IN THEIR OWN IMAGE: THE REFRAMING OF THE DUE PROCESS CLAUSE BY THE UNITED STATES SUPREME COURT

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A distinguished constitutional scholar recently pointed out that "many of the important decisions of the Supreme Court of the United States are not based on law in the popular sense of that term."1 It is true, he noted, that "the court endeavors to identify Constitutional clauses upon which to hang its pronouncements." "[S]ome key words and phrases in the Constitution," however, "are so highly indeterminate that they cannot really qualify as law in any usual sense." Rather, he said, "they are semantic blanks—verbal vacuums that may be filled readily with any one of many possible meanings." Thus, it is not surprising that "different judges over a period of time, as well as at the same time, choose to fill them with their own meanings"—choose to fashion a Constitution in their own image.

Aware of the operation of this principle and dissatisfied with the prevailing trend of constitutional law, former President Richard Nixon, in the 1968 presidential campaign, made the Supreme Court of Chief Justice Earl Warren a special target. His stated preference for "strict constructionists" as opposed to "superlegislators" free to "impose their social and political viewpoints"2 on the nation gave a strong indication that Nixon as President would nominate for Supreme Court vacancies individuals who strongly believed in the concept of federalism.3 After attaining the presidency, Nixon set about

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2 See N.Y. Times, Nov. 3, 1968, at 70, cols. 3-5.
3 Federalism, of course, is the form of government in which power is distributed between a central authority and a number of constituent units. The constitutional framers, concerned about excessive concentrations of governmental power, protected against it less through explicit "shall not" than through a diffusion of power among a variety of governmental units. They allocated powers among the nation and states by enumerating the powers Congress could exercise (primarily in art. I, § 8) while asserting that undelegated powers were "reserved to the States respectively or to the people," U.S. Const. amend. X. The limited powers allocated to the national government were then divided among three distinct branches of government: the legislature, the executive, and the judiciary. See G. Gunther, Constitutional Law, Cases and Materials 81 (5th ed. 1978). The values inherent in American federalism have been listed as "diversity, pluralism, experimentation, protection from arbitrary majoritarianism and over-centralization, and a greater degree of citizen participation."
to redeem his pledge by appointing a total of four "strict constructionists" to the Court. President Ford later added a fifth. Can it be that a President can change the meaning of the Constitution through the appointment process? Can new justices alter the direction of the federal judiciary in constitutional matters while the words of the document remain the same?

One need only look to the fourteenth amendment for an example: "No state shall . . . deprive any person of life, liberty or property without due process of law." Former Justice William O. Douglas once commented on this provision:

Due process, to use the vernacular, is the wild card that can be put to such use as the judges choose. Those who use it as the wild card often deny doing so, saying that Due Process is not subjective, that it has its roots in civilized ideas of ordered liberty. Yet no matter what the judges say, Due Process, as it is presently employed, is fickle and capricious.

The recent history of the due process clause as applied to personnel decisions of state and local governments demonstrates that the new "strict constructionists" have, in fact, strongly influenced constitutional doctrine.

For a number of years, the federal courts quite narrowly interpreted the scope of the individual "liberty" and "property" interests protected by the Constitution's due process clause. In the leading case of Bailey v. Richardson, the Court of Appeals for the District of Columbia in 1950 held that public employment in general was a "privilege" and not a "right" and that procedural due process guarantees were not applicable unless an individual was being deprived

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4 President Nixon made the following appointments: in June 1969, Warren E. Burger as Chief Justice following the retirement of Earl Warren; in 1970, Harry A. Blackmun following the resignation of Abe Fortas; in January 1972, Lewis F. Powell, Jr., following the retirement of Hugo L. Black; and William H. Rehnquist following the retirement of John Harlan.

5 In December 1975, President Ford appointed John P. Stevens to replace the retiring William O. Douglas.


7 Although the fourteenth amendment speaks in terms of "No state shall . . . " (state action), it is clear from the following statement in Reynolds v. Sims, 377 U.S. 533, 576 (1964), that the actions of cities and counties are state action for fourteenth amendment purposes: "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions."
of something to which he had a right.\textsuperscript{8} The underlying premise of Bailey, the right/privilege distinction, extended to all governmental benefits, but this concept was eroded throughout the 60's and 70's\textsuperscript{9} when the court finally declared that it had "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"\textsuperscript{10} Instead the inquiry focused on the nature of the individual interest involved, with this interest balanced against the governmental interest;\textsuperscript{11} the result was that the Court slowly compiled a list of governmental benefits which required procedural due process protections before they could be terminated.\textsuperscript{12} Of course, even benefits which were not clearly entitled to protection on their own could not be summarily terminated in response to the exercise of a constitutionally guaranteed right.\textsuperscript{13}

\textsuperscript{8} Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), aff'd by an equally divided court, 341 U.S. 918 (1951). The court stated:

It has been held repeatedly and consistently that Government employ is not "property" and that in this particular it is not a contract. We are unable to perceive how it could be held to be "liberty". Certainly it is not "life". So much that is clear would seem to dispose of the point. In terms the due process clause does not apply to the holding of a Government office.

182 F.2d at 57. Bailey was a federal civil service employee from 1939-1947 when she was released as part of a general reduction in force. In May 1948 she was reinstated, but was subsequently dismissed upon a finding that she was "disloyal to the Government of the United States." Bailey appealed this finding to the Loyalty Review Board which, following a hearing, sustained the decision. Bailey next objected to the form of the hearing in which no evidence was revealed by the government to support the claim of disloyalty. Id. at 49-51. The court of appeals found that executive employees hold office at the pleasure of the appointing authority, subject only to statutory restraints. Because the Board violated no statutory procedures, the court affirmed Bailey's dismissal. Id. at 57-58.

\textsuperscript{9} See Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972), and cases cited therein.

\textsuperscript{10} Graham v. Richardson, 403 U.S. 365, 374 (1971).

\textsuperscript{11} Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The Court noted that "whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) . . . [but] due process is flexible and calls for such procedural protections as the particular situation demands." 408 U.S. at 481.


\textsuperscript{13} See Perry v. Sindermann, 408 U.S. 593 (1972), where the Court explained that even though the government may deny [an individual] the benefit for any number of reasons, there are some reasons upon which the government may not rely . . . For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized (and inhibited). This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.
In 1972, in the companion cases of Board of Regents v. Roth\textsuperscript{14} and Perry v. Sindermann\textsuperscript{15} the Court attempted to establish workable guidelines for determining when procedural due process protections were mandated. Roth, a young nontenured political science professor at Wisconsin State University-Oshkosh had been informed that he would not be rehired after the completion of his first year’s employment. He was given neither an explanation nor an opportunity for a hearing before the decision became final.\textsuperscript{16} Wisconsin law provided an appeal procedure for a tenured teacher, but the state’s law required no such procedure for nontenured employees.\textsuperscript{17} Roth brought an action in federal district court alleging that the decision not to rehire him for a second year infringed upon his fourteenth amendment rights.\textsuperscript{18} In holding that Roth did not have a constitutional right to a statement of reasons and a hearing on the decision not to rehire him, the Court emphasized:

The requirements of procedural due process apply only to the


\textsuperscript{15} 408 U.S. 593 (1972). Justice Stewart wrote for the same majority as in Roth, with the Chief Justice concurring. See note 14 supra. Justice Marshall dissented in part, id. at 605, and was joined by Justices Brennan and Douglas, id. at 604. See note 40 and accompanying text infra. Justice Powell did not participate.

\textsuperscript{16} The Court noted that there were “no statutory or administrative standards defining eligibility for re-employment,” thus leaving the decision to rehire clearly within the “unfettered discretion of university officials.” 408 U.S. at 566-67.

\textsuperscript{17} To acquire tenure an individual had to be employed for four years on a year to year basis. Tenured teachers could only be discharged “for cause upon written charges,” with a right to appeal the discharge to the Board of Regents for a hearing. While a nontenured teacher was granted some protection from dismissal during the academic year, he was not protected if simply not rehired, other than by a requirement that notice of nonretention be given by February 1. The Board of Regents could, within their discretion, grant an informal review of an advisory nature to a teacher not rehired. Otherwise, no reasons for nonretention had to be given. Id.

\textsuperscript{18} Plaintiff brought the action under 42 U.S.C. § 1983 (1976). 408 U.S. at 580 (Douglas, J., dissenting). Roth initially attacked the decision on both substantive, first amendment grounds, and procedural, fourteenth amendment grounds. Id. at 568-69. The district court had granted a partial summary judgment for Roth on the procedural issue, Roth v. Bd. of Regents, 310 F.Supp. 972 (W.D. Wisc. 1970), and the Court of Appeals for the Seventh Circuit had affirmed with one judge dissenting. 446 F.2d 806 (7th Cir. 1971). Thus, the Supreme Court faced only the procedural issue. 408 U.S. at 569.
deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount.\textsuperscript{19} But the range of interests protected by procedural due process is not infinite.\textsuperscript{20}

The Court noted that while the terms "liberty" and "property" are purposefully broad and are not subject to "rigid or formalistic limitations," they nevertheless are limited by certain boundaries.\textsuperscript{21} In 1922, in \textit{Meyer v. Nebraska},\textsuperscript{22} the Court had stated that liberty guaranteed by the fourteenth amendment clearly denotes

not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to orderly pursuit of happiness by free men.\textsuperscript{23}

In addition, "liberty" would include freedom from unwarranted charges which "might seriously damage [an individual's] standing and associations in his community."\textsuperscript{24} The decision not to rehire him, however, implicated none of Roth's liberty interests.\textsuperscript{25}

\textsuperscript{19} The one exception is the "emergency situation" in which a "valid governmental interest is at stake that justifies postponing the hearing until after the event." \textit{Boddie v. Connecticut}, 401 U.S. 371, 379 (1971). The situations in which the exception has been considered applicable have been extremely limited. See 408 U.S. at 570 n.7.
\textsuperscript{20} 408 U.S. at 569-70 (footnote omitted).
\textsuperscript{21} \textit{Id.} at 572. The Court quoted Justice Frankfurter's dissent in \textit{National Mut. Ins. Co. v. Tidewater Transfer Co.}, 337 U.S. 582, 646 (1949), where he stated that liberty and property are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." The Court observed that because of this philosophy the "wooden distinction" between "rights" and "privileges" had finally been rejected. 408 U.S. at 571. See notes 8-10 and accompanying text \textit{supra}.
\textsuperscript{22} 262 U.S. 390, 399 (1973).
\textsuperscript{23} 408 U.S. at 572.
\textsuperscript{24} \textit{Id.} at 573. The Court elaborated in a quote from \textit{Wisconsin v. Constantineau}, 400 U.S. 433, 437 (1971): "[W]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Nor did the decision not to rehire Roth impose on him "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 403 U.S. at 573.
\textsuperscript{25} 408 U.S. at 573. The mere fact of nonretention in itself "would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.'" \textit{Id.} at 574 n.13. "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply
The Court then addressed the concept of "property" in what was to become an often quoted "definition":

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. 25

Moreover, to determine the existence of a "legitimate claim of entitlement" one must look to sources outside the Constitution:

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. 27

While Roth had an "abstract concern in being rehired," it did not rise to the level of a property interest sufficient to require a hearing upon his termination. 28 Consequently, the University's method of handling the situation was constitutionally acceptable. 29

Justice Marshall, joined by Justices Brennan and Douglas, dissented in Roth on the basis that the Court's definition of "liberty" and "property" did not go far enough. 30 He declared:

In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the "property" right that I believe is protected by the Fourteenth Amendment and that cannot be denied "without due process of law." And it is also liberty—liberty to work—which is the "very essence of the per-

is not rehired in one job but remains as free as before to seek another. Cafeteria Workers v. McElroy, 367 U.S. 886, 895-96." 408 U.S. at 575.

25 408 U.S. at 577. The Court added that "it is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims." Id.

26 Id.

27 Id. at 578. The Court noted that the terms of Roth's appointment specifically provided that his employment would terminate on June 30, the end of the academic year, and included no provisions whatever for renewal. Id.

28 Id. at 578-79. The Court expressed no judgment on what procedures, although not constitutionally mandated, would be "appropriate or wise." Id.

29 Id. at 587-88 (Marshall, J., dissenting).
sonal freedom and opportunity" secured by the Fourteenth Amendment. In

To Justice Marshall, procedural due process is "our fundamental

31 guarantee of fairness, our protection against arbitrary, capricious,

Consequently, whenever an

and unreasonable government action." Consequently, whenever an

employment decision is made, reasons for that decision should be
given to the person affected. In

the companion case to Roth, Perry v. Sindermann, the Court

found that a genuine issue as to the existence of a property interest

in continued employment was presented, thus making a summary

judgment for the employing college inappropriate. Sindermann

had been a teacher in the state college system of Texas for ten years;
during the last four years he had been a professor at Odessa Junior
College under a series of one-year contracts. When his last one-year
contract had expired, the college's Board of Regents had voted not
to offer him a new contract for the next academic year. He alleged
that his protected interest, though not provided by a formal contract

tenure provision, was secured by a no less binding understanding fostered by the college administration. In particular, he asserted

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31 Id. at 588-89.

32 Id. at 589. While procedural safeguards could not prevent malicious arbitrary actions from occurring, they would at least make their occurrence more difficult. In addition, proper procedures would eliminate arbitrariness resulting from innocent mistakes. "When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct." Id. at 591-92.

33 Id. at 591. Such employment decisions would include denials of application, discharges, and nonretrentions (i.e., refusals to rehire). Justice Marshall was not explicit on "how much process is due," although he seemed willing to accept some flexibility within the minimum of "hearing and statement of reasons." He implied, for instance, that procedural due process need only be accorded when demanded, and that summary procedures might be acceptable in certain contexts. Id.


35 408 U.S. at 599. Sindermann had also alleged that the decision not to rehire him was based on the exercise of his right to freedom of speech. The Court noted that such a claim, if true, was not dependent on a "right" to reemployment. Since the issue had not been fully explored at the trial level, see note 36 infra, the case was remanded for further proceedings on this issue as well as on the "property" issue. 408 U.S. at 598. See note 13 supra.

36 The district court granted summary judgment for the college because Sindermann's contract terminated at the end of the academic year and the school did not have a tenure program. 408 U.S. at 596. The district court's findings are unreported. The Court of Appeals for the Fifth Circuit reversed because the first amendment and fourteenth amendment claims were independent and neither was foreclosed by the lack of a tenure system. The court remanded the case so that the factual disputes could be decided. Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970). The Supreme Court, on a writ of certiorari, approved of the result reached by the Fifth Circuit while not wholly agreeing with its rationale. 408 U.S. at 603.

37 408 U.S. at 594-95.
that the college had a *de facto* tenure program, and that he had tenure under that program. The Court pointed out that, while an explicit tenure provision would be clear evidence of a "claim of entitlement," its absence would not be conclusive proof of lack of a property interest. Such an interest might arise from the unwritten "common law" of a particular institution and Sindermann had presented allegations sufficient to justify a trial on this issue.

In a concurring opinion, Chief Justice Burger emphasized the point made in *Roth* and illustrated by *Sindermann*, that independent sources such as state law define and create property interests. The Chief Justice stressed the underlying principle of federalism, pointing out that the relationship between a state institution and its employees is essentially a matter of state concern and, consequently, state law. He advised that when the relevant state law is unclear, the federal courts should abstain.

The relationship between employment and "property" and "liberty" next arose in the federal civil service context. In *Arnett v. Kennedy* the Court considered a statute which provided that non-probationary federal employees could be removed or suspended without pay "only for such cause as will promote the efficiency of the service," but at the same time only provided for limited procedural safeguards. Kennedy, removed from his position in accordance with the statute and accompanying regulations, objected to the procedures used and argued that the Constitution required that

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*Id.* at 599-600.

*Id.* at 601.

*Id.* at 602-03.

*Id.* at 603-04. See text accompanying note 27 *supra*.

408 U.S. at 603.

*Id.* at 604.


*Id.* § 7501(b). The statute provides for a statement of reasons for the decision, notice of the action sought and a copy of the charges, an opportunity for a written answer to the charges, and a written decision. Whether or not to provide a full "trial-type" hearing is within the discretion of the individual directing the removal or suspension. Regulations promulgated by the Civil Service Commission and the Office of Economic Opportunity which include a right to appeal and obtain a post-removal trial-type hearing have expanded the provisions of the statute. See 416 U.S. at 141-46 & nn.5-14.

Kennedy was accused of having made recklessly false and defamatory statements about other employees, including the individual who directed his removal. Although Kennedy was provided the opportunity to respond orally or in writing, he declined, stating that the statements he made were protected by the first amendment. Kennedy was subsequently removed from his position and notified of his right to appeal, but he instead filed suit in federal court seeking injunctive and declaratory relief. 416 U.S. at 137-38.
he be given a trial-type hearing before an impartial hearing officer prior to removal from employment. The Court found that the procedures available were constitutionally adequate, although the justices differed in their reasoning. Justice Rehnquist, writing for the plurality, noted that the 1972 decisions in Roth and Sinderman were most closely in point, even though Arnett involved federal employment and, necessarily, the fifth amendment. While recognizing that Kennedy had a statutory expectancy of continued employment absent "cause" for removal, Justice Rehnquist asserted that "the substantive right [could not] be viewed wholly apart from the procedure provided for its enforcement." The statute as enacted by Congress was basically a legislative compromise, designed to afford federal employees a limited benefit that was not constitutionally required. Thus, Kennedy's conditional property

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41 U.S. at 151. The fifth amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

42 Id. at 154.

Justice Rehnquist explained:

[The] very section of the statute which granted [employees] that right, a right which had previously existed only by virtue of administrative regulation, expressly provided for the procedure by which "cause" was to be determined, and expressly omitted the procedural guarantees which [Kennedy] insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon [Kennedy] the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. In the area of federal regulation of government employees, where in the absence of statutory limitation the governmental employer has had virtually uncontrolled latitude in decisions as to hiring and firing, we do not believe that a statutory enactment such as the Lloyd-La Follette Act may be parsed as discretely as appellee urges. Congress was obviously intent on according a measure of statutory job security to governmental employees which they had not previously enjoyed, but was likewise intent on excluding more elaborate procedural requirements which it felt would make the operation of the new scheme unnecessarily burdensome in practice. Where the focus of legislation was thus strongly on the procedural mechanism for
interest in his job could be terminated without a full adversary hearing.\textsuperscript{54} Nor was the Court limited by the holdings in such cases as \textit{Goldberg v. Kelly},\textsuperscript{55} \textit{Fuentes v. Shevin},\textsuperscript{56} \textit{Bell v. Burson},\textsuperscript{57} and \textit{Sniadach v. Family Finance Corp.},\textsuperscript{58} for "[t]he types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests."\textsuperscript{59}

The proposition that the government could grant a substantive right and at the same time give only limited procedural safeguards caused disagreement among those Justices voting to uphold the constitutionality of the statute. Justice Powell, joined by Justice Blackmun, wrote:

The applicability of the constitutional guarantee of procedural due process depends in the first instance on the presence of a legitimate "property" or "liberty" interest within the meaning of the Fifth or Fourteenth Amendment. Governmental deprivation of such an interest must be accompanied by minimum procedural safeguards, including some form of notice and a hearing.\textsuperscript{60}

Whether or not a property interest exists depends upon the presence of a "legitimate claim of entitlement" stemming "from an independent source" as outlined in \textit{Roth} and \textit{Sindermann},\textsuperscript{61} but once a property interest is found to exist, the Constitution determines the attendant procedural safeguards.\textsuperscript{62} For Kennedy this meant notice enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause.

\textit{Id.} at 152 (citation omitted).

\textsuperscript{54} \textit{Id.} at 155.

\textsuperscript{55} 397 U.S. 254 (1970).

\textsuperscript{56} 407 U.S. 67 (1972).

\textsuperscript{57} 402 U.S. 535 (1971).

\textsuperscript{58} 395 U.S. 337 (1969).

\textsuperscript{59} 416 U.S. at 155.

\textsuperscript{60} \textit{Id.} at 164 (footnote omitted).

\textsuperscript{61} \textit{Id.} at 165. \textit{See} notes 26 & 27 and accompanying text \textit{supra}.

\textsuperscript{62} The plurality would . . . conclude that the statute governing federal employment determines not only the nature of [Kennedy's] property interest, but also the extent of the procedural protections to which he may lay claim. It seems to me that this approach is incompatible with the principles laid down in \textit{Roth} and \textit{Sindermann} [and] . . . misconceives the origin of the right to procedural due process. That right
and a hearing in connection with the termination of his employment. The problem thus became when the hearing must occur. To make this determination, Justice Powell proposed that the Government's interest in an "expeditious removal of an unsatisfactory employee" be balanced against the individual's interest in continued employment. On balance, a prior evidentiary hearing was not required because the post-termination hearing accorded by the statute provided a "reasonable accommodation of the competing interests."

Justice White, while agreeing that the government could not grant a substantive right and at the same time condition it with limited procedural protections, emphasized the need for an impartial hearing examiner. Like Justice Powell, he felt that notice and

is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.

416 U.S. at 166-67 (footnotes omitted).

"Id. at 166.

"Id. at 167-68. The Government's interest according to Justice Powell was "substantial" because of the necessity for "wide discretion and control over the management of its personnel and internal affairs." In addition, [p]rolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges.

Id. at 168.

"Justice Powell noted that if Kennedy prevailed on the merits at the post-termination hearing he would be reinstated and awarded backpay, so that his actual injury would be a temporary interruption of income. Such a deprivation, while difficult for the employee, would not be so serious as that occurring in Goldberg v. Kelly, 397 U.S. 254 (1970), where welfare recipients were being deprived of the means by which they lived. For the discharged employee who could not secure another job, welfare benefits would be available. 416 U.S. at 169.

"Id. at 171.

"Id. at 177-78. "While the State may define what is and what is not property, once having defined those rights the Constitution defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition." Id. at 185.

78 It may be true that any hearing without an impartial hearing officer will reflect the bias of the adjudicator. The interest of the Government in not so providing would appear slim. Given the pretermination hearing, [see note 73 infra] it would seem in the Government's interest to avoid lengthy appeals occasioned by biased initial judgments, and it would be reasonable to expect more correct decisions at the initial stage at little cost if the hearing officer is impartial.

416 U.S. at 188. Nevertheless, Justice White did not feel it necessary to hold the statute unconstitutional for its failure to provide for an impartial hearing examiner. In situations such as Kennedy's, where the hearing examiner's own reputation was at stake, see note 47
a hearing were essential, adding that "the usual rule of this Court has been that a full hearing at some time suffices." Justice White believed that the procedures provided for in the statute were constitutionally adequate.

Arnett v. Kennedy also raised the question of "liberty interests." In the plurality opinion Justice Rehnquist noted that

supra, the hearing examiner should simply excuse himself and transfer the file to a disinterested but qualified individual. 416 U.S. at 199. Justice Rehnquist addressed the question of an impartial hearing examiner in a footnote, where he differed with Justice White's statutory construction. He did not reach the constitutional aspects of this question because of the Court's holding with respect to appellee's "property-type expectations." Id. at 155 n.21.

Justice Powell also objected to Justice White's standard on practical grounds, adding that "the relevant fact is that an impartial decisionmaker is provided at the post-removal hearing where the employee's claims are finally resolved." Id. at 170 n.5.

Where there is a legitimate entitlement to a job, as when a person is given employment subject to his meeting certain specific conditions, due process requires, in order to insure against arbitrariness by the State in the administration of its law, that a person be given notice and a hearing before he is finally discharged.

416 U.S. at 185.

Id. at 187 (emphasis added). We have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.

In recent years, however, in a limited number of cases, the Court has held that a hearing must be furnished at the first stage of taking, even where a later hearing was provided.

Id. (citations omitted). Justice White then cited Bell v. Burson, 402 U.S. 535 (1971); Fuentes v. Shevin, 407 U.S. 67 (1972), Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); and Goldberg v. Kelly, 397 U.S. 254 (1970). See note 12 supra. He proceeded to elucidate the factors which made a pretermination hearing essential in these cases. These factors included: the risk that the initial deprivation may be wrongful; the impact on the claimant to a hearing of not having the property while he waits for a hearing; the interest of the party opposing the prior hearing and asserting the need for immediate possession in not alerting the current possessor to the lawsuit; and the risk of leaving the property in possession of the current possessor between the time notice is supplied and the time of the preliminary hearing.

416 U.S. at 190. Also significant is the willingness of the party seeking summary procedures to make the individual whole if the initial taking is wrongful. Id. Essentially, according to Justice White, the Court has balanced the interests of the opposing parties. Id. at 188.

Specifically, the statute, by providing for 30 days' advance notice and a right to make a written presentation, accorded a pretermination hearing sufficient to satisfy "minimum constitutional requirements." 416 U.S. at 195-96. The purpose of this hearing is to make a probable cause determination that the charges brought are true. Due process, according to Justice White, requires no more. Id. at 200. Of course, the requirements of due process will vary in specific circumstances, tempered in part by "the risk of making an erroneous determination," id. at 201, but in the employment context a full trial-type hearing need not be provided prior to termination. Id. at 202.

Kennedy claimed that the charges on which his dismissal was based, see note 47 supra, in effect accused him of dishonesty, thereby affecting his liberty. 416 U.S. at 156.
[t]he liberty here implicated by [the employer's] action is not the elemental freedom from external restraint . . . but is instead a subspecies of the right of the individual "to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." But that liberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee. Since the purpose of the hearing in such a case is to provide the person "an opportunity to clear his name," a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause.\textsuperscript{75}

Because Kennedy had chosen to forego an administrative appeal as provided in the statute, he could not now complain that his liberty interest had been infringed.\textsuperscript{76}

Justice Marshall's dissent asserted the need for a full evidentiary hearing prior to termination.\textsuperscript{77} Also, he took issue with Justice

\textsuperscript{77} 416 U.S. at 157 (citation omitted). In \textit{Arnett}, Justice Rehnquist quoted a passage from Roth where this "liberty interest" was recognized:

"The State, in declining to rehire the respondent [Roth], did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. . . . In such a case, due process would accord an opportunity to refute the charge before University officials."

\textit{Id.} at 156-57 (footnote omitted). In a footnote to Roth the Court added: "The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons." 408 U.S. at 573 n.12. 416 U.S. at 157 n.22.

\textsuperscript{76} 416 U.S. at 157.


[given the importance of the interest at stake, the discharged employee should be afforded an opportunity to test the strength of the evidence of his misconduct by confronting and cross-examining adverse witnesses and by presenting witnesses in his own behalf, whenever there are substantial disputes in testimonial evidence. A dismissal for cause often involves disputed questions of fact raised by accusations of misconduct. . . . The possibility of error is not insignificant.

\textit{Id.} at 214 (citation omitted). For the hearing to be meaningful it must also include an independent and unbiased hearing officer whose decision would be entitled to some weight. \textit{Id.} at 216. Justice Marshall stated that "the Court has embraced a general presumption that one who is constitutionally entitled to a hearing should be heard before the deprivation of his liberty or property takes place," the only exception being "extraordinary situations" where a valid governmental interest justifies postponing the hearing. \textit{Id.} at 217-18.
Rehnquist's argument that a property interest could be limited by statute. To Justice Marshall "[t]he interests of a public employee in a secure Government job are as weighty as other interests which we have found to require at least the rudimentary protection of an evidentiary hearing as a precondition to termination." Furthermore, dismissal for cause imposes a "stigma of incompetence or wrongdoing" that can implicate liberty interests of the individual who may find it difficult to obtain other employment. Accordingly, "a worker with a claim of entitlement to public employment absent specified cause has a property interest protected by the Due Process Clause and therefore the right to an evidentiary hearing before an impartial decision-maker prior to dismissal."

Six months later the pendulum swung back in the direction of greater procedural protections. In Goss v. Lopez, a case involving temporary suspensions of public school students, the Court, in an opinion written by Justice White, found that the students possessed property and liberty interests that were entitled to procedural protections under the due process clause. While no constitutional right to an education at the public expense exists, the students had "legitimate claims of entitlement" to a public education on the basis of state law. Even though the state is not required to

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78. "In none of these cases [see note 77 supra] did the Court consider a statutory procedure to be an inherent limitation on the statutorily created liberty or property interest. Rather, once such an interest was found, the Court determined whether greater procedural protections were required by the Due Process Clause than were accorded by the statute."

416 U.S. at 211 (footnote omitted). Justice Marshall contended that the approach taken by Justice Rehnquist "would amount to nothing less than a return, albeit in somewhat different verbal garb, to the thoroughly discredited distinction between rights and privileges which once seemed to govern the applicability of procedural due process." Id. (footnote omitted).

79. 416 U.S. at 212. Justice Marshall reaffirmed his position that "[e]mployment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life." Roth, 408 U.S. at 589 (Marshall, J., dissenting)." 416 U.S. at 212.

80. 416 U.S. at 214.

81. Id. at 226-27. Justice Marshall also found that the relevant provision of the Lloyd-LaFollette Act violated constitutionally protected speech; it was "unconstitutionally vague and overbroad." See id. at 227-31.

82. 419 U.S. 566 (1975).


84. Id. at 572-76.

85. Id. at 572.

86. Id. at 573. The Court reaffirmed that portion of Roth that Chief Justice Burger had emphasized, see note 41 and accompanying text supra: "Protected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are
provide a public school system, "[h]aving chosen to extend the right to an education to people of [the students'] class generally, [the state] may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." In addition to this state-granted property interest, the Court found that the students' liberty interest was implicated when they were suspended from school on charges of misconduct. The State had argued that the temporary suspensions were "neither severe nor grievous," and that the due process clause was therefore inapplicable. The court rejected this approach, however, declaring that

the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, "is not decisive of the basic right" to a hearing of some kind. The Court's view has been that as long as a property deprivation is not de minimus, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.

As for the appropriate form of hearing, the Court announced that due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. . . . There need be no delay between the time "notice" is given and the time of the hearing. . . . Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school. . . . [H]owever, . . . there are recurring situations in which notice and hearing cannot be insisted upon.

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\(^{7}\) Id. at 574. The Court cited Roth and Wisconsin v. Constantineau, 400 U.S. 433 (1971), adding that "[i]f sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." 419 U.S. at 575 (footnote omitted).

\(^{8}\) 419 U.S. at 575.

\(^{9}\) Id. at 576 (citations omitted). The Court again quoted from Roth, stating that it is the nature of the interest at stake and not its weight that is significant. Id. at 575.

\(^{10}\) Id. at 581-82. The Court appeared to be contemplating an informal discussion between the student and the disciplinarian in the general case. See id. at 582. It attempted to justify
The Court declined to require "even truncated trial-type procedures," specifically stating that students need not be accorded the opportunity to secure counsel, to confront and cross-examine witnesses, or to call their own witnesses.\textsuperscript{82}

Justice Powell, joined by the three other Nixon appointees, filed a vigorous dissent in this case. While relying on the same analysis of property interests as the majority,\textsuperscript{83} the dissent adopted a slightly different emphasis, stating that "the Court's past opinions make clear that these interests are created and their \textit{dimensions are defined} by existing rules or understandings that stem from an independent source such as state law."\textsuperscript{84} The dissenters further elaborated that

the very legislation which "defines" the "dimension" of the student's entitlement, while providing a right to education generally, does not establish this right free of discipline imposed in accord with Ohio law. Rather, the right is encompassed in the entire package of statutory provisions governing education in Ohio—of which the power to suspend is one.\textsuperscript{85}

Justice Powell did not, however, rest his conclusions on this different approach to defining property interests but went on to assert that a suspension of ten days or less does not "assume constitutional dimensions."\textsuperscript{86} He specifically rejected the majority's assertion that the length of a deprivation was not decisive of the basic right. "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'"\textsuperscript{87} The same principle applied as well to liberty interests, where "serious damage" to reputation would be required before the Constitution came into play.\textsuperscript{88} Justice Powell concluded by delooping the ramifications of the majority's abandonment of the principles of federalism:

\begin{footnotes}
\item \textsuperscript{82} \textit{Id.} at 583.
\item \textsuperscript{83} \textit{Id.} at 583. The Court did, however, add the caveat that suspensions exceeding 10 days or expulsions might require more formal procedures. \textit{Id.} at 584.
\item \textsuperscript{84} See note 86 supra.
\item \textsuperscript{85} 419 U.S. at 586 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)) (emphasis supplied in \textit{Goss}).
\item \textsuperscript{86} 419 U.S. at 586-87.
\item \textsuperscript{87} \textit{Id.} at 587.
\item \textsuperscript{88} \textit{Id.} at 588 (citations omitted) (emphasis supplied in \textit{Goss}).
\item \textsuperscript{89} \textit{Id.} at 589.
\end{footnotes}
If, as seems apparent, the Court will now require due process procedures whenever such routine school decisions are challenged, the impact upon public education will be serious indeed. The discretion and judgment of federal courts across the land often will be substituted for that of the 50 state legislatures, the 14,000 school boards and the 2,000,000 teachers who heretofore have been responsible for the administration of the American public school system. . . . As it is difficult to think of any less consequential infringement than suspension of a junior high school student for a single day, it is equally difficult to perceive any principled limit to the new reach of procedural due process. 99

The appointment of Justice Stevens to the bench appeared to give the dissenters in Goss v. Lopez a clear majority in procedural due process questions. This result became particularly apparent in the decision in Bishop v. Wood, 100 written by the new justice. 101 Bishop involved the dismissal of a Marion, North Carolina, police officer. 102 After noting that the sufficiency of property interest claims must be decided by state law, 103 the Court accepted as authoritative the interpretation of the applicable city ordinance by the federal district court judge. 104 According to that interpretation, Bishop "held his

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99 Id. at 599-600 (footnotes omitted).
100 426 U.S. 341 (1976).
101 Joining in the majority with Justice Stevens were Chief Justice Burger and Justices Stewart, Powell, and Rehnquist. Id. Justice Brennan, with whom Justice Marshall concurred, id. at 350, Justice White, with whom Justices Brennan, Marshall and Blackmun joined, id. at 355, and Justice Blackmun, with whom Justice Brennan joined, id. at 351, filed dissents.
102 The city manager terminated petitioner's employment without a hearing, telling him privately that the "dismissal was based on a failure to follow certain orders, poor attendance at police training classes, causing low morale, and conduct unsuited to an officer." A city ordinance provided that a permanent city employee, as petitioner was, "may be discharged if he fails to perform work up to the standard of his classification, or if he was negligent, inefficient, or unfit to perform his duties." Petitioner brought suit claiming that as a permanent employee he had a constitutionally protected property interest, giving him a right to a pretermination hearing. Also, he claimed that the false explanation for his discharge deprived him of a protected liberty interest. During pretrial discovery petitioner was again advised of the reasons for his dismissal. Id. at 342-44.
103 In a footnote the Court quoted the "independent source/claim of entitlement" paragraph from Roth. Id. at 344 n.7. See text accompanying note 27 supra.
104 The District Court's reading of the ordinance is tenable; it derives some support from a decision of the North Carolina Supreme Court, Still v. Lance, 277 N.C. 254, 182 S.E.2d 403 (1971); and it was accepted by the Court of Appeals for the Fourth Circuit [by an equally divided court]. These reasons are sufficient to foreclose our independent examination of the state-law issue.

426 U.S. at 347.
position at the will and pleasure of the city." Under such a view of the North Carolina law, Bishop's discharge did not deprive him of a property interest protected by the fourteenth amendment.

Bishop also attempted to attack his discharge as a deprivation of liberty. In a two-pronged argument, Bishop first contended that the reasons given for his discharge were "so serious as to constitute a stigma that may severely damage his reputation in the community." Second, he claimed that the reasons were false. The Court rejected both contentions, noting that communications not made public could not be claimed to impair an individual's interest in his "good name, reputation, honesty, or integrity." As for the claim of falsity the Court observed that "the truth or falsity of the City Manager's statement determines whether or not his decision to discharge [Bishop] was correct or prudent, but neither enhances nor diminishes [Bishop's] claim that his constitutionally protected interest in liberty has been impaired."

In the strongest noninterventionist statement in many years in this area, the Court concluded:

The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous,
can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.\textsuperscript{110}

Justice White dissented,\textsuperscript{111} finding that the majority implicitly adopted the position that six of the justices in \textit{Arnett v. Kennedy}\textsuperscript{112} had rejected: that state law not only determines the existence of the property interest but the scope of the procedural requirements as well.\textsuperscript{113} Justice White believed that the city ordinance clearly granted Bishop a right to his job absent cause for dismissal. Consequently, “[h]aving granted him such a right it is the Federal Constitution, not state law, which determines the process to be applied in connection with any state decision to deprive him of it.”\textsuperscript{114}

Justice Brennan filed a separate dissent\textsuperscript{115} in which he objected to the majority’s restrictive definition of “liberty.”\textsuperscript{116} He expressed concern that the reasons for Bishop’s discharge would be revealed to future employers who might inquire about his work record.\textsuperscript{117} Justice Brennan noted that “merely because the derogatory information is filed in [the employers’] records and no ‘publication’ occurs until shortly after his discharge from employment does not subvert the fact that a postdeprivation hearing to accord [the discharged employee] an opportunity to clear his name has been contemplated by our cases.”\textsuperscript{118}

The Court continued its restrictive approach in the recent decision of \textit{Codd v. Velger},\textsuperscript{119} although the case revealed that Justice Stevens was not so clearly aligned with the Nixon appointees as \textit{Bishop v. Wood} seemed to indicate.\textsuperscript{120} Velger had been dismissed from his position as a probationary police officer. Although no reasons were given for his discharge,\textsuperscript{121} the employer’s file indicated

\textsuperscript{110} \textit{Id.} at 349-50 (footnote omitted).
\textsuperscript{111} \textit{Id.} at 355. He was joined by Justices Brennan, Marshall, and Blackmun.
\textsuperscript{112} See note 69 supra.
\textsuperscript{113} See 426 U.S. at 359-60.
\textsuperscript{114} \textit{Id.} at 360-61 (footnote omitted).
\textsuperscript{115} \textit{Id.} at 350. Justice Marshall concurred in this dissent.
\textsuperscript{116} \textit{Id.} at 351-52.
\textsuperscript{117} \textit{Id.} at 352.
\textsuperscript{118} \textit{Id.} (footnote omitted). Justice Blackmun, whom Justice Brennan joined, filed a third dissent, objecting to the interpretation of North Carolina law relied on by the majority. \textit{Id.} at 361-62.
\textsuperscript{119} 429 U.S. 624 (1977).
\textsuperscript{120} Justice Stevens filed the leading dissent in \textit{Codd}. \textit{Id.} at 631.
\textsuperscript{121} None were required because Velger, as a probationary employee, had no property interest in his job and, consequently, no right to a hearing. \textit{Id.} at 624-25.
that Velger had been discharged because of an apparent suicide attempt.\textsuperscript{122} When a subsequent employer reviewed the file, Velger was dismissed from his position with that firm.\textsuperscript{123} At no time did Velger deny the suicide attempt.\textsuperscript{124} The court observed in a per curiam opinion that

[a]ssuming all of the other elements necessary to make out a claim of stigmatization under Roth and Bishop, the remedy mandated by the Due Process Clause of the Fourteenth Amendment is “an opportunity to refute the charge.” “The purpose of such notice and hearing is to provide the person an opportunity to clear his name.” But if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee’s reputation.\textsuperscript{125}

Consequently, Velger’s failure to deny the suicide attempt was fatal to his claim for a hearing under the due process clause.\textsuperscript{126}

In a very significant statement, the Court clearly indicated that where an employee lacks a fourteenth amendment property interest in continued employment and claims to have been stigmatized the only purpose of a hearing is to provide the person an opportunity to clear his name. The hearing need not determine whether, conceding the truth of the report, the employee was properly refused reemployment, for the adequacy or existence of reasons for the employer’s decision does not present a constitutional question.\textsuperscript{127}

This position, of course, prevents the federal courts from substi-
tuiting their judgments regarding the justifiability of discharge for that of the appropriate state and local officials. It thus constitutes a substantial deference to the concept of federalism.

Justice Stevens filed a dissent in which he asserted that an allegation of falsity is not necessary and took issue with the majority's statement that the sole purpose of a hearing in this context is to provide an individual with an opportunity to clear his name. He explained:

[T]he purpose of the hearing, as is true of any other hearing which must precede a deprivation of liberty, is two-fold: first to establish the truth or falsity of the charge, and second, to provide a basis for deciding what action is warranted by the facts. Even when it is perfectly clear that the charge is true, the Constitution requires that procedural safeguards be observed.

There is little question in today's climate of legal realism that each member of the Supreme Court since the days of John Marshall has all but added his own name to those of the framers of the Constitution. Few would advance the view that only the amendment process can alter the Constitution. The great document is, in fact, a living creation, one which has grown and changed through the subtle yet decisive process of constitutional interpretation.

The controversy which exists today, on the Court, in the classroom, and in scholarly writing, centers around the extent to which the judicial license permitted by the interpretation process is desira-

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120 Id. at 631. "Surely the burden should be on the State to show that failure to provide due process was harmless error because the charges were true." Id. at 635. In a separate dissent, Justice Brennan, with whom Justice Marshall joined, agreed with Justice Stevens that an allegation of falsity is not necessary. Id. at 629. In addition he emphasized that the burden of introducing truth or falsity should be on the defendant/employer. Id. at 631.

121 Id. at 634 (footnote omitted). Justice Stevens also would have remanded to the court of appeals so that it might consider whether or not the district court's finding of "no property interest" was correct. The court of appeals had not reached this issue in its original decision. Id. at 639-41. On the issue of remanding to consider the property interest claim, Justices Stewart, Brennan, and Marshall joined Justice Stevens. Id. at 631.

ble. Most scholars agree that constitutional change through judicial construction permits, and perhaps even generates, social change. They differ, however, on their assessments of the value of this phenomenon. Observers fear the destructive impact of a Court that is too far ahead or too far behind the mainstream of American opinion.

The question that split the Court in Arnett, Goss, and Bishop aptly illustrates the differences of opinion among the justices on whether Congress and the state legislatures should be permitted to "define the dimensions" of due process protections.

Justice Rehnquist in Arnett first advanced the view that they should be so permitted, thereby expressing respect for legislative judgments.132 His opinion contrasted sharply with Justice Marshall's dissenting position that the Court should take an active role in protecting the "plight of a discharged employee."133

In Goss the Justices split over the issue of who should define the process of public school suspensions. The four Nixon justices were in the minority in asserting that federalism interests dictated that states and not the Court should make this determination.134

The Goss dissenters' view prevailed, however, in Bishop, with the result that in the public employment context state law was held to establish due process limitations as well as to grant property rights.135 The majority, in fact, went so far as to hold that not only the adequacy of procedural protections but also the accuracy of the grounds for dismissal were not subject to judicial review.136 This conclusion is indeed a far cry from the spirit of Justice Marshall's earlier assertion that procedural requirements are "our protection against arbitrary, capricious, and unreasonable government action."137

It is uncertain whether the broad deference to notions of federal-

132 Justice Rehnquist observed that "Congress was obviously intent on according a measure of statutory job security to government employees which they had not previously enjoyed, but was likewise intent on excluding more elaborate procedural requirements which it felt would make the operation of the new scheme unnecessarily burdensome in practice." 416 U.S. at 152.

133 Id. at 220. Justice Marshall explained that

[many workers, particularly those at the bottom of the pay scale, will suffer severe and painful economic dislocations from even a temporary loss of wages. . . . The loss of income for even a few weeks may well impair their ability to provide the essentials of life—to buy food, meet mortgage or rent payments, or procure medical service.

Id.

134 See notes 82-99 and accompanying text supra.

135 See text accompanying notes 111-14 supra.

136 See notes 109 & 110 and accompanying text supra.

ism expressed in these decisions will prevail and prevent the enforcement of minimal procedural requirements. The absence of any effective constitutional restrictions implies, as Justice White warned, that a state may dispense with any hearing and not offend the guarantees of due process.

This result, the logical extreme of the Bishop rationale, would be a major shift in constitutional doctrine from the principles expressed in the well established precedents that led to Roth and Sindermann. It seems unlikely, therefore, that the Court will abandon all review of due process challenges to public employment dismissals. Whatever the outcome, however, the Burger Court has continued the practice of using the process of construction to alter the meaning of the Constitution. If the Bishop and Codd line of cases is any indication, the present Court is using its interpretive tools to limit its role as an active force in our society.

In recent years the focus of the commentators who have followed the Court has shifted from concern over the results in decisions like those above to the more fundamental question of whether the issue addressed is even appropriate for judicial resolution. They have placed increasingly more attention on the role of the Court and the process of constitutional construction itself. Also, they have examined whether and to what extent the Court should rely on “neutral” principles in deciding constitutional questions.

The views expressed on this issue have been as diverse as they have been numerous. At one end of the spectrum is the position of John Ely that the Court is “under an obligation to trace its premises to the charter from which it derives its authority.” A neutral principle, he says, “may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business

138 In the strictest sense the absence of an impinged liberty interest permitted the Court not to consider the adequacy of the procedural protections. Bishop v. Wood, 426 U.S. 341, 345 n.8 (1976). It thus was not directly faced with the question of whether constitutional minimum standards were applicable.

139 Id. at 357-61 (White, J., dissenting).

140 Justice Stevens, the author of Bishop, in his dissenting opinion in Codd v. Velger, 429 U.S. 624, 631 (1977) (Stevens, J., dissenting), stated his support for Roth in asserting that “normally . . . the Constitution mandates ‘a full prior hearing’.” Id. at 633. This affirmation indicates that he and perhaps the Court may distinguish between a “legislative compromise” as to procedural protections and an actual denial of such.

141 Forrester, for example, has described the abortion decision in Roe v. Wade, 410 U.S. 113 (1973), as a “spectacular example” of judicial legislation. See Forrester, supra note 1.

142 Ely, supra note 131, at 949.
imposing it.” In contrast stands the opinion of some that “natural law” has constitutional status and that the Justices should, as Thomas C. Grey asserts, enforce “such principles as part of their function of judicial review.”

Each of these views has had its spokesmen on the Court. A third, more moderate position, however, propounded most eloquently by Herbert Wechsler, expresses what seems to have been the mainstream of opinion both on and off the Court. It takes a middle ground between standards based entirely on the “historical meaning” of the constitutional provisions and those which permit an unfettered judicial discretion. Wechsler and others who take this position appropriately consider the clauses in the Bill of Rights as “an affirmation of the special values they embody rather than as statements of a finite rule of law, [containing] limits fixed by the consensus of a century long past, with problems very different from our own.”

This analysis affirms the significant truth that the nature of constitutional construction is a great deal different from that of statutory application. The content of the broad and lofty principles embodied in the Constitution must necessarily change to some extent as the Court applies them to constantly changing circumstances. The practical difficulty lies not in enunciating such a role for the Court, but rather in devising a way to prevent the Justices from straying too far from the moderate course set by the envisioned role.

The power vested in the Court is both its greatest strength and chief hindrance, for though it authorizes the body to be the expounder and protector of the Constitution, it enables the Justices to reconstruct the document to reflect their own biases as well. Time has proven the threat of impeachment to be too remote and the alternative of amending the Constitution to be too unwieldy in all but the most weighty of circumstances to control the tendency of the Court to abuse its power. Even Mr. Nixon’s use of the appointment process failed by some accounts to eliminate the “superlegislators”

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143 Id.
144 Grey, supra note 131, at 717.
146 Wechsler, supra note 131.
147 Id. at 19.
he opposed.\textsuperscript{145}

Time has proven that the most effective deterrent to the abuse of the construction process is the recognition by the Justices them-
selves of the pragmatic fact that the source of their power lies in public acceptance of their role as guardians of the Constitution. It is only by linking its decisions to the enduring principles which the Constitution embodies that the Court maintains its authority. The late Mr. Justice Frankfurter most succinctly stated this truth when he wrote that the “law as promulgated by the Supreme Court ultimately depends upon confidence of the people in the Supreme Court as an institution.”\textsuperscript{149} Individual judgment and feeling, he observed, “cannot be wholly shut out of the Judicial process.”\textsuperscript{150} If they control, however, “the judicial process becomes a dangerous sham.”\textsuperscript{151} A recognition by the justices, both individually and corporately, of their own fallibility will, it seems, serve them in good stead and will most effectively protect both the Court and the nation from the fashioning of the due process clause and other malleable portions of the Constitution in the images of the Justices of the Supreme Court.

\textsuperscript{145} The most notorious example of judicial legislation by the Burger Court is the decision in Roe v. Wade, 410 U.S. 113 (1973). For a critical analysis of this case, see Ely, supra note 131.

\textsuperscript{149} F. Frankfurter, Of Law and Men 31 (1956).


\textsuperscript{151} Id.