitution, but also to state-created property. Second, Amy must show that procedural safeguards are inadequate by themselves to protect the substantive aspect of state-created property. Both premises of McKinney seem problematic and do not bar a substantive due process claim by a plaintiff holding a state-created property interest.

1. "Fundamental" vs. "State-Created" Rights. In distinguishing between fundamental rights created by the Constitution on the one hand, and state-created rights on the other, the Eleventh Circuit in McKinney necessarily implies that the latter have a lower status by virtue of their state-law origin. Degrading state-created rights in this way ignores the core principle, reaffirmed in Castle Rock, that whether expectations generated by state law give rise to a property interest is ultimately an issue of federal constitutional law. Calling them state-created rights is useful shorthand, but the moniker misleads by failing to acknowledge the federal constitutional screen through which they must pass in order to win protection under the Due Process Clause. For example, the federal requirements may thwart protection for a given interest due to lack of monetary value or the incidental or indirect nature of the protection. Given the federal law overlay, it follows that property interests that satisfy the constitutional norms cannot be distinguished from other forms of property (like fundamental rights) simply because of their state-law origins.

By ignoring this federal law component, the McKinney court's distinction between state and constitutional rights lacks justification. The universe of rights protected by the Fourteenth Amendment cannot be divided into state-created rights in

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148 See McKinney, 20 F.3d at 1560-61 (finding procedural remedy to be available only for deprivation of state-created right).
149 See supra Part II.B.
150 See Town of Castle Rock v. Gonzales, 545 U.S. 748, 766 (2005) (finding no state-created property right under federal Constitution when enforcement of the restraining order was discretionary). Justice Scalia evidently thought that discretion was fatal to the property claim in Castle Rock, though it appears he could not muster a majority for that view. See supra note 69 and accompanying text.
government benefits (which receive only procedural protection) and rights “created” by the Constitution (which alone are entitled to substantive protection). This distinction ignores the largest class of property rights not created by the Constitution—those rights in land, chattels, and intangibles that are defined by the common law. For the most part, the existence and scope of common law property rights are governed by state law, yet the Due Process Clause and the Takings Clause protect common law property against substantive, as well as procedural, violations.  

Stated in abstract terms, the property component of the Due Process Clause addresses the constitutional problem created by the tension between persons in a free society entitled to rely on keeping rights they have acquired, and the government seeking (for good or bad reasons) to take those interests away. Starting with Roth, the guiding principle for property cases has been the Court’s understanding that “a purpose of the ancient institution of property is to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.” For hundreds of years, the common law has preserved interests in land, chattels, and intangibles, and the Due Process Clause, and the Takings Clause of the Fifth Amendment safeguard these common-law property interests against legislatures and officials. With the growth of the state in the second half of the twentieth century came the “emergence of government as a major source of wealth,” in the form of jobs, contracts, licenses, permits, and the like. In Roth and

151 See, e.g., Curry v. McCanless, 307 U.S. 357 (1939) (applying Due Process Clause to real property); Simi Inv. Co. v. Harris County, 236 F.3d 240, 248–49 (5th Cir. 2000) (finding that substantive due process may apply to taxation of real property); Clark v. City of Draper, 168 F.3d 1185, 1190 (10th Cir. 1999) (stating that arbitrary deprivation of property may trigger substantive component of Due Process Clause).

152 This is the central insight driving Charles A. Reich’s The New Property, a highly influential pre-Roth article that made the case for treating state benefits as property for constitutional purposes. See Reich, supra note 31, at 733 (“[I]n a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.”); id. at 764 (“[T]he growth of largess has made it possible for government to ‘purchase’ the abandonment of constitutional rights.”); id. at 771 (“[P]roperty performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.”).


154 See supra note 151 and accompanying text.

155 Reich, supra note 31, at 733.
Sindermann, the Court responded to the transformation by extending the reach of Fifth and Fourteenth Amendment property.\textsuperscript{156}

Thus, a more accurate account of constitutional property rights would drop the distinction drawn by McKinney and instead acknowledge that property has several sources: some of the property and liberty rights deserving procedural and substantive protection under the Due Process Clause originate in state law and practice, while others come from the common law, from the Supreme Court's understanding of "ordered liberty,"\textsuperscript{157} or from the notion that, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."\textsuperscript{158}

Now consider the amount of constitutional protection we should afford state-created property in particular. State-created property exists only when a court determines that state law and practice produce legitimate grounds for reliance on "the security of interests that a person has already acquired in specific benefits."\textsuperscript{159} Given such a determination, we do not believe there are plausible grounds for distinguishing state-created property from any other kind of property. Thus, the constitutional principle that curbs the government's power to deprive us of common-law property rights and fundamental rights applies with equal force to these state-created benefits.\textsuperscript{160} By adopting this approach, a court can recognize substantive due process claims for state-created property interests without contravening or altering Supreme Court precedent.

2. Favoring Procedural over Substantive Protection. Another barrier to substantive protection of state-created property rights is the argument that the procedural and substantive components of a

\textsuperscript{156} See supra Part I.A.
\textsuperscript{158} Id. at 851.
\textsuperscript{159} Bd. of Regents v. Roth, 408 U.S. 564, 576 (1972).
\textsuperscript{160} We are not alone in finding Judge Tjoflat's reasoning unpersuasive. Long before McKinney, others had already rejected the distinction Judge Tjoflat would draw in McKinney between "state-created" property and other kinds of property. See Monaghan, supra note 27, at 436 ("[G]iven the purposes behind the protection of 'property,' the word may fairly be held to embrace new forms of property as they emerge."); Reich, supra note 31, at 779 ("Once property is seen not as a natural right but as a construction designed to serve certain functions, then its origin ceases to be decisive in determining how much regulation should be imposed.").
right operate autonomously, and that state-created rights enjoy only procedural protection. 161 McKinney's treatment of state-created property concedes that the Fifth and Fourteenth Amendments embrace state-created interests, but then it limits the reach of the Constitution by recognizing only procedural rights for protection. As justification for excluding the substantive component of the Due Process Clause, McKinney quotes Collins v. City of Harker Heights162 for the proposition that

the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.163

A difficulty with McKinney's reliance on this case is that the Supreme Court in Collins addressed a different issue altogether from the one presented by McKinney. In Collins, a city employee complained that city officials showed deliberate indifference to his health by exposing him to dangerous working conditions, and that this amounted to a substantive due process violation.164 The Collins Court did not reject substantive due process in principle but ruled that the alleged misconduct at issue could not "properly be characterized as arbitrary, or conscience shocking, in a constitutional sense."165 Collins was not a case in which the Supreme Court favored procedural over substantive due process. Rather, the issue in Collins was whether the plaintiff's claim met the threshold for obtaining any degree of constitutional protection—procedural or substantive. The Court ruled that it did not.166

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161 See, e.g., McKinney v. Pate, 20 F.3d 1551, 1560 (11th Cir. 1994) (making this argument).
163 McKinney, 20 F.3d at 1556 (internal quotations omitted) (quoting Collins, 503 U.S. at 125).
164 Collins, 503 U.S. at 17.
165 Id. at 128.
166 Id. at 127-30. The Collins Court also stated that a safe work environment was not part
A different issue is presented in cases like *McKinney* and in our Amy hypothetical.\(^1\)\(^6\) The issue in cases like these is whether an interest that definitively qualifies as state-created property under the Court's criteria—and hence deserves some constitutional safeguards—should nonetheless be denied *substantive* protection. In concrete terms, the issue is whether Amy, having established that she holds a state-created property interest and having received a procedurally flawless due process hearing, has any recourse when she can show that there was too little evidence to support Joe's finding of *cause*. This issue undermines *McKinney*'s reliance on *Collins* for the proposition that the Court disfavors substantive protection.

Besides favoring procedural protection over substantive protection of state-created property, the Eleventh Circuit in *McKinney* also distinguishes between challenges to legislation, for which it found substantive due process available, and challenges to executive acts (like Amy's claim).\(^1\)\(^8\) The distinction drawn by *McKinney* between legislation and executive acts is faulty for at least two reasons. First, it may not be tenable after *County of Sacramento v. Lewis*.\(^1\)\(^9\) In *Lewis*, the Court declared that "due process protection in the substantive sense limits what the government may do in both its legislative and its executive capacities."\(^\text{170}\) This statement appears to contradict directly (and thereby eliminate) the distinction that was drawn in *McKinney*.

Second, *McKinney*'s distinction seems to ignore the constitutional values at stake, and the way those values vary in strength depending on whether legislation or executive action is at issue. Broadly speaking, legislation is typically enacted by a group (for example, a city council or a state legislature) and hence is unlikely

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\(^1\) See supra Part I for facts of hypothetical.

\(^2\) 20 F.3d at 1557 n.9. The distinction between the legislative and executive contexts is explored at length in *Hawkins v. Freeman*, 195 F.3d 732, 738–39 (4th Cir. 1999). See also Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 326–27 (1993) ("[A] striking disparity has developed: substantive due process review is harder to obtain, and occurs under less clear standards, in tort actions based on relatively isolated official acts than in challenges to rules and legislation.").

\(^3\) 523 U.S. 833 (1999).

\(^4\) *Id.* at 846 (citation omitted). The viability of *McKinney*, therefore, depends on the further distinction between state-created property rights and other rights.
to reflect the bad motives of a few decision makers. Moreover, legislation will usually affect many people in approximately the same way. For these reasons, the democratic process will ordinarily serve as a check on abusive legislation, and judges should and do practice self-restraint (verging on self-abnegation), except for in a small category of "fundamental rights" cases. In the executive context, however, a given decision will often affect only one or a few people, and the decision is made by one or a small number of officials. The potential for abuse and the need for judicial oversight is greater in this context. Yet, this is the type of case McKinney denies the protection of substantive due process.

B. DO PROCEDURAL SAFEGUARDS SUFFICE?

In our view, the strongest defense of the McKinney approach is not found in its reasoning or in the cases Judge Tjoflat cited. In short, we do not think that McKinney's reasoning holds up under scrutiny. Only the Eleventh Circuit in McKinney and cases applying McKinney defend the "no substantive claim" rule. Because

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171 Compare Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) (upholding state business regulation in face of due process challenge), with Roe v. Wade, 410 U.S. 113, 155 (1973) (finding that a regulation limiting fundamental rights, such as the right to have an abortion under certain circumstances, may be justified only by compelling state interest). While the Court in recent years has moved away from the term fundamental, it continues to strike down statutes that interfere with "a person's most basic decisions about family and parenthood, as well as bodily integrity." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992) (internal citations omitted). See also Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking down statute that interfered with persons' private sexual conduct).

172 See Armistead, supra note 109, at 783 (concluding that abuse is most likely to occur in non-legislative context). The Third Circuit also distinguishes between executive and legislative actions. Unlike the Eleventh Circuit, however, the Third Circuit does not preclude substantive due process claims arising from executive actions. Stockham Interests, LLC v. Borough of Morrisville, No. 08-3431, 2008 WL 4889023, at *6 (E.D. Pa. Nov. 12, 2008) (discussing Third Circuit law in this area). It allows such claims (thereby providing judicial oversight) and applies the "shock the conscience test." See id. at *6–8. When evaluating legislative actions, however, the Third Circuit requires the government to "point to a legitimate state interest rationally served by the ordinance." Id. at *8.

173 We have conducted an exhaustive search of district and circuit court opinions without finding support for the reasoning in McKinney. See also Kenneth Bley, Use of the Civil Rights Acts to Recover Damages in Land Use Cases, SM040 ALI-ABA 207 (April 12–14, 2007) (listing McKinney court as only court that "has held that rights created by state law are subject to procedural, but not substantive, due process protection against nonlegislative action"). Nor do we find any substantial defense of the McKinney rule in scholarly literature. For example, Thomas Merrill seems to take for granted that state-created property is entitled only
McKinney's reasoning is infirm, champions of its rule must look elsewhere for a cogent defense.

The best justification for the “procedural but not substantive protection” principle lies in the general efficacy of procedural rights as a means of vindicating substantive rights. For example, one might maintain that procedural rights are sufficient by themselves to protect the plaintiff's property interest from the actions of state actors like our hypothetical Joe, who may threaten it.\footnote{In Amy's case,\footnote{Reasoning similar to this may underlie the holding in Tun v. Whitticker, 398 F.3d 899 (7th Cir. 2005). Tun, a high school student, was expelled from school after another student photographed him while he was taking a shower. \textit{Id.} at 900. He sought reinstatement through the school district's procedures for reviewing decisions of this kind, and he succeeded after six weeks. \textit{Id.} at 901. In his § 1983 suit against his principal and hearing officer, he charged that the expulsion violated his substantive due process rights because the actors arbitrarily denied him his right to attend school. \textit{Id.} at 900. Unlike the Eleventh Circuit in McKinney, the Seventh Circuit recognized the existence of the substantive due process theory but rejected Tun's claim on the merits, characterizing the school officials' conduct as an "overreaction" but not a constitutional violation. \textit{Id.} at 904. The court then commented that "the situation does demonstrate the importance of providing procedural due process, which ultimately allowed Tun ... to prevail at the end of the day: his expulsion was set aside, his school records were cleared, and he returned to school." See supra Part I for hypothetical.} for example, the procedural due process requirement of an impartial decision maker will usually be sufficient to prevent her from being dismissed without a good reason. However, even this argument falls short. A defender of McKinney could not ignore the possibility of cases in which a reviewing court would find (a) that Joe was impartial and (b) that Joe had dismissed Amy without a good reason. The defender of McKinney, however, would rationalize that these cases may be rare.\footnote{In Greenbriar Village, L.L.C. v. Mountain Brook, the Eleventh Circuit argues that such cases do not even exist. Instead of asserting that procedural regularity is sufficient to protect substantive rights, the Eleventh Circuit reasons that the two are "equivalent":}}
would have to concede that while there may be no procedural claim, a plaintiff charging that a legislative decision has deprived him or her of property without due process has a substantive claim because even courts following McKinney allow substantive claims.  

345 F.3d 1258, 1263 n.4 (11th Cir. 2003) (per curiam) (emphasis added). The problem with this reasoning is that, according to the Supreme Court, procedural law and substantive law are conceptually distinct. See, e.g., Zinermon v. Burch, 494 U.S. 113, 125 (1990) ("The Due Process Clause . . . encompasses . . . a guarantee of fair procedure" as well as "a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." (citation and internal quotation marks omitted)); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) ("[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct.").

This is not to say that the two are entirely severable. Procedural law and substantive law are related in that the "constitutional purpose" of process "is to protect a substantive interest to which the individual has a legitimate claim of entitlement." Olim v. Wakinekona, 461 U.S. 238, 250 (1983). A coherent argument can be advanced that sound procedural rules provide sufficient safeguards for the substantive rights they aim to protect. That argument is dealt with in Part III.A. Nevertheless, the "equivalence" theory advanced in Greenbriar Village fails for a different reason. Contrary to the Eleventh Circuit in Greenbriar Village, an implication of the Court's conceptual distinction between procedural and substantive rights is that the latter cannot "be . . . subsumed" ("easily" or otherwise) into "a claim that improper procedures were used in the deprivation." Greenbriar Village, 345 F.3d at 1263. Thus, the plaintiff may argue that he suffered both a violation of procedural and substantive rights, and he may win on one, neither, or both claims.

Notice, too, that Greenbriar Village's "equivalence" reasoning does not depend on the source of the right. Under Greenbriar Village, substantive due process would be "subsumed" into procedural due process for all claims that involve executive acts depriving the plaintiff of property or liberty, whether or not the property or liberty right was state-created. Id. at 1263. As noted earlier, the Supreme Court has rejected this view. See, e.g., County of Sacramento v. Lewis, 523 U.S. 833, 845–46 (1998) (distinguishing between procedural and substantive due process "protection of the individual against arbitrary action of government"); Zinermon, 494 U.S. at 126 (addressing plaintiff's procedural claim and noting substantive due process claim could be read into plaintiff's complaint but that issue was not raised on appeal).

177 McKinney explicitly distinguishes legislative acts from administrative or executive acts and preserves the substantive due process theory only for the former. McKinney v. Pate, 20 F.3d 1550, 1557 n.9 (11th Cir. 1994). This distinction obliges courts to distinguish on a case-by-case basis between legislative and executive acts. For a recent example of this case-by-case distinction, see Lewis v. Brown, 409 F.3d 1271 (11th Cir. 2005).
The force of this "procedure suffices" argument also depends on an assessment of the costs and benefits of recognizing substantive claims. One justification of the argument is that authorizing substantive suits would generate costs and that the costs may not be worth the marginal benefit of constructing a body of substantive due process doctrine for vindicating state-created rights. According to McKinney, one of those costs is the danger of unbridled substantive due process. That particular argument, however, seems inapposite to cases like Amy's, where the existence of a substantive property right has already been established.

The McKinney court also asserts that substantive due process suits would be "wasteful of judicial resources." It is true that this type of litigation, like all litigation, adds to the judicial workload, but that is hardly a reason to single it out for rejection. The Eleventh Circuit also worries that "subjecting local officials to indiscriminate blindsiding by their employees" will "encourage them not to fire anyone for fear of the resulting federal suit." This concern is not baseless, as some substantive suits will lack merit and pose the risk of placing undue burdens on officials called upon to defend them.

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178 20 F.3d at 1564. The court further states, "By allowing pretextually terminated employees to bring substantive due process cases . . . we encourage employees to sandbag the decisionmaker by pocketing their objections and then using them as part of a § 1983 case for damages." Id. This argument seems at odds with Supreme Court doctrine on exhaustion of remedies and issue and claim preclusion. For instance, in Patsy v. Florida Board of Regents, 457 U.S. 496, 507 (1982), the Court rejected the notion that a litigant must first exhaust state administrative remedies before suing under § 1983, and in University of Tennessee v. Elliott, 478 U.S. 788, 796-99 (1986), the Court held that federal courts should defer to state administrative agencies' findings of fact only if the state courts would do so.

179 As Justice Harlan once noted, the question is how the goal of overseeing state officers for constitutional violations would "rank on a scale of social values" compared with other uses of the federal courts. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). He continued:

Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

Id. at 411. In Bivens, the Court allowed a federal suit for damages against federal officers for Fourth Amendment violations, despite the absence of a federal statute authorizing the cause of action. Id. at 396-97.

180 McKinney, 20 F.3d at 1564.
Section 1983 already addresses that problem in the law of official immunity, which protects officers unless they violate "clearly established" law.\(^{181}\)

By focusing on the costs of allowing substantive due process claims, McKinney simply ignores the affirmative case for substantive due process suits for violations of state-created rights. Section 1983 suits serve two related but distinct purposes: vindication of the plaintiff's constitutional rights and deterrence of constitutional violations.\(^{182}\) With regard to the former, the point is to vindicate the plaintiff's rights by making the plaintiff whole at the expense of the wrongdoer. The focus is on the case at hand and the demands of corrective justice.\(^{183}\) By precluding substantive due process suits,

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\(^{181}\) See, e.g., Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). Legislators, judges, and prosecutors are absolutely immune from suits for damages. See Sheldon H. Nahmod et al., Constitutional Torts 385-438 (2d ed. 2004) (providing framework for determining when legislators, judges, and prosecutors are absolutely immune). One of the justifications for official immunity is to avoid defining constitutional rights narrowly. See John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 Va. L. Rev. 47, 78 (1998) (arguing official immunity provides "breathing space" for constitutional rights that would be lost under strict liability regime).

\(^{182}\) See, e.g., Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306-07 (1986) (discussing influence of common law tort principles on damages in Section 1983 claims); Owen v. City of Independence, 445 U.S. 622, 651 (1980) ("[S]ection 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well."); Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978) ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law."); Carey v. Piphus, 435 U.S. 247, 256-57 (1978) ("To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages."). See also Bivens, 403 U.S. at 397 ("Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment... we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment."); id. at 407-08 (Harlan, J., concurring) ("[T]he Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities ...."); Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1787-88 (1991) ("The Constitution thus contemplates a judicial 'check' on the political branches not merely to redress particular violations, but to ensure that government generally respects constitutional values ....").

\(^{183}\) See Bernard P. Dauenhauer & Michael L. Wells, Corrective Justice and Constitutional Torts, 35 Ga. L. Rev. 903, 906 (2001) (stating that corrective justice demands that persons who
McKinney significantly diminishes this goal, for there will be some situations, like Amy's case, in which procedural regularity is insufficient to prevent a substantive wrong. For example, if the plaintiff holds a property right guaranteed by the Fifth and Fourteenth Amendments, and the official has violated that right, the vindication goal of § 1983 calls for the defendant to make the plaintiff whole. We recognize, of course, that this principle is not absolute because other goals must be accommodated as well. However, that accommodation is typically and appropriately accomplished through carefully targeted doctrines like official immunity, not through absolute denial of the substantive claim.

Turning to the deterrence purpose of § 1983, there are many legitimate reasons to doubt the efficacy of procedural rules, however elaborate, as reliable safeguards against executive deprivations of state-created property rights. The key reason is that “process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.” Given that the purpose of procedural rights is to protect substantive rights, foreclosing substantive claims seems to defeat that purpose. It is pointless to afford procedural protection to a right whose substance is not worthy of protection by itself.

While assuring that fair procedures should diminish the number of substantive violations, a clever and determined supervisor or local official can often find a way to conceal improper motives behind a facade of procedural regularity. This potential loophole illustrates

were deprived of something without their consent have it returned).

See Fallon, supra note 168, at 340 (reviewing Court's holding in Parratt v. Taylor, 451 U.S. 527 (1981)), which “reasoned that the Due Process Clause does not categorically forbid the states to effect deprivations of liberty and property, but only bars deprivations without due process of law”).

See id. at 343 (“The assumption that substantive arbitrariness is always traceable to procedural defects is not always valid.”).


See Thomas C. Grey, Procedural Fairness and Substantive Rights, in DUE PROCESS: NOMOS XVIII 182, 197 (J. Roland Pennock & John W. Chapman eds., 1977) (“A decision to treat a legislatively created benefit program as subject to the constitutional–moral constraints of due process, while regarding the substance or existence of the program as a matter of legislative grace, would be simply an unjustifiable anomaly.”).

Cf. Herts v. Smith, 345 F.3d 581, 587 (8th Cir. 2003) (recognizing that substantive due process violation may occur even where procedures are flawless).
that the accuracy and fairness values that underlie procedural rights are distinct from the values of vindicating legitimate expectations and barring badly motivated conduct that generate substantive rights. We do not rely solely on procedure when the bad motive is racial or gender bias or retaliation for protected speech. There is no more reason to do so when it is personal animus, office politics, bureaucratic obduracy, or incompetence on the part of the decision maker.

V. SUBSTANTIVE CONSTITUTIONAL NORMS FOR STATE-CREATED PROPERTY

We argued in Part III that substantive protection for state-created property constitutes a third branch of substantive due process doctrine, despite the Supreme Court's failure thus far to develop this branch in any detail. Nonetheless, after Engquist and its narrowing of the class-of-one equal protection theory, the Court should turn its attention to this aspect of substantive due process. In this Part, we propose a framework for resolving substantive due process issues in the state-created property context. We begin by identifying the principles that govern substantive due process decisions in other contexts. Then, we apply those principles to the distinctive features of cases where legitimate expectations give rise to state-created property.

A. LESSONS FROM THE PERSONAL SECURITY CASES

The most controversial area of substantive due process doctrine involves challenges to legislation that restricts individual liberty. Attacks on statutes that criminalize abortion or sodomy fall into this category. Another branch of the doctrine concerns isolated acts by officials that directly or indirectly cause physical injury. These cases start from the premise that the Fourteenth Amendment right of

“liberty” encompasses not only freedom from restraint but also personal security from harm, and as a result, anyone who is injured by a government employee has the beginnings of a substantive due process claim.\(^{190}\)

Cases dealing with physical harm are not directly relevant to the scope of substantive protection of state-created property. Nonetheless, they deserve attention here, if only because we lack explicit directives from the Supreme Court for the state-created property context.\(^{191}\) While several differences exist between state-created property and personal security, they share a common feature: both involve challenges to a relatively isolated act by a state actor rather than a challenge to a statute, rule, ordinance, or procedure. Accordingly, personal security cases provide some guidance as to the general principles of substantive due process that apply when dealing with executive actions like dismissing an employee, canceling a building permit, and other deprivations of state-created property.

The key feature of personal security cases is that they articulate a normative theory of substantive due process for encounters between individuals and the administrative state. In personal security cases, the Court has not had occasion to address the substantive due process limits on state officials in connection with state-created liberty interests. Cf. Superintendent v. Hill, 472 U.S. 445, 454 (1985) (holding that prison officials' revocation of prisoner's good time credit “does not comport with the minimum requirements of procedural due process unless the findings of the prison disciplinary board are supported by some evidence in the record” (emphasis added) (citation and internal quotation marks omitted)). For a recent application of Hill, see Sira v. Morton, 380 F.3d 57, 76 (2d Cir. 2004).

While liberty interests may also be created by state law, as discussed supra in note 33, the Court has not had occasion to address the substantive due process limits on state officials in connection with state-created liberty interests. Cf. Superintendent v. Hill, 472 U.S. 445, 454 (1985) (holding that prison officials' revocation of prisoner's good time credit “does not comport with the minimum requirements of procedural due process unless the findings of the prison disciplinary board are supported by some evidence in the record” (emphasis added) (citation and internal quotation marks omitted)). For a recent application of Hill, see Sira v. Morton, 380 F.3d 57, 76 (2d Cir. 2004).

\(^{190}\) See Youngberg v. Romeo, 457 U.S. 307, 315–18 (1982) (discussing liberty interests in context of safety, freedom of movement, and training). The “liberty” interests identified in Youngberg are not derived from state law, but from the common-law tradition. See Ingraham v. Wright, 430 U.S. 651, 673 (1977) (“The liberty preserved from deprivation without due process included the right ‘generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.’ ” (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923))); see also Michael Wells, Constitutional Torts, Common Law Torts, and Due Process of Law, 72 CHI.-KENT L. REV. 617, 632–33 (1997) (arguing that Ingraham’s holding that Fourteenth Amendment “liberty” included personal security “rests on firmer historical footing than the artificial Fourth and Eighth Amendment rationales” advanced in other cases).

\(^{191}\) When the property at stake is not state-created but rather the kind of interest recognized by the common law, the Takings Clause is generally the governing constitutional provision, and Supreme Court decisions interpreting that clause make up the bulk of the law. See Merrill, supra note 17, at 957 (discussing Takings Clause and its interaction with common-law property, eminent domain, and just compensation).
security cases, the Court identifies the core due process value as a safeguard against arbitrary action or abuse of power. In *Daniels v. Williams*, however, the Court clarified that neither strict liability nor negligence on the part of officials is sufficient to support substantive due process liability. Writing for the Court, Justice Rehnquist explained that the point of substantive due process is "to prevent governmental power from being used for purposes of oppression." Thus, negligence cannot suffice for liability because "[f]ar from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person." Though *Daniels* did not tell us what kind of showing would make out a good substantive due process claim, it took the critical first step in developing doctrine in the area.

By identifying "abuse of power" as the core substantive due process principle in evaluating executive acts, *Daniels* sets up a guidepost for resolving substantive due process issues in many diverse fact patterns. As an example of an application of this principle to another fact pattern, consider *County of Sacramento v. Lewis*. In *Lewis*, the issue was whether a police officer violated the plaintiff's substantive due process rights when the officer injured the plaintiff during a high-speed motorcycle chase with another person. The Court ruled that "in such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." The Court distinguished from *Lewis* the question of the standard a pretrial...
detainee must meet in a suit against his jailors for inattention to his medical needs. That test is "deliberate indifference." The Court explained why it chose different tests for the two types of cases:

[A]ttention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one case is less egregious in the other (even assuming that it makes sense to speak of indifference as deliberate in the case of sudden pursuit). As the very term "deliberate indifference" implies, the standard is sensibly employed only when actual deliberation is practical, and in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare.

By contrast, deciding whether to give chase calls for "fast action" and presents a need to "balance on one hand the need to stop a suspect" and "on the other, the high-speed threat to all those within stopping range." The decision to give chase therefore lacks the harmful purpose that implicates a due process violation because the actor does not have the time to deliberate. As a result, what constitutes an "abuse of power" in isolated executive actions depends in part on the time the state actor has to make his decision. Thus, when there is the luxury of time, deliberate indifference constitutes an abuse of power—whereas situations calling for immediate decisions must shock the conscience.

199 Id. at 849–50.
200 Id. (citing City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983)).
201 Id. at 851 (internal citations omitted).
202 Id. at 853.
203 See id. at 853–54 (noting that when circumstances call for "instant judgment," not even recklessness is sufficient to violate due process).
204 Id. at 852–53.
B. ISOLATED ACTS AND THE ROLE OF CONTEXT

Lewis, Daniels, and other personal security cases illustrate the general principle that arbitrariness and abuse of power are key to establishing a successful substantive due process claim in the "isolated executive action" context.205 The Court has also been sensitive to differences in the balance of state and individual interests—a balance that depends on the circumstances of a given encounter. The Court's sensitivity is evident in the distinction it draws in Lewis between the "deliberate indifference" test for inmates and the "shock the conscience" test for persons injured in high-speed chases.206 The state's interest is stronger when officers must act quickly, and consequently plaintiffs must meet a higher standard before liability is imposed on the officer in those cases. The Court has favored taking a contextual approach rather than attempting to identify a single all-purpose test. In fact, over a decade ago, Richard Fallon noted that "no agreed framework ha[d] emerged for identifying when relatively isolated official acts offend substantive due process,"207 and this remains true today.

The court's contextual approach is wise in light of the variety of circumstances in which individuals have interactions with the state

205 See supra notes 196–203 and accompanying text.
206 See supra notes 196–203 and accompanying text.
207 Fallon, supra note 24, at 324. One group of cases that we do not address are those involving challenges to legislation. Ever since the 1930s, the standard for challenging legislative acts has been highly deferential. For example, in Harrah Independent School District v. Martin, the Court upheld the school district's rule that teachers must enroll in continuing education programs, stating that "[t]he School Board's rule is endowed with a presumption of legislative validity, and the burden is on [the plaintiff] to show that there is no rational connection between the Board's action and its conceded interest in providing its students with competent, well-trained teachers." 440 U.S. 194, 198 (1978).

For other formulations of the test reflecting the Court's deference to legislative acts, see, for example, Schenck v. City of Hudson, 114 F.3d 590, 593 (6th Cir. 1997) ("[A] federal court may only consider 'whether the legislative action is rationally related to legitimate state ... concerns.' " (quoting Pearson v. City of Grand Blanc, 961 F.2d 1211, 1223 (6th Cir. 1992))); WMX Technologies, Inc. v. Gasconade County, 105 F.3d 1195, 1198 (8th Cir. 1997) ("[T]he ordinance is unconstitutional if it is arbitrary, capricious and not rationally related to a legitimate public purpose."); and Texas Manufactured Hous. Ass'n v. Nederland, 101 F.3d 1095, 1106 (5th Cir. 1996) (providing for rational basis review). See supra notes 168–72 and accompanying text for discussion of the reasons why the scrutiny of executive acts should be more searching.
and the diversity of interests on either side of that relationship. For example, sometimes the state is an employer, as in Roth and Sindermann, and it has an interest in efficient delivery of government services. In other cases, the state is a regulator of businesses or of land use. In still others, it is an educator, a guardian, or a custodian.

Another line of cases, illustrated by Castle Rock v. Gonzales, involves the state as enforcer of the criminal law. Both the state and individual interests vary in these contexts. In its enforcement role, the state, through its agents, often must act quickly, use force, and make choices as to how to deploy limited resources. In its role as educator, the state may be entitled to deliberately injure someone by suspending a student from school or by inflicting corporal punishment. In contrast, in its role as custodian, the state is obliged to look out for the welfare of those in its charge. Because of the range of roles the state can assume, no single rule could take account of the manifold constitutional values at stake in devising substantive due process principles for all of these relationships.

C. ENFORCING LEGITIMATE EXPECTATIONS

Our concern here is with the distinctive features of cases in which the plaintiff holds state-created property of some kind—for example, a job, a building permit, or a liquor license. In the typical case, state

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208 It might also be argued that the Court's contextual approach allows it to serve its own agenda of preventing federal courts from becoming overwhelmed with largely state-law claims. The Court could accomplish this objective by claiming that deference to the decisions of state officials prevents it from recognizing the plaintiff's due process claim.

209 545 U.S. 748 (2005). For a discussion of the case, see supra notes 64-70 and accompanying text.


211 E.g., Butler v. Rancho Rio Pub. Sch. Bd. of Educ., 341 F.3d 1197, 1200-01 (10th Cir. 2003) (upholding school board's decision to suspend student because its decision was not arbitrary, irrational, or conscience shocking).

212 Compare Neal v. Fulton County Bd. of Educ., 229 F.3d 1069 (11th Cir. 2000) (holding that hitting student in eye is excessive force and violates his substantive due process rights), with Saylor v. Bd. of Educ., 118 F.3d 507 (6th Cir. 1997) (holding five whacks with paddle is not constitutional violation).

213 E.g., Ray v. Foltz, 370 F.3d 1079, 1083 (11th Cir. 2004) (holding state has duty to ensure safe environment for children for whom it has assumed responsibility).
officials have deliberately interfered in some way with the plaintiff's state-created property, as Joe did when he fired Amy in our hypothetical.214 The state's interest as an employer counsels against constitutional rules that interfere too much with efficient delivery of government services. At the same time, the state itself has created a legitimate expectation that Amy will keep her job absent cause for firing her. Thus, the task—a task the Supreme Court has yet to squarely confront—is to balance these competing interests by devising principles for distinguishing between substantive due process cases in which the plaintiff should prevail and those in which the state should prevail.

In our view, the core values for a plaintiff in cases of this type are the plaintiff's expectation and the state-created property interest that the expectation generates. This expectation gives rise to a constitutional right on the plaintiff's part to keep his benefit so long as the expectation of keeping it remains legitimate. For example, unless there is proof of specific substantive circumstances for firing Amy (such as incompetence, insubordination, or budgetary necessity), Joe's dismissal of Amy can fairly be characterized as arbitrary and an abuse of power under the general principles developed in the personal security cases.215 This conclusion is implicit in the Court's ruling in Perry v. Sindermann216—that proof of a property interest "would obligate college officials to grant a hearing at [plaintiff's] request, where he could be informed of the grounds for his nonretention and challenge their sufficiency."217

If during her hearing Amy shows the insufficiency of Joe's reasons for dismissing her, is still fired, and has no further recourse, her Due Process Clause right to a hearing is rendered meaningless. This same reasoning applies across the whole range of situations where

214 See supra Part I for hypothetical. Given the general "abuse of power" principle embodied in Daniels v. Williams, it seems unlikely that a negligent interference with state-created property could give rise to a substantive constitutional claim under the Due Process Clause. See 474 U.S. 327, 330 ("[W]e should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.' " (quoting Parratt v. Taylor, 451 U.S. 527, 549 (1981))). In any event, we do not address that issue in our discussion.

215 Conversely, officials should prevail on the plaintiff's substantive claim, even if they have plainly deprived him of property, so long as they can establish that there were good reasons for the deprivation.

216 408 U.S. 593 (1972).

217 Id. at 603.
individuals hold state-created property under the legitimate expectations rationale. The substantive content of the plaintiff's due process right can be defined by the proof the state offers as to the illegitimacy of the plaintiff's expectation of retaining the benefit. In identifying this norm, we recognize that many questions remain. First, the "legitimate" expectations created by the state in connection with each benefit that creates property will need to be determined. Second, our principle that the state must offer proof of a good reason for the deprivation will oblige courts to determine just how much proof will be enough. Questions like these cannot be answered in the abstract, but only in the course of litigation.

D. THE STATE-CREATED PROPERTY CASE LAW

We have drawn on state-created property principles and on general substantive due process principles to develop a rationale for substantive protection of state-created property. Only two Supreme Court decisions—Regents of the University of Michigan v. Ewing and City of Cuyahoga Falls v. Buckeye Community Hope Foundation—deal somewhat directly with substantive due process rights in state-created property. Those cases are not particularly useful in building the doctrine because the Court's treatment of the substantive due process issues in them is terse and fragmented. Nonetheless, these cases are broadly consistent with the approach we advocate here.

In Ewing, a student was dismissed from the University of Michigan for academic failure. He sued the Regents, claiming, among other things, "that he had a property interest in his continued enrollment ... and that his dismissal was arbitrary and capricious, violating his 'substantive due process rights' guaranteed by the Fourteenth Amendment and entitling him to relief under 42 U.S.C. § 1983." The Court assumed both the existence of a state-created property interest and the availability of a substantive due

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220 Ewing, 474 U.S. at 215.
221 Id. at 217.
process theory of recovery without deciding that either existed.\textsuperscript{222} The Court went on to say that judges owed great deference to school administrators.\textsuperscript{223} They held that the courts may not override the decision of school faculty unless the decision departed from "accepted academic norms" so substantially that it evidenced a lack of "professional judgment."\textsuperscript{224}

Assuming the existence of a property right on the student's part, the Court's emphasis on professional judgment dovetails neatly with the legitimate expectations principle. Fitting the Court's "respect for professional judgment" theme\textsuperscript{225} into the "protecting legitimate expectations" framework that we propose, the student's legitimate expectation in the educational context is not that he or she will receive grades that an outside arbiter like a judge would approve, but only that he or she will receive grades that reflect the faculty's professional judgment.

The most common types of state-created property are jobs, building plans, business licenses, and other benefits that can only be taken away for cause. In City of Cuyahoga Falls v. Buckeye Community Hope Foundation,\textsuperscript{226} the Supreme Court assumed the existence of a state-created property interest in the issuance of a building permit, which the city took away via a voters' referendum.\textsuperscript{227} Writing for a unanimous Court, Justice O'Connor ruled against the plaintiffs and devoted just a few sentences to the substantive due process issue.\textsuperscript{228} She pointed out that the city

\begin{itemize}
\item \textsuperscript{222} See id. at 223 ("Elven if Ewing's assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action.").
\item \textsuperscript{223} Id. at 225.
\item \textsuperscript{224} Id. In an earlier case, the Court very briefly addressed a substantive due process claim when a student challenged her dismissal from medical school on substantive as well as procedural due process grounds. Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978). The Court assumed both the availability of the substantive cause of action and that the test governing the substantive due process claim was whether the action was "arbitrary or capricious." Id. at 91. Given these assumptions, the Court held that "no showing of arbitrariness or capriciousness has been made in this case." Id. at 92. See Bell v. Ohio State University, 351 F.3d 240, 251 (6th Cir. 2003); and Wright v. Chattahoochee Valley Community College, No. 3:06-CV-1087-WKW, 2008 WL 4877948, at *5–6 (M.D. Ala. Nov. 12, 2008), for recent applications of Ewing.
\item \textsuperscript{225} See supra note 224 and accompanying text.
\item \textsuperscript{226} 538 U.S. 188, 198 (2003).
\item \textsuperscript{227} Id. at 198. See also supra notes 98–102 and accompanying text.
\item \textsuperscript{228} Buckeye, 538 U.S. at 198.
\end{itemize}
charter provided for a referendum on such projects if enough residents signed a petition. There had been substantial public opposition to issuance of the permit, which led to a petition for a referendum; the opinion noted that submitting the building permit to the voters was "eminently rational." This ruling can be restated in terms appropriate to the state-created property context: the builder had no legitimate expectation that he could avoid a referendum and the subsequent revocation of his city-issued building permits.

We do find fault, though, with some of the Court's rhetoric in Buckeye. Citing Lewis, the Court declared that only "egregious or arbitrary government conduct" would offend substantive due process. If the Court meant to import the "shock the conscience" test from Lewis to the state-created property context, then it seems to us that it ignored the differences we have identified between high-speed chases and state-created property, or at least failed to explain why those differences should not matter. Our objection to applying the "shock the conscience" test to state-created property claims is that legitimate expectations can be disappointed by actions that do not shock the conscience (under a plausible understanding of what shocks the conscience). For example, in Herts v. Smith, after finding that a terminated teacher had a property

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229 See id. at 192 (noting that petition stayed projects until a vote on the issue).
230 Id. at 199.
231 Id. at 198.
232 See supra notes 196–203 and accompanying text.
233 The opinion is unclear on this point. Justice O'Connor avoided any reference to the "shock the conscience" test and invoked Lewis only for the proposition that a substantive due process violation occurs when there has been "egregious or arbitrary government conduct." Lewis, 538 U.S. at 198–99.
234 345 F.3d 581 (8th Cir. 2003). See also Young v. Twp. of Green Oak, 471 F.3d 674, 685 (6th Cir. 2006) ("To the extent that a substantive due process claim is available, [plaintiff] must demonstrate that the Township's decision to terminate his employment had no rational basis."); Yates v. District of Columbia, 324 F.3d 724, 725 (D.C. Cir. 2003) ("[O]nly the most egregious official conduct rises to the level of a substantive due process violation." (internal quotation marks and citation omitted)); Simi Inv. Co. v. Harris County, Tex., 236 F.3d 240, 249 (5th Cir. 2000) (stating that substantive due process analysis is appropriate only in "cases in which government arbitrarily abuses its power"); Contreras v. City of Chicago, 119 F.3d 1286, 1295 (7th Cir. 1997) (noting that "a plaintiff bringing a substantive due process claim predicated on a deprived property interest must show . . . that the state's decision was arbitrary and irrational.").

Of course, courts that use this phrase do not always mean the same thing. See
interest but had received procedural due process, the Eighth Circuit turned to the teacher's substantive claim\footnote{See Herts, 345 F.3d at 587 (discussing substantive due process claim).}. Citing Lewis, the court said the test for deprivation of substantive due process is "whether the officials acted in an arbitrary or capricious manner, or so as to shock the conscience,"\footnote{Id. For similar ways of stating the test, see Tun v. Whitticker, 398 F.3d 899, 902 (7th Cir. 2005); Butler v. Rio Rancho Pub. Sch. Bd. of Educ., 341 F.3d 1197, 1200 (10th Cir. 2003); and Wash. Teachers Union Local No. 6 v. Bd. of Educ., 109 F.3d 774, 781 (D.C. Cir. 1997).} It defined arbitrary and capricious as "reasons that are trivial, unrelated to the education process, or wholly unsupported by a basis in fact."\footnote{Herts, 345 F.3d at 587 (citation and internal quotation marks omitted). Similar language was also used in Fowler v. Smith, 68 F.3d 124 (5th Cir. 1995), a public employee dismissal case. In Fowler, the plaintiff had been fired from his job as director of maintenance operations of a public school district. \textit{Id.} at 125. Rejecting his substantive due process argument, the Fifth Circuit said that "[p]ublic officials violate substantive due process rights if they act arbitrarily or capriciously," and that under this standard the defendants would win if their "action was a rational means of advancing a legitimate government purpose." \textit{Id.} at 128. The defendants did not meet that standard because there was evidence that "Fowler admitted to using a school truck to pull his boat on a weekend trip, kept a pool table in the maintenance building, stored his boat on school property, drove the school vehicle to pool halls, and sent school employees on personal errands." \textit{Id.}}

The holding in Herts is fully consistent with our thesis. The plaintiff's legitimate expectations in Herts, as in Amy's case,\footnote{See supra Part I for Amy's hypothetical case.} would indeed be disappointed by dismissal based on the kinds of trivial, irrelevant, or unsupported reasons that the Eighth Circuit characterized as arbitrary or capricious.\footnote{Herts, 345 F.3d at 587.} It makes sense to focus on arbitrariness and capriciousness in deciding whether the government has made a sufficient showing of cause. The point of the cause constraint is that only certain reasons will suffice for dismissing the plaintiff, taking away his building permit or otherwise depriving him of state-created property. If there is little or no evidence that those reasons are present, or strong evidence that some impermissible reason drove the decision, then the
plaintiff's legitimate expectations have been disappointed. Moreover, the phrase *arbitrary and capricious* is an apt way to describe the government's conduct. Using that or a similar phrase to identify the standard will focus attention on the key features of a given case.

The concept of conduct that shocks the conscience denotes a more extreme degree of fault on the part of the defendant. The type of act sufficient to shock the conscience has been described as one that "violates the decencies of civilized conduct," is "so brutal and offensive that it [does] not comport with traditional ideas of fair play and decency," and is "intended to injure in some way unjustifiable by any governmental interest." Under the framework we propose, there will be many viable deprivation of state-created property cases in which the reasons offered by the government actor are trivial, unrelated, or unsupported by the facts, yet the behavior of the official will not necessarily shock the conscience. Often the

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240 See Fallon, supra note 24, at 310 n.8. Giving content to concept of arbitrariness, Fallon stated that "the intuitive idea is not mysterious: government officials must act on public spirited rather than self-interested or invidious motivations, and there must be a 'rational' or reasonable relationship between government's ends and its means." Id.

241 The application of these principles is illustrated by *Simi Investment Co. v. Harris County*, 236 F.3d 240 (5th Cir. 2000). In upholding a substantive due process challenge to the county's refusal to permit the plaintiff to gain access to a city street adjacent to its property, the court said that it could "ascertain no rational reason for the County to deny abutting owners access to the street when the City of Houston now has complete jurisdiction over Fannin Street." Id. at 251. In support, the court said that the "[m]ost troubling" aspect of the case was the district court's finding of "an illegitimate plan to benefit the private interests of Hofheinz-Smith whose properties were financially benefited by the denial of access to the other properties abutting Fannin Street." Id. The court concluded that "the evidence demonstrates that the County acted arbitrarily in inventing a park and, thus, acted without a rational basis in depriving Simi of a constitutionally protected interest." Id.


243 Id. at 847 (citation and internal quotation marks omitted).

244 Id. at 849.

245 The difficulty of meeting this test is illustrated by *Porter v. Osborn*, 546 F.3d 1131 (9th Cir. 2008). Porter involved the death of the plaintiffs' son who had been lying down in the son's car in a parking area next to a highway at 2:00 a.m. Id. at 1133. The police were called about the abandoned vehicle, and Osborn responded to the call. Id. at 1133-34. When the police approached the car, the son sat up and began to drive away slowly. Id. at 1134. When the son failed to respond to the officers' commands, one of the officers pepper-sprayed him. Id. As the son tried to rapidly drive away, an officer shot and killed him. Id. at 1133. The parents alleged that the responding officer had violated their Fourteenth Amendment substantive due process right of familial association with their now deceased son, and that the officer's behavior was "so outrageous as to shock the conscience." Id. at 1132. The Ninth Circuit held
government actor will be shown to have been incompetent or indifferent rather than indecent, offensive, or malicious.\textsuperscript{246} Here, again, we find no fault with the \textit{Herts} court's reasoning, but only with the way a careless lawyer may read the opinion. In this regard, it is worth noting that the Eighth Circuit took care to state its substantive due process test in the disjunctive, by making "shock the conscience" one of two alternatives, rather than the touchstone of liability.\textsuperscript{247}

VI. CONCLUSION: DOES \textit{ENGQUIST} STAND IN THE WAY?

This Article began with a discussion of \textit{Engquist v. Oregon Department of Agriculture}, where the Supreme Court shut the courthouse door to government employees seeking to bring class-of-one equal protection challenges to actions taken against them, even those employees who can convince a jury that they were dismissed without a rational basis.\textsuperscript{248} Our aim has been to explore an underappreciated alternative to the class-of-one suit: a substantive

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\textsuperscript{246} The test for arbitrariness in the context of disappointing the plaintiff's legitimate expectations may be compared to the "deliberate indifference" principle of substantive due process, which is a principle applied to the treatment of persons confined by the state. \textit{See supra} notes 193–203 and accompanying text. \textit{See also} Rosalie Berger Levinson, \textit{Reining in Abuses of Executive Power Through Substantive Due Process}, 60 FLA. L. REV. 519, 541 (2008) ("Outside the emergency context of high-speed chases or prison riots, courts should apply a meaningful deliberate-indifference standard to effectively restrain arbitrary, unreasonable government misconduct.").

In some circuits, the test for arbitrariness has been compared to "state-created danger" cases. \textit{See King v. E. St. Louis Sch. Dist.}, 496 F.3d 812, 817–18 (7th Cir. 2007) (analyzing circuit courts' three guidelines governing state-created-danger doctrine). For example, in \textit{Hunt v. Sycamore Community School District Board of Education}, 542 F.3d 529, 532–33 (6th Cir. 2008), a special education student with a history of violence assaulted a teacher's aide. The court applied the "deliberate indifference" standard and ruled that this standard would be met only if the "governmental actor chose to act (or failed to act) despite a subjective awareness of substantial risk of serious injury" and "did not act in furtherance of a countervailing governmental purpose that justified taking that risk." \textit{Id.} at 541. Applying these factors, and stressing that the plaintiff had "voluntarily undertaken public employment involving the kind of risk at issue," the court found no substantive due process violation. \textit{Id.} at 544–45.

\textsuperscript{247} \textit{Herts v. Smith}, 345 F.3d 581, 587 (8th Cir. 2003) (noting that substantive due process rights are violated if officials act in arbitrary or capricious manner or so as to shock the conscience).

\textsuperscript{248} \textit{128 S. Ct. 2146} (2008); \textit{see also supra} notes 1–15 and accompanying text.
due process claim. In proper circumstances, the aggrieved employee may make a substantive claim under the Due Process Clause that arbitrary dismissal violates the employee’s state-created property right to keep the post absent cause for termination. Due process recovery is both broader and narrower than the employee class-of-one theory rejected in Engquist. It is narrower in that it is available only to those employees who, under state law, may not be fired without cause. At-will government employees have no recourse under the Due Process Clause. Yet due process recovery is broader in that it is available not only to employees, but to anyone holding state-created property: a building permit, a liquor license, access to public education.

We have examined objections to the due process approach, especially those raised by the leading case opposing it, McKinney v. Pate. The considerations raised in McKinney are not sufficiently compelling to overcome the case for allowing due process recovery. Though the Supreme Court has shown some sympathy for the due process approach, a fair reading of the cases is that the Court has given the matter little attention. The holding in Engquist, however, may provide new ammunition to champions of the McKinney opinion. Chief Justice Roberts’s opinion certainly manifests some reluctance to permit employees to sue for arbitrary dismissal. Going forward, a pressing question is whether Engquist threatens the viability of the substantive due process theory of recovery we have outlined here.

The answer to that question will depend on which aspects of the Engquist opinion courts chooses to emphasize in future cases. Some of the reasoning in Engquist poses problems for substantive due process litigation. The Court emphasizes the distinction between the government’s relatively weak interest as regulator and its comparatively strong interest as an employer when exerting its

249 See Bishop v. Wood, 426 U.S. 341, 350 (1976) (“The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-adviced personnel decisions.”).
250 See supra Part II.B.
251 See supra Part III.
252 See Engquist, 128 S. Ct. at 2156 (“[An allegation of arbitrary differential treatment could be made in nearly every instance of an assertedly wrongful employment action.”).
Hence, the "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." This line of reasoning could be extended to foreclose substantive claims brought by government employees under the Due Process Clause.

Another possible interpretation of Engquist could extend the Court's reasoning beyond the employment context, support total abrogation of the substantive due process theory, and leave plaintiffs with nothing more than a procedural due process claim. The underlying reason articulated in Engquist for rejecting class-of-one equal protection claims of government employees is that "employment decisions are quite often subjective and individualized," and "[i]t is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized." The "subjective and individualized . . . principle applies most clearly" in the employment context. By implication, this principle may also apply to other decisions made by state government officials.

Grounds are available, however, for limiting the reach of Engquist. First, the Court explicitly confined its holding to the Equal Protection Clause class-of-one theory, thereby giving itself a clear basis for declining to extend its holding to claims under the Due Process Clause and other constitutional provisions. Second, the Court makes clear that, in distinguishing between employment and regulation, the Court intends to restrict the constitutional rights associated with at-will employment. The substantive due process theory is only available to plaintiffs who can show that they have

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253 See id. at 2151 ("The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." (citations and internal quotation marks omitted)).

254 Id.

255 Id. at 2154.

256 Id. Before applying this principle to the case at hand, the Court declares, without specific reference to employment, that "[t]here are some forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." Id.

257 See supra notes 13-15 and accompanying text.

258 See Engquist, 128 S. Ct. at 2156 (limiting holding to exclusion of class-of-one theory in public employment context).

259 See id. (declining to apply equal protection theory in at-will employment context).
state-created property interests in jobs or other benefits, not to at-will employees.\footnote{For a recent illustration of this distinction, see Miller v. Clinton County, 544 F.3d 542, 551–53 (3d Cir. 2008).}

There is another reason for cautious optimism that Engquist may not be extended to preclude substantive due process claims for deprivations of state-created property. This reason relates to a weakness in Chief Justice Roberts’s rationale for deferring to government actions that involve discretionary decision making. The Chief Justice explains that “allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.”\footnote{Engquist, 128 S. Ct. at 2154.} As an example, he uses the case of a traffic officer who observes many speeders on the highway and who singles out a few of them for tickets.\footnote{Id.} A complaint by a ticketed speeder “does not invoke the fear of improper government classification,” but “rather, challenges the legitimacy of the underlying action itself—the decision to ticket speeders in such circumstances.”\footnote{Id.} Allowing a class-of-one action here “would be incompatible with the discretion inherent in the challenged action.”\footnote{Id.} In his dissenting opinion, Justice Stevens identifies the flaw in this line of reasoning. The unlucky speeder has no case, because the officer does indeed have a rational basis for singling out some speeders: “[An officer’s] inability to arrest every driver in sight provides an adequate justification for making a random choice from a group of equally guilty and equally accessible violators.”\footnote{Id. at 2159 (Stevens, J., dissenting). Justice Stevens’s dissent was joined by Justices Souter and Ginsburg.} Here, by contrast, a jury found “that there was no rational basis for either treating Engquist differently from other employees or for the termination of her employment.”\footnote{Id.}

The problem here is not with an ill chosen hypothetical marring a basically sound argument. The problem is, as Justice Stevens pointed out in dissent, that the Engquist majority’s rationale ignores the difference “between an exercise of discretion and an arbitrary
Discretion is "the power to choose between two or more courses of action, each of which is thought of as permissible," while arbitrary decisions are those "unsupported by any rational basis . . . ." Six Justices nonetheless voted to eliminate class-of-one equal protection claims in the employment context. No member of the majority, however, answered Justice Stevens's objection. Some of the Justices who joined the majority opinion may well harbor doubts about the intellectual sturdiness of the thesis advanced by Chief Justice Roberts. Time will tell whether a majority of the Court would endorse reasoning similar to that in the Engquist majority opinion to expunge substantive due process claims for deprivations of state-created property.

\(^{267}\) Id.

\(^{268}\) Id. (citations and internal quotation marks omitted).

\(^{269}\) Id.