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Articles

Adjudicatory Independence and the Values of Procedural Due Process

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I. INTRODUCTION

Since the early 1970's, there has been considerable judicial and academic analysis of the types of personal interests that trigger application of the due process clauses of the Fifth and Fourteenth Amendments. For example, the Supreme Court's well-documented shift from a broad "injury"-based conception of liberty and property[1] to a more technical definition of those terms[2] has sparked intense debate among legal scholars.[3] Yet, notwithstanding the voluminous scholarship dedicated to defin-

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1. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (termination of financial aid pending resolution of controversy "may deprive an eligible recipient of the very means by which to live"). *But see* Butler v. Perry, 240 U.S. 328, 333 (1916) ("[T]o require work on the public roads has never been regarded as a deprivation of either liberty or property.").

2. *See* Paul v. Davis, 424 U.S. 693 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974); Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). For a general discussion of the Court's transformation of these terms from broad to technical principles, see Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977).

3. *See, e.g.*, Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85; Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 TEX. L. REV. 875 (1982); Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981); Michelman, *Formal and Associational Aims in Procedural Due Pro-*

ing the interests triggering due process, little attention has been given a question of far greater importance to the typical litigant who invokes the clause: What process is due once it is recognized that the guarantee applies in a given case?[4]

One might expect that the Court which developed a precise and technical definition of one variable of the due process equation would also have made some progress toward establishing broad guidelines for treating the question of how much process is due. Yet this is far from the case. The Supreme Court has continued to adhere to its long-standing position that the content of due process is extremely flexible, and not susceptible to precise definition.[5]

In this Article we will consider the question of what procedures are necessary to meet the due process requirement. First, we will critique the positivist argument that the legislative determination of how much process is due should satisfy the constitutional requirement.[6] This conception of due process, we argue, effectively renders the guarantee a rubber stamp for all legislative enactments. Further, the historical evidence upon which the positivists rely offers no real support for any particular conception of the clause, even if one accepts the controversial principle that modern constitutional interpretation is rigidly controlled by the intent of the framers.[7]

We will then examine the flexible approach that the Court has adopted in dealing with most due process claims.[8] After tracing the evolution of the flexible model, we find that the conception of due process as an inherently abstract notion which must be applied on a case-by-case basis is not entirely consistent with the purposes of the clause. Although a certain degree of situational flexibility is both necessary and advisable, it should come into play only after the establishment of a solid, value-oriented floor serving as the necessary "ground" for procedural due process. Absent such a floor, the flexibility of due process threatens to make the guarantee dependent on legislative choice, the same result as that achieved by the positivist approach.

We will then explore the contours of the due process "floor." An analy-

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cess, DUE PROCESS: NOMOS XVIII 126 (J. Pennock & J. Chapman eds. 1977); Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978); Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

4. Some of the notable writings on this issue include: Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

5. "'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" Schweiker v. McClure, 456 U.S. 188, 200 (1982) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

6. *See infra* notes 12–56 and accompanying text.

7. *See infra* notes 19–36 and accompanying text.

8. *See infra* notes 57–86 and accompanying text.

sis of the proper constitutional values informing the procedural due process requirement demonstrates that the participation of an independent adjudicator is at least one element of this floor.[9] Regardless of what other procedural safeguards are employed, the values of due process cannot be realized absent this core element. Thus, the participation of an independent adjudicator is at least a *necessary* condition, and may even constitute a *sufficient* condition, for satisfying the requirements of due process.

Such an assertion may seem so basic as to be totally free from controversy. However, neither court nor commentator has paid sufficient attention to the primacy of adjudicatory independence in the due process infrastructure. In fact, the need for adjudicatory independence grows as the modern realist skepticism about the possibility of truly neutral principles of adjudication increases. In the absence of such principles, the role of the adjudicator in assuring fairness to the litigants becomes critical. Because of the special importance of the participation of an independent adjudicator and the difficulties inherent in assuring that independence on a case-by-case basis, the independence of the adjudicator must be protected through formalized, prophylactic protections.[10] Only those potentials for bias that cannot be eradicated without incurring severe institutional costs should be tolerated. Finally, we will apply this model to several fact situations to which the due process requirement applies,[11] an exercise that will illustrate the illusory nature of the due process guarantee absent the participation of an independent adjudicator.

II. The Fallacy of the Positivist Analysis: Procedural Due Process as Legislative Command

A. *The Positivists' View of Procedural Due Process as Legislative Command*

According to the positivist view of procedural due process, the courts should play no role in defining what procedures are necessary to satisfy the constitutional requirement.[12] Rather, the term "due process" dictates that individuals be afforded whatever procedures the legislature has mandated—no more and no less. If the legislature has not recognized the right

9. *See infra* notes 87–143 and accompanying text.
10. *See infra* notes 144–49 and accompanying text.
11. *See infra* notes 150–80 and accompanying text.
12. *See* Easterbrook, *supra* note 3, at 94–109 (basing conclusion that courts have no role in defining due process on structure of Constitution, antecedents of due process clause, and Court's early due process cases).

It is important to note that the issue at stake here is not merely the appropriate level of judicial review. Under the positivist approach there is absolutely nothing for the courts to review, because the legislature is afforded unfettered discretion.

to a given procedure, the positivist argument goes, it is simply not "due" in any sense of the word.

This argument is not a new one. Indeed, in the first Supreme Court decision construing the clause,[13] the Court considered and rejected this proposition:

> It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will.[14]

Notwithstanding the Court's early words, this position has frequently been advanced in recent years.[15] Its supporters have based their arguments on some combination of the following approaches. First, they argue that the framers of the Fifth and Fourteenth Amendments understood the words "due process" to mandate no more than compliance with the law of the land as established by the legislative branch, or at most to require mere technical service of process.[16] Second, they argue that, from a structural standpoint, it is unreasonable to impute to the framers an intention to grant broad and boundless authority to the judiciary.[17] Finally, from a functional standpoint, they argue that there is no principled way for the courts to allow the legislature to define substantive entitlements but not allow that same body to define the procedures required to terminate those entitlements.[18] Yet none of these arguments, as we shall see, supports the positivist approach.

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13. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855).

14. *Id.* at 276.

15. The strongest supporter of this position on the current bench is Justice Rehnquist. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1503 (1985) (Rehnquist, J., dissenting) (Court "ought to recognize the totality of the State's definition of the property right"); Arnett v. Kennedy, 416 U.S. 134 (1974) (writing for three justice plurality) ("[P]roperty interest which appellee had in his government was itself conditioned by the procedural limitations which had encompassed the grant of that interest."). In academic circles, Raoul Berger has been one of the chief advocates of this position, at least as it relates to the Fourteenth Amendment. *See* R. BERGER, GOVERNMENT BY JUDICIARY 193–214 (1977).

16. *See* Easterbrook, *supra* note 3, at 95–100 and discussion *infra* at notes 19–36 and accompanying text.

17. *See* Easterbrook, *supra* note 3, at 94–95 and discussion *infra* at notes 37–45 and accompanying text.

18. *See* Easterbrook, *supra* note 3, at 109–15 and discussion *infra* at notes 46–56 and accompanying text.

B. *The Historical Rationale*

The positivists[19] typically seek to find support for their approach in the framers' choice of the words "due process." In his recent article, for example, Professor (now Judge) Easterbrook sets out three alternative interpretations of the phrase "due process of law."[20] First, the phrase might have been interpreted to mean only that before an individual is deprived of life, liberty, or property, he must physically be served with actual legal process by the sheriff or otherwise.[21] Second, the phrase might have been understood to require "courts to comply with procedures laid down in law," but not to authorize "judicial revision of law."[22] Finally, the clause could have been understood by the framers as a "general grant of power to courts to ensure that all procedures are 'due' or fair." It is unclear, Easterbrook argues, whether the first or the second definition encompasses the framers' understanding of the scope of the clause. But he is able to conclude that they did not mean to vest the judiciary with broad authority to assure procedural fairness—no matter how "natural" that reading seems to those "steeped in the decisions of the last twenty years."[23]

Initially, one may question whether the intent of the framers in drafting a constitutional provision should control modern construction, at least when the constitutional language rationally lends itself to a broader interpretation. Easterbrook's analysis begins with the explicit assumption that a strict historical construction should control. This view is hardly universally accepted as a canon of constitutional interpretation.[24] If one concludes that historical analysis is, as a practical or conceptual matter, of only limited value in construing the Constitution, then Easterbrook's painstaking examination of the framers' understanding becomes largely irrelevant.

One need not even reach this broad issue of constitutional construction, however, to see the frailty of the positivist interpretation of procedural due process. For even under a purely historical analysis, the positivists fail to establish that the framers intended so narrow and technical a construction of the clause.

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19. For a discussion of the use of the term "positivism" in the "due process" context, as compared with the legal philosophy of positivism, see Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1071 n.141 (1984).

20. Easterbrook, *supra* note 3, at 90.

21. Raoul Berger has also argued that the clause "was conceived in utterly procedural terms, specifically, that a defendant must be afforded an opportunity to answer by service of process in proper form, that is, in due course." R. BERGER, *supra* note 15, at 197.

22. Easterbrook, *supra* note 3, at 90.

23. *Id.*

24. *See, e.g.*, M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 9-36 (1982); Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 456-74 (1984); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

First, the possibility that the clause refers to mere technical service of process conflicts with what we know about the way the framers understood due process. For many years prior to the adoption of the Fifth Amendment, the phrase had been interpreted to include a wide array of procedural protections, and it is thus inconceivable that the framers would have used the phrase in its narrowest sense.[25] It is well established that the phrase "due process" of law was based on the Magna Carta's "law of the land" provision.[26] The dispute between Lords Coke and Blackstone over the definition of that term concerned only whether it gave the common law supremacy over Parliament in establishing fair procedures. Neither Coke nor Blackstone, however, understood the term to refer solely to service of process.

Even if the term cannot be construed to refer to service of process, however, Easterbrook offers another interpretation that similarly questions the traditional definition of due process. Easterbrook argues that the difference in interpretation between the view that affords the judiciary the power to set procedure and the view that renders the legislature's actions the equivalent of due process derives from a dispute between Lord Coke and Blackstone. It was Lord Coke's position that the term "per legem terrae," the Magna Carta's equivalent of due process, included components of natural law and was therefore capable of overriding parliamentary action.[27] Blackstone, on the other hand, never explicitly defined the

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25. Rodney Mott concludes that:

> It is evident that the colonists looked upon due process of law as a guarantee which had a wide, varied, and indefinite content. At no time was there any serious attempt to define it, and it is noteworthy that they should seize upon these particular words under such diverse circumstances. It is not probable that any of the colonists realized how much was wrapped up in the thirty-ninth section of the Great Charter, but it is certain that many of them realized that it had a much wider import than merely guaranteeing proper procedure in criminal cases.

R. MOTT, DUE PROCESS OF LAW 123 (1926).

26. *See* Hurtado v. California, 110 U.S. 516, 521–25 (1884); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276–78 (1855).

27. *See* II COKE, INSTITUTES 50 (4th ed. 1671). To Lord Coke, the restraints imposed on Parliament's authority were all derived from "natural law." In *Dr. Bonham's Case*, for example, he explained that "it appears in our books, that in many cases, the common law will controul Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void . . . ." 8 Co. 114a, 118a (c.p. 1610).

Easterbrook claims that "Coke was a solitary voice in English law. His natural law utterances were uninfluential with other English judges and other commentators." Easterbrook, *supra* note 3, at 96. It is not clear whether Easterbrook means that Coke was a solitary voice with regard to his whole conception of natural law or, alternatively, only with regard to his interpretation of the "law of the land" provision of the Magna Carta. In either case, Easterbrook is incorrect: There was considerable support for both of Coke's positions.

Rodney Mott, after surveying the rise and decline of Coke's view regarding the supremacy of the Magna Carta, explains that there is "no doubt that up to the last quarter of the Eighteenth Century, English opinion was by no means unanimously behind the officially growing doctrine of Parliamentary supremacy." R. MOTT, *supra* note 25, at 66. Indeed, he points out, "[t]he influence of Coke may be found in the attitude of the English courts at the present time as well as in the writings of political

term "law of the land," leading Easterbrook to conclude that he implicitly rejected Coke's broad conception.[28] In any event, Easterbrook is correct in pointing out that it is irrelevant which of these scholars properly interpreted the Magna Carta. Arguably, it is important, however, to consider to what extent the framers of the Bill of Rights were familiar with either or both of these views.

Even if Blackstone's view correctly concluded that the Magna Carta's "law of the land" provision did not override parliamentary action, this would not be dispositive of the relationship of the due process clause to legislative action within our constitutional system. The English system was, on the whole, one in which "the omnipotence of Parliament over the common law was absolute, even against common right and reason."[29] But the framers of the Constitution and of the Bill of Rights explicitly rejected this theory of government. The Constitution, unlike the Magna Carta, explicitly limits the powers of the government.[30] The entire system of separation of powers responds to the legislative omnipotence that the framers sought to avoid. Thus, even if the framers intended to incorporate the exact provision of the Magna Carta, that language must be interpreted with the understanding that the United States Constitution and the English Magna Carta emerge from dramatically different philosophies of government.

Further, Easterbrook concedes that Coke's works were widely read in the colonies.[31] Indeed, in discussing the adoption of a New York statute that uses language similar to the Fifth Amendment, Easterbrook notes that "[t]o the extent [the New York legislators] discussed English commentators, they mentioned Coke but not Blackstone."[32] Faced with this fact, Easterbrook retreats to an argument that Coke's view of the procedures that transcended parliamentary authority included only a few basic,

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theorists." *Id.* at 69. Similarly, Coke's view of the scope of the "per legem terrae" language was virtually unanimously accepted at the time of the decision in *Dr. Bonham's case. Id.* at 50–51.

Thus, notwithstanding their eventual decline, Coke's views were well accepted at the time of the framing of the Constitution and were far from representing a "solitary view." For an excellent presentation of the historical evidence that refutes Easterbrook's position, see also Laycock, *supra* note 3, at 890–95.

28. Blackstone states that the language "protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land." 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 417 (1st ed. 1769).

29. Hurtado v. California, 110 U.S. 516, 531 (1884).

30. "In this country written constitutions were deemed essential to protect the rights and liberties of the people . . . ." *Id.*

31. Easterbrook, *supra* note 3, at 96.

32. *Id.* at 96–97. Of course, even if it were not established that the framers took the work of Coke very seriously, the mere fact that they were familiar with it, even if they were equally familiar with the work of others such as Blackstone, is strong evidence of their likely intent in using the language "due process." Had they intended an extremely narrow definition, they certainly would not have used a term which they knew to have been so broadly interpreted.

inalienable rights. Moreover, he argues, Coke intended due process to protect only traditional conceptions of life, liberty, or property.[33] Thus, Easterbrook concludes, "there is no support in either the structure or history of the Constitution for a conclusion that Coke's natural law procedural rights should be applied to every subsequent addition to 'life, liberty, or property.'"[34]

Once Easterbrook concedes that the framers were aware of Coke's interpretation of the term "due process" and that Coke's view clearly called for some judicial intervention, he admits that the framers may well have understood due process to warrant judicial definition of how much process is due—at least in certain circumstances. Having admitted that the framers did conceive of due process as giving the courts the authority to invalidate legislative schemes, Easterbrook basically concedes his entire thesis. Surely he can argue that the Court has gone too far in expanding its definition of life, liberty, or property, but this has no bearing on the question of whether the due process clause was intended as a wholly positivistic concept, at least for purposes of determining what process is due. Similarly, the question of exactly what types of safeguards should be required is wholly different from the question of whether the judiciary has the power to impose the procedures. Thus, even the staunchest supporter of the positivist model seems to concede that it simply does not withstand either his own methodology or close historical scrutiny.

Moreover, Easterbrook's treatment of Coke's view demonstrates that Easterbrook does not actually *interpret* the due process clause at all. In essence, his argument displays two separate conceptions of due process. His first conception deals exclusively with the types of interests that Coke would have recognized as protectable—i.e., the natural rights of life, liberty, or property. These interests merit whatever safeguards Coke would have recognized as fundamental, and, at certain points in his analysis, Easterbrook seems to concede that the courts can override legislative actions in these areas. His second conception of due process deals with all other types of interests. It is here, according to Easterbrook, that the positivist model of due process comes into play. But if these "new property" interests or new procedures were not recognized as part of the framers' due process, then in Easterbrook's view there is no due process right involved at all. No one would argue with the conclusion that when only nonprotected interests or unnecessary procedures are at issue, the legisla-

33. Conceding the probability that the framers attended to Coke's interpretation when they framed the term "due process," Easterbrook asserts that "Coke's natural law was a rather tame creature, satisfied with the inalienable rights to indictment and jury trial. . . . Moreover, Coke's approach applied only to life, liberty, or property. Those words then described a small collection of rights." *Id.*

34. *Id.* at 98.

ture may dictate however much or little procedure it sees fit. But at this point Easterbrook's argument no longer turns on any positivist model. Rather, he simply argues that the Court has gone too far in defining property and in defining how much process is due.

An additional flaw in Easterbrook's argument merits attention. Even if all of his historical arguments are correct, they relate only to the intent and understanding of the men who framed the Fifth Amendment. But the men who framed the Fourteenth Amendment clearly had a different understanding of the term "due process." Those men had read *Murray's Lessee v. Hoboken Land & Improvement Co.*, where Justice Curtis, in his characterization of due process, soundly rejected any notion of unlimited legislative authority to define procedure.[35] Thus, when the Fourteenth Amendment was adopted, the framers and ratifiers clearly knew that they were putting the courts in charge of procedure.[36]

The framers' choice of language does not support, and indeed seems to negate, the positivist position. Though this conclusion is strongest when applied to the Fourteenth Amendment, it also holds true for the Fifth Amendment. Much more significant than the precise language, however, is the fact that the provisions are part of the Bill of Rights and the Four-

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35. 59 U.S. (18 How.) 272, 276 (1855) (due process is "restraint on the legislative as well as on the executive and judicial powers . . . and cannot be so constructed to leave congress free to make any process 'due process of law' by its mere will").

36. Although there is considerable debate on the history of the ratification of the Fourteenth Amendment, Rodney Mott points out that Congressman Bingham "seems to have been the only member of Congress who had occasion to tell what he considered due process to mean, and he probably expressed the general feeling of the House when he declared in answer to a question regarding its meaning, 'the courts have settled that long ago, and the gentlemen can go and read their decisions.'" R. MOTT, *supra* note 25, at 164 (quoting CONG. GLOBE, 39th Cong., 1st Sess. (1889)).

Murray's Lessee was not the only Supreme Court decision that had interpreted due process in a broad sense by that time. *See, e.g.*, Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). It is possible that many members of Congress understood the term "due process" in the way that their own state courts had interpreted it. Those courts had, for the most part, also interpreted "due process" as a very general term. R. MOTT, *supra* note 25, at 165. Indeed, there is explicit evidence that some framers of the Fourteenth Amendment considered the due process guarantee to encompass the right to a fair trial. *See* sources cited in Note, *Justice Without Favor: Due Process and Separation of Executive and Judicial Powers in State Government*, 94 YALE L.J. 1675, 1676 n.5 (1985).

This realization leads to an intriguing phenomenom. On the one hand, there is a canon of constitutional construction which posits that like terms have like meaning. *See* Adamson v. California, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring) ("It ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth."); Hurtado v. California, 110 U.S. 532, 535 (1884) (language in Fourteenth Amendment "was used in the same sense and with no greater extent [than in the Fifth Amendment]"). But if Easterbrook is right about the Fifth Amendment, there were clearly differing understandings of the meaning of the term "due process" by those who chose to employ it. It would surely put form over substance to argue that, notwithstanding this clear historical evidence regarding the framers' understanding in choosing the phrase "due process" for inclusion in the Fourteenth Amendment, it still means whatever the framers of the Fifth Amendment understood it to mean. Indeed, such a position would be especially untenable for a literalist such as Easterbrook, who puts so much stock in the framers' understanding of their words. *See* Easterbrook, *supra* note 3, at 92 ("History lays down the baseline against which other arguments are measured.").

teenth Amendment, respectively. We will next discuss their place within the overall structure of the Constitution—an inquiry that settles all doubt about their intended role.

C. *The Structure of the Bill of Rights*

The positivist reading of the due process clause also relies on the structure of the Bill of Rights. In view of the specificity of the Bill of Rights, the argument proceeds, the due process clause could not have been designed to allow the courts a more general power "to find and enforce whatever procedures judges thought important . . . ."[37] The structural argument treats the framers' delineation of certain rights as proof that they intended protection only of those rights that they explicitly mentioned. But if due process is understood as reflecting the framers' intent to establish a flexible concept that changes over time, it is obvious that the framers could not have listed all the rights encompassed by the due process guarantee.

There is clear evidence that the framers of the Bill of Rights were aware of their inability to envision each and every scenario that might arise.[38] Indeed, many objected to the amendments for the very reason that they might be understood as embodying the principle *expressio unius est exclusio alterius*.[39] It is therefore not at all unreasonable to suggest that, notwithstanding the Bill of Rights' enumeration of specific procedures, the framers fashioned an open-ended clause to cover both those procedures that they might have accidently omitted and those that might prove necessary in future times.[40]

The Bill of Rights was drafted as a response to fears about the power of a centralized federal government.[41] Many were concerned that the new government would undermine the rights that the colonists held dear. Yet,

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37. Easterbrook, *supra* note 3, at 94.

38. Madison, for example, recognized the difficulties inherent in the task of framing a written constitution when he cautioned that "[n]o language is so copious as to supply words and phrases for every complex idea." THE FEDERALIST No. 37, at 236 (J. Madison) (J. Cooke ed. 1977).

39. *See* I. BRANT, THE BILL OF RIGHTS 41 (1965) (supporters of Constitution without Bill of Rights thought Bill of Rights "was not needed and might be dangerous, jeopardizing the rights not specified in it").

40. An analogy can be drawn to the Ninth Amendment where the framers also recognized the limits of their abilities to list exhaustively all rights. The Ninth Amendment "was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1898, at 751–52 (Boston 1833).

41. In Davidson v. New Orleans, the Court described the due process clause of the Fifth Amendment as one of the "series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the States as further limitations upon the power of the Federal government . . . ." 96 U.S. 97, 101 (1878).

according to the positivist approach, the framers proceeded to draft a clause that put power back in the hands of that very branch. If the right to define procedure is a wholly legislative function, uncontrolled by the Constitution, then the due process clause is stripped of its supermajoritarian import. It makes little sense to interpret the clause as mandating that legislative determinations be followed. Not only is the clause then inconsistent with the rest of the Bill of Rights, but it is also superfluous: The legislature has the power to ensure compliance with its own laws, even absent the due process provision, by virtue of the necessary and proper clause.

It might be thought that the strict positivist model does not necessarily render the Fifth Amendment's due process clause a nullity because, as construed, it provides a legal springboard into federal court, allowing the judiciary to police administrative and executive compliance with the legislature's procedural commands. Under article III, section 2 of the Constitution, the federal judicial power's reach is limited largely to cases "arising under" the Constitution and laws of the United States.[42] Under this argument, the due process clause renders executive failure to comply with legislatively mandated procedures a "federal question" to which the federal judicial power extends. But this point ignores the fact that, even absent the due process clause, an allegation of executive failure to comply with legislatively dictated procedures would provide the necessary "federal question." Such failure would effectively violate the particular federal statute dictating the procedures in question.[43] Thus, under a strict positivist model, the due process clause would be wholly unnecessary, and therefore meaningless.

Further, as with interpretations regarding the *language* of the clause, so conclusions regarding the *structure* of the Fifth Amendment must be re-evaluated in light of the Fourteenth Amendment. Not surprisingly, analysis of the Fourteenth Amendment reveals that its framers did not intend to empower the individual states to determine how much process is due. The Fourteenth Amendment was clearly intended to protect individuals from the state's power.[44] Moreover, Easterbrook's argument about the Bill of Rights' specificity does not apply to the Fourteenth Amend-

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42. U.S. CONST. art. III, § 2.

43. It is conceivable that the argument fashioned here has relevance for construction of the Fourteenth Amendment's due process clause, since the failure of state executive officers to comply with the procedural commands of the state legislature would not present a question of construction of a *federal* statute. However, the framers of the Fifth Amendment imposed no procedural requirements on the states, but instead chose only to limit congressional action. Thus, the strict positivist model renders the constitutional guarantee of procedural due process a complete nullity.

44. *See* H. FLACK, ADOPTION OF THE FOURTEENTH AMENDMENT 94–97 (1908); R. MOTT, *supra* note 25, at 163–64.

ment, which lists no specific procedural safeguards. Although Easterbrook might argue that the framers of the Fourteenth Amendment understood due process to mean service of actual legal process, it is rather absurd to think that, of all the crucial safeguards that had been recognized, the framers singled out that protection as the one that would be forced on the states.[45]

Thus, even apart from questions about the framers' intent, the structure and purpose of both the Bill of Rights and the Fourteenth Amendment militate against the positivists' conclusion. It is highly unlikely that the framers would have undertaken the meaningless exercise that the positivist model presumes.

D. *The "Paradox" Rationale*

Advocates of the positivist approach claim additional support for their position in the Court's recent adoption of a positivist method for ascertaining whether a "property" interest exists in a given case. In the companion cases of *Board of Regents v. Roth*[46] and *Perry v. Sindermann*,[47] the Court considered the claim that a professor possesses a constitutionally protected property interest in his academic appointment and therefore has the right to due process prior to being dismissed from that position. In analyzing the plaintiffs' claims, the court explained that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it . . . . He must, instead, have a legitimate claim of entitlement to it."[48] Such entitlements, at least as they concern property, the Court continued, "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 . . . ."[49]

This shift in the Court's method of defining property was a dramatic one.[50] The important point for present purposes, however, is that the

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45. Of course, the meaning given the term prior to the adoption of the Fourteenth Amendment also makes this interpretation impossible. *See supra* notes 35–36 and accompanying text.

46. 408 U.S. 564 (1972).

47. 408 U.S. 593 (1972).

48. *Roth*, 408 U.S. at 577.

49. *Id.*

50. Prior to these cases the Court had never defined the term "property" by examining positive law. Instead, the Court had relied on the common law's characterization of property. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (property right in control of estate trust account); Pennoyer v. Neff, 95 U.S. 714 (1878) (property interest in possession of land). *See generally* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1717–18 (1975). Aside from the infamous right-privilege distinction, *see generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968), this approach served to protect most interests that were worth litigating. Eventually, in some cases the Court did not even tie the presence of a property interest back to common law, but found a property

Court's decision in these two cases seemed to be the logical stepping stone toward recognizing that the legislature may delineate the scope of the *procedural* safeguards, as well as the *substantive* content of a given right. If the legislature has the greater authority to abolish a given right totally, it must, *a fortiori*, possess the lesser authority to modify some of the procedures that come into play when that right is terminated.[51] Moreover, the line between substance and procedure seems to be an imaginary one. Any legislative definition of a substantive property right must include procedural aspects, and there can be no principled reason for allowing the legislature complete control over one aspect while not allowing them any control over the other. In short, the commentators had uncovered a "paradox"[52] which seemed to make a strong case for total adoption[53]—or alternatively, total rejection—of the positivist model.[54]

It is certainly true that adopting the pure positivist approach resolves the difficult paradox that results when the legislature is allowed to define only the substantive, but not the procedural, aspect of a given property interest. Yet by solving the paradox in this manner, one creates an even greater problem: If all aspects of due process are open to legislative definition, then of what possible value is the *constitutional* guarantee of due process of law?[55] The Bill of Rights and the Fourteenth Amendment both

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interest based on the fact that the interest in question was obviously of great importance to the individual. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970). The decisions in *Roth* and *Sindermann* changed all that. Now, apparently, governmental bodies are free to do away with procedural safeguards to the extent they are willing to recognize no substantive entitlement.

51. It is not clear whether this reasoning applies only to the "new property"—that which was once considered "privilege"—or whether it extends to traditional property, and for that matter, life and liberty as well. Professor Laycock argues that the positivist entitlement theory cannot logically be stopped at the "new property." Laycock, *supra* note 3, at 879–82. He explains that "[a] capital punishment statute defines the scope of the right to life, just as a civil service statute defines the scope of the right to a government job. . . . Every individual enters life subject to legislative specification of the conditions that will cause him to forfeit it." *Id.* at 881.

52. *See* Grey, *Procedural Fairness and Substantive Rights*, DUE PROCESS: NOMOS XVIII 182, 190 (J. Pennock & J. Chapman eds. 1977).

53. It was not long before this argument was being raised by Justices of the Court. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 153–54 (1974) (Justice Rehnquist writing for three justices arguing citizens "must take the bitter with the sweet"). The argument has consistently been rejected, however. *See* Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1492–93 (1985) ("[I]t is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee . . . . The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology.").

54. Because the paradox results from the Court's allowing the legislature to define substance but not procedure, it can be eliminated by the Court's either allowing the legislature to define *both* substance and procedure, or alternatively, allowing the legislature to define *neither* substance nor procedure. For a brief discussion of two of the many alternative solutions to the "paradox," see *infra* notes 115 & 129.

55. Professor Mashaw accurately portrays the problem in his hypothetical discussion between a fired public school teacher and a federal judge. After the judge explains to the teacher that his interest in his job and the procedures surrounding its termination are contingent on state law, the teacher exclaims, "if they had agreed by contract or regulation to give me a hearing, I don't see why I would need *constitutional* protection in the first place." Mashaw, *supra* note 3, at 891 (emphasis added).

embody counter-majoritarian principles de-emphasizing legislative authority. But their unique role is forfeited if they hinge on that very legislature to define their scope. What need for a provision which merely dictates that legislative determinations must be obeyed?[56] To understand due process of law in this manner is to write it out of the Constitution.

Thus, the three arguments offered to bolster the positivist theory actually provide little support. Not the language and history of the phrase "due process," nor the structure of the Bill of Rights, nor, finally, the perceived paradox in the Court's opinions, can sustain the positivist argument.

III. Giving Content to the Constitutional Provision of Procedural Due Process

A. *The Methodology of Procedural Due Process: An Overview*

In analyzing the merit—or, more precisely, lack of merit—of the positivist argument, we have addressed the question of *whose* job it is—legislature or courts—to delineate how much process is due before any given deprivation of a protectable interest. Having established that this task ultimately belongs to the judiciary, we now attempt to develop a principled method by which the courts can decide just how much process is constitutionally necessary.

The Supreme Court has employed various methods to ascertain whether a specific procedure is required in a given case. At first the Court simply looked to the English practice and held that the due process clause had incorporated the procedures that were integral to the English common law system.[57] It quickly abandoned this approach, however, choosing instead to ask whether a given procedure was essential to *modern*—as opposed to 17th century—notions of fairness.[58]

Recently the Court seems to have abandoned this approach, and instead has applied a balancing scheme: The probable value of additional procedural safeguards in protecting an interest is weighed against the state's fiscal and administrative burden in providing them.[59] Under this methodology, even those procedures once considered essential to rudimentary due process are now open to question.

In this Section, we will discuss the various methods that the Court has used to determine the content of procedural due process. Though the

56. *See* L. Tribe, American Constitutional Law 535 (1978) (although positivist theory suffers no *internal* contradiction, it ignores structure and purpose of constitutional clauses).

57. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1855).

58. *See* Twining v. New Jersey, 211 U.S. 78, 101 (1908).

59. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Court correctly discarded the pure historical approach focusing on whether the framers intended a *specific procedure*, the types of procedures traditionally required shed light on the general values that the clause protects. Discerning the values that due process protects is the critical step in the development of a model for adjudicating due process claims. Though different deprivations indeed demand different procedures, we argue that the balancing of interests must never be conducted in a manner that ignores recognized core values.[60] Certain specific *procedures* may not be necessary in certain cases, but only because the appropriate due process *values* are otherwise protected. Finally, we will examine some of the values that shape the application of due process.[61]

1. *The Historical Approach*

The Court's first discussion of the historical approach to due process came in *Murray's Lessee v. Hoboken Land & Improvement Co.*[62] In that case, the Court adopted a historical method for determining the procedures mandated by the clause, focusing on the types of procedures that the framers of the Fifth Amendment would have understood to be "the law of the land."[63] The "frozen-in-history" approach did not last long. In *Hurtado v. California*,[64] the Court rejected the notion that the framers' understanding limited the scope of the procedures required by the clause. No matter how offensive a practice is to a modern society, it does not violate the due process clause if "in substance, [it] has been immemorially the actual law of the land . . . ."[65]

The *Hurtado* Court's rejection of an absolutely fixed due process clause was grounded in the nature of law itself. To fix a definition, the Court feared, "would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."[66] Though the Court urged the concept of an evolving due process, it did not explain why the law could progress only in the direction of *less* procedural protections. The decision protected the government—but not individuals—from the dangers of "the laws of the Medes and the Persians."

By the time of its decision in *Twining v. New Jersey*,[67] the Court

60. *See infra* notes 79–86 and accompanying text.
61. *See infra* notes 88–143 and accompanying text.
62. 59 U.S. (18 How.) 272 (1855).
63. *Id.* at 277 ("[W]e must look to those settled usages and modes of proceeding existing in the common and statue [sic] law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.").
64. 110 U.S. 516 (1884).
65. *Id.* at 528.
66. *Id.* at 529.
67. 211 U.S. 78 (1908).

seemed to recognize the deficiencies in the one-directional progress approach adopted in *Hurtado*. Addressing the question of whether states could compel self-incrimination in criminal cases, the Court explained that the meaning of the clause "should be gradually ascertained by the process of *inclusion and exclusion* in the course of the decisions of the cases as they arise."[68] Though historical practice clearly condoned compelling self-incrimination, the Court nonetheless questioned whether the freedom from self-incrimination was a "fundamental principle of liberty and justice."[69] The historical absence *or presence* of a procedure was simply another evidentiary factor in the overall equation for determining whether a given procedural safeguard was sufficiently fundamental to warrant the clause's protection.

2. *The Evolution of the Balancing Tests*

Having decided that history provides neither a floor nor a ceiling to modern due process, the Court began to struggle with the task of determining on a case-by-case basis whether a given procedure violated due process. For a long time, the Court seemed to deal in a rather intuitive way with the question of how much process was due.[70] This has recently given way to a detailed—and somewhat mechanical—balancing scheme. Unfortunately, the recent mechanization of the test has led the Court to disregard many of the subtleties that the "intuitive" approach necessarily took into account. During the Court's "intuitive" period, the Justices generally tended to treat due process as Justice Stewart treated obscenity—as recognizable, albeit undefinable. This ad hoc, open-ended approach left the Court vulnerable to the obvious criticism that the Justices were forcing their personal notions of fairness on the nation.[71] Further unevenness

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68. *Id.* at 106; *see also* Davidson v. New Orleans, 96 U.S. 97, 104 (1877) (employing language of gradual inclusion and exclusion).

69. *Twining*, 211 U.S. at 106. There have been many similar formulations of the due process standard. For instance, Justice Frankfurter asked whether procedures are required for the "protection of ultimate decency in a civilized society," Adamson v. California, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring). Justice Cardozo has said, "due process of law requires that the proceedings shall be fair . . . ." Snyder v. Massachusetts, 291 U.S. 97, 116 (1934).

70. The Court did try "manfully to avoid" resting its decisions on nothing but the personal preferences of the Justices. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 344 (1957). According to Kadish, the two main analytic techniques the Court used to do this were "a respectful deference" to the state courts and legislatures whose decisions were being reviewed and "an attempt to rest conclusions upon external and objective evidence." *Id.* at 327.

71.

> [T]he 'natural law' formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power.

in the application of the due process guarantee resulted from the Court's long-standing recognition that not all relationships between the government and its citizens would be treated identically. For example, the Court had long held that the boundaries of due process are very different in the agency rulemaking process from those in the adjudicatory process.[72] Yet the "basic elements of fairness" inquiry tended to lead to the conclusion that the individual in an administrative proceeding should be afforded procedural safeguards identical to those afforded the individual in traditional judicial proceedings. The realities of the burgeoning administrative state of the late 1960's, however, demonstrated that the implementation of such procedures across the board was not possible.[73]

To get around this obstacle, the Court modified the fairness inquiry. It began to balance an individual's interest in a procedure against the government's cost in providing the procedures. Obviously, some degree of balancing had always gone into the Court's "intuitive" decisionmaking, if only implicitly, and therefore the fact that it was now being done a bit more openly caused little alteration in the doctrinal development.

Once the Court's balance became explicit, litigants began to stress the importance of their substantive interests, while the government urged the innocuousness of its deprivations.[74] Soon the Court's analysis began to reflect these formulations. For example, in *Cafeteria & Restaurant Workers Union v. McElroy*,[75] the Court emphasized the minimal nature of the deprivation in holding that a short order cook had no right to a proceeding before being fired from her government job. By contrast, the Court in *Goldberg v. Kelly*[76] placed great emphasis on the hardship that welfare recipients endure when their benefits are terminated. Thus, the extent of the hardship that the threatened deprivation would create had become a significant factor in the Court's due process analysis.

The Court entered its "mechanical" due process phase with its decision in *Mathews v. Eldridge*,[77] which laid out the specific factors that should

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Adamson v. California, 332 U.S. 46, 75 (1947) (Black, J., dissenting).

72. *See, e.g.*, Londoner v. Denver, 210 U.S. 373, 386 (1908) ("Many requirements essential in strictly judicial proceedings may be dispensed with [in the administrative forum].").

73. Especially in entitlement programs, there has always been the concern that money spent improving procedures would deplete funds available for the substance of the program. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 278 (1970) (Black, J., dissenting) ("The Court apparently feels that this decision will benefit the poor and needy. In my judgment the eventual result will be just the opposite.").

74. For example, Professor Rubin has pointed out that "the welfare rights movement had produced a change in emphasis. Commentators were focusing on the intrinsic importance of the benefits themselves, instead of the unfairness of government procedures for determining these benefits." Rubin, *supra* note 19, at 1062.

75. 367 U.S. 886 (1961).

76. 397 U.S. 254 (1970).

77. 424 U.S. 319 (1976).

shape its balancing process. In that case, the plaintiff claimed that he had been denied due process when the Social Security Administration terminated his disability benefit payments without an evidentiary hearing. In holding that the plaintiff had no right to such a hearing, the Court announced three factors to be balanced in ascertaining the process due in each case:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[78]

According to this test, the Court looks only to the individual's interest in the substantive right, totally ignoring any "non-instrumental" interests that the individual—or society—may have in procedure for procedure's sake. The word "fairness" did not appear in the balancing test; the Court apparently chose to focus upon considerations of economic efficiency instead. The notions of elemental fairness that had been so dispositive under the "intuitive" approach were now abandoned in favor of the new—economically efficient—due process.

3. *The Problem of Balancing: A House Without a Floor Is Not a House At All*

The development of the *Mathews* balancing test gave rise to a structure within which an individual can possess an undisputed property interest—and thus, a clear right to due process—but have no right to any procedures at all. In other words, balancing can lead to the anomalous result that an individual will have a clear due process right to no process. Such a result is surely problematic in light of the explicit constitutional requirement that no life, liberty, or property be taken without due process of law.

Of course, balancing is not unique to the due process clause. Throughout constitutional adjudication, the government's interest is frequently weighed against, for example, the individual's right to free speech,[79] free exercise of religion,[80] or some other fundamental interest.[81] Yet the bal-

78. *Id.* at 335.
79. *See* Widmar v. Vincent, 454 U.S. 263 (1981); NAACP v. Alabama, 357 U.S. 449 (1958).
80. *See* United States v. Lee, 455 U.S. 252, 259 (1982); Sherbert v. Verner, 374 U.S. 398 (1963).
81. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (balancing state's interest in potentiality of human life against woman's discounted right to privacy).

ancing in these areas is far different from that informing procedural due process.

When a court overrides an individual's right to free speech, it must be sensitive to the fact that it is subordinating an explicit constitutional right to some government objective. In so doing, the court is limited doctrinally in the kinds of governmental interests to which it can give credence.[82] Moreover, that the issue before the court is whether it will override the Constitution undoubtedly limits the court's willingness to accept the governmental incursion. Under the current method of adjudicating due process claims, courts are relieved of the burden of finding that a governmental interest overrides a clear constitutional safeguard. Instead, they may hold that, in light of the government's interests, the individual simply has no due process right to the procedure in question. Politically, it is far easier for judges to tell a litigant that "the Constitution gives you no right in this case," than it is to tell her that "the Constitution gives you a right, but in this case, the government's interest is strong enough to cancel it."

An additional, significant factor distinguishes procedural due process balancing from the balancing employed for most other constitutional rights. By their very nature, procedural safeguards impose administrative costs and burdens on the government that would not otherwise exist. At the same time, the benefits of such safeguards are not always immediately recognizable. Often it is not clear that the ultimate outcome in a particular case will be more just or efficient when specific procedures are employed than when they are not. In an important sense, then, the benefits of procedural due process—at least when measured from a purely efficiency standpoint—are prophylactic in nature. An efficiency-oriented balancing test, therefore, weighs an inevitable and immediately recognizable administrative cost against a largely prophylactic interest in the use of specific procedural protections. Thus, it is likely that the Court's balancing test, lacking any minimum floor of procedural protection, will generally find in favor of the governmental interest.[83]

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82. For example, in *Sherbert v. Verner*, the Court rejected the state's arguments about the administrative inconvenience of distinguishing between bona fide religious believers and others. 374 U.S. 398, 406-09 (1963).

83. In the words of Professor Saphire: "Aside from its questionable assumption that the societal costs of procedural protection can reliably be predicted, utility theory tends to minimize the value of less quantifiable factors . . . by setting them off against more easily identifiable and often intuitively more compelling conceptions of the public good." Saphire, *supra* note 3, at 155. Saphire concludes, "[i]n this respect, utilitarianism is hostile to any theory of due process that treats individual dignity as a serious, operative societal value." *Id.*; *see also* Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 596 (1985) ("The inevitable result [of utilitarian policy analysis] is not only that 'soft' variables—such as the value of vindicating a fundamental right or preserving human dignity—tend to be ignored or understated, but also that entire problems are reduced to terms that misstate their structure and that ignore the nuances that give these problems their full character."). *Id.* For a more general critique of the Court's analysis in *Mathews*, see Mashaw,

This problem is compounded when the Court adopts a deferential stance toward legislative balancing. Because the basic issues to be balanced relate to fiscal objectives, the Court has at times been reluctant to hold that the legislature weighed the issues improperly. After all, if the test is efficiency, who is better equipped, or motivated, to deal with the problem than the legislative branch?[84]

4. *The Need for an Intermediate Approach*

Neither the historical nor the wholesale balancing approach succeeds in realizing the goals of due process. The historical approach fails, as the Court recognized early in its due process jurisprudence, because it cannot adequately respond to changing circumstances and perceptions of justice. The balancing approach fails for the diametrically opposite reason. Its inadequacy lies in its inability to take into account the traditional concerns of procedural justice that the framers most certainly intended when they shaped the two amendments. What is needed, therefore, is a model that embraces the historical approach's adherence to traditional values and the balancing approach's responsiveness to changing reality. In the next section of this Article, we propose a model that accomplishes this goal.

5. *A Proposed Model: Distinguishing Due Process Values from Specific Procedures*

Apart from the period during which the Court employed a purely historical approach, the contours of the procedural due process requirement have always been subject to a disturbing degree of flexibility. In particular, the indeterminacy of *Mathews*' balancing test threatens to undermine wholly the viability of the guarantee. It is possible to devise a model of procedural due process that simultaneously allows the flexibility central to the due process concept as it has evolved, while providing a principled and workable structure. Due process need be flexible mainly in terms of the *specific procedures* that courts require. The *values* that the clause represents, on the other hand, are more enduring. Once the values are discerned, a court's task is to assess the manner in which these values may best be realized. Various balancing texts may lead to a conclusion about how a given value can best be realized at the lowest cost, but under this model balancing can never, under circumstances short of an extreme and

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The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

84. As one commentator points out, however, such interest balancing is clearly inappropriate "because it transforms the right to due process from a constitutional limit upon the total power of government over the individual into merely an institutional check upon whether the state's procedural policies in fact promote the general welfare." Note, *supra* note 4, at 1511.

overwhelming emergency, lead to the conclusion that one of the values is outweighed by a competing governmental interest.[85]

Though recognition of the procedures deemed necessary in the past does not answer whether those same procedures are still needed, it does help shed light on the types of values that due process encompasses. Indeed, it might be worthwhile to establish a rebuttable presumption that procedures historically required are still necessary for the achievement of due process values. In deciding whether that presumption remains valid, the Court's task is to translate traditional due process values into the modern context.

This description of the Court's role seems consistent with the notion of gradual "inclusion and exclusion" that the Court announced when it first adopted a flexible model of due process.[86] The model does demand that certain values remain constant. The practical methods of fostering these values, however, might differ today from the methods that were available or expedient two centuries ago.

The following section examines the different theoretical values that the concept of procedural due process could be thought to serve, and attempts to delineate the specific procedural protections required today to maintain those values. It is our contention that the one procedural protection that is clearly necessary for the fulfillment of all of the goals of due process is the participation of a truly independent adjudicator.

IV. Due Process Values and the Right to An Independent Adjudicator

According to the model described above, the notion of a "flexible" due process clause is accurate only to the extent that it recognizes the court's authority to decide that a fixed due process value can be accomplished through procedures different from those used previously. If a given value cannot be protected absent the use of a specific procedure, then that procedure must be deemed essential to the achievement of due process in all cases. It is our position that the participation of an independent adjudicator is such an essential safeguard, and may be the only one. Even though the Supreme Court has often stated that the core rights of due process are notice and hearing,[87] we shall demonstrate that, under certain circum-

85. Like any other constitutional provision, due process can be subordinated to some extraordinarily pressing governmental need. As Justice Goldberg put it, "while the Constitution protects against invasions of individual rights, it is not a suicide pact." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

86. *See supra* notes 70-71 and accompanying text.

87. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1493 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'") (quoting Mullane v. Central Hano-

stances, the values of due process might arguably be safeguarded absent those specific procedural protections. None of the core values of due process, however, can be fulfilled without the participation of an independent adjudicator.

A. *"Instrumental Concerns"*

According to the instrumental conception of due process, the purpose of the clause is to ensure the most accurate decision possible. The due process protections such as notice, hearing, and right to counsel are valuable because they contribute to the goal of accuracy. The Supreme Court has long relied upon this rationale in shaping its conception of the due process clause.[88] In *Mathews v. Eldridge*,[89] for example, the Court's three-part balancing test seemed to focus exclusively on instrumental concerns.

The instrumental conception of due process focuses on the individual's interest in having an opportunity to convince the decisionmaker that he deserves the right at issue. Examination of the instrumental value demonstrates that it cannot be furthered without the participation of an adjudicator truly independent of the governmental body involved in the case.

As might be expected in light of the Court's emphasis on instrumental concerns, most of the procedures that have fallen within the scope of the due process clause deal with the individual's opportunity to argue his case effectively. The rights to notice, hearing, counsel, transcript, and to calling and cross-examining witnesses all relate directly to the accuracy of the adjudicative process. These procedural safeguards are of no real value, however, if the decisionmaker bases his findings on factors other than his assessment of the evidence before him. For example, if the individual seeking to enforce his rights is black, and the adjudicator is racially prejudiced and would therefore never find in favor of a black person regardless of the weight of the evidence, all of the procedural guarantees of

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ver Bank & Trust Co., 339 U.S. 306, 313 (1950)).

88. In many cases the Court has focused exclusively on the accuracy value in determining what procedures are needed. For example, in Dixon v. Love, 431 U.S. 105 (1977), the Court explained that although the right to contest a driver's license revocation "might make the licensee feel that he has received more personal attention . . . it would not serve to protect any substantive right." *Id.* at 114. The Court therefore held that there was no due process right to an oral hearing. *But see* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (discussing due process value of promoting "participation"). Individual justices have, moreover, touched upon the non-instrumental themes in their concurrences and dissents. *See, e.g.*, Meachum v. Fano, 427 U.S. 215, 233 (1976) (Stevens, J., dissenting) (inmates retain "at the very minimum the right to be treated with dignity"); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter J., concurring) ("generating the feeling, so important to a popular government, that justice has been done").

89. 424 U.S. 319 (1976). Although the language in the *Mathews* test is somewhat ambiguous as to what type of individual interests enter the calculus, the Court's application of the test to the facts of the case made it quite clear that it was focusing on solely instrumental—accuracy-oriented—interests. There was no premium put on the individual's interest in procedure *qua* procedure, i.e., for the dignitary values that procedures implicate.

hearing, notice, counsel, transcript and the examination of witnesses are rendered irrelevant. Similarly, if the adjudicator is himself an integral part of the governmental body on the other side of the case, then it is likely that his decision will be based on considerations other than the merits as developed by the evidence. The government would, in effect, be the judge of its own case. Once again, traditional procedural protections, however meticulously adhered to, become irrelevant.

Of course, it is not immediately evident at what point the adjudicator's bias or lack of independence from a government body becomes so great that the use of traditional procedural protections becomes a sham. The problem of defining adjudicatory independence requires detailed discussion.[90] The important point here, however, is that the use of an "independent" adjudicator is a *sine qua non* of procedural due process.

Thus, it is clear that the use of an independent adjudicator constitutes a necessary condition for the realization of the instrumental value of procedural due process. An argument might be fashioned that, at least in extreme circumstances, its use may also serve as a sufficient condition. Judge Henry Friendly has noted that as the independence of the decisionmaker increases, the need for other procedural safeguards decreases.[91] Of course, the use of traditional procedural guarantees can enhance the accuracy of the decison of a well-intentioned and independent adjudicator. But if the costs of such procedures in a particular situation are prohibitive, the use of an independent adjudicator can at least assure that a good-faith effort to achieve an accurate conclusion will be made. The converse is not true.

In light of these considerations, it is surprising that the Court has not always included the right to an independent tribunal in its list of the core elements of due process. The Court has frequently included only the rights to notice and an opportunity to be heard in that list.[92] Yet in some situations even these basic elements may be abandoned without adversely affecting the factfinding process. For example, the right to an opportunity to be heard has typically required an oral hearing.[93] Yet, the advantage of

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90. *See infra* notes 144–80 and accompanying text.

91.

> [T]here is wisdom in recognizing that the further the tribunal is removed from the agency and thus from any suspicion of bias, the less may be the need for other procedural safeguards. . . . Instead of the *Goldberg* formulation permitting a welfare official (even with some involvement in the very case) to act as a decisionmaker as long as he had not "participated in making the determination under review," but requiring a corresponding heavy dose of judicialization, agencies might be offered an option of less procedural formality if the decisionmaker were not a member of the agency and of still less if, as in England, he were not a full-time government employee at all.

Friendly, *supra* note 4, at 1279.

92. *See infra* note 87.

93. In 1958 Professor Davis defined the term "hearing" as any *oral* proceeding before a tribunal." K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.01, at 407 (1st ed. 1958). Since that time,

oral rather than written presentations is at best minimal in many situations. Courts of appeals frequently decide cases on the basis of written briefs without giving the litigants an opportunity to argue the case orally, a practice which has been upheld by many courts on many occasions.[94] In the initial factfinding process, too, certain cases do not lend themselves to oral presentation. In cases involving complex, technical evidence, it is quite plausible that written presentation of evidence is more helpful than oral presentation would be.[95] Indeed, under certain circumstances, oral argument may undermine the process of accurate factfinding because it may lack precision or detail more readily captured in written form.[96]

The right to counsel is another example of a safeguard that can be denied under certain circumstances without debilitating the factfinding process.[97] Many small claims courts and administrative proceedings function without the participation of counsel,[98] and if the adjudicator is prepared to take a role consistent with the needs of the situation, there is no reason the parties cannot achieve a fair and accurate decision in such cases.[99] Similarly, without exploring them in detail, the rights to cross-

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however, he too has conceded that the answer to the question whether "due process require[s] an opportunity to present oral argument . . . is an unqualified no . . . ." 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 10.9, at 337 (2d ed. 1978).

94. *See, e.g.*, United States v. Smith, 484 F.2d 8 (10th Cir. 1973), *cert. denied*, 415 U.S. 980 (1974); NLRB v. Int'l Ass'n of Heat & Frost Insulators & Asbestor Workers, 476 F.2d 275 (3d Cir. 1973). *See generally* 2 K. DAVIS, *supra* note 93, § 10.9, at 337–39.

95. *Cf.* Richardson v. Perales, 402 U.S. 389 (1971) (holding written reports of examining doctors admissible as evidence in social security hearings); Long v. United States, 59 F.2d 602, 603–04 (4th Cir. 1932) (physician's "testimony when produced is ordinarily a mere recital of what is contained in their reports, to which they must look for the purpose of refreshing the memory; and every one with experience in conducting litigation knows that as a matter of fact such [written] reports are more reliable than the memory of the witnesses who made them"). The provisions allowing for written interrogatories in additon to oral deposition also seem to recognize that certain types of evidence are best dealt with through written submissions. *See* FED. R. CIV. P. 33.

96. Judge Friendly "object[s] to requiring oral presentation as a universal rule. Determination whether or not an oral hearing is required should depend on the susceptibility of the particular subject matter to written presentation, on the ability of the complainant to understand the case against him and to present his arguments effectively in written form, and on the administrative costs." Friendly, *supra* note 4, at 1281; *see also* Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 125–30 (1972) (discussing different techniques necessary in "polycentric controversies").

97. In the context of prison discipline, for example, the Court has recognized that "insertion of counsel . . . would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals." Wolff v. McDonnell, 418 U.S. 539, 570 (1974). Our discussion of the due process right to counsel does not, of course, deal with the independent question of the right to counsel under the Sixth and Seventh amendments.

98. *See generally* Friendly, *supra* note 4, at 1287–91.

99. The role of the adjudicator necessarily varies with the context and the ability of the litigants. In Heckler v. Campbell, 461 U.S. 458 (1983), Justice Brennan concurred in the Court's decision to allow the Social Security Administration to promulgate certain rules in place of individual adjudication of specific questions. He stressed that:

> [T]here is a 'basic obligation' on the ALJ in these nonadversarial proceedings to develop a full and fair record, which obligation rises to a "'special duty . . . to scrupulously and conscientiously explore for all relevant facts'" where an unrepresented claimant has not waived

examination, calling witnesses, and the making of a record seem to fall within the category of rights that can be done away with in certain circumstances without sacrificing the fairness of the procedure.[100] This fact distinguishes the right to an unbiased adjudicator from all the other core procedural safeguards.

We should emphasize that we do not intend to demean the importance of these various procedural protections to the attainment of the goals of due process. In many instances, their absence will—and should—be deemed to amount to a departure from fair procedure, and therefore constitute a violation of due process. Our point is, simply, that at least under certain circumstances, it might be possible to fashion a hearing that meets the requirements of due process, even though one or another of these procedural elements is absent. The same cannot be said of the use of an independent adjudicator: Once that protection is dispensed with, the provision of all other procedural safeguards cannot cure the violation of fundamental fairness. Thus, our goal is not to *devalue* the traditionally accepted procedural protections, but rather to *accentuate* the value of the use of an independent adjudicator, relative to those other protections.

Under the value-oriented due process model that we propose,[101] the fact that a procedure is necessary in order to fulfill a value is enough to show that the procedure is mandated by the dictates of due process. In view of the unique relationship that the participation of an independent judge has to the key due process value of accurate decisionmaking, it is evident that there can never be due process without a sufficiently independent adjudicator. Review of historical evidence demonstrates that the right to an independent adjudicator was considered a crucial element of procedural justice by the common law, by those that established the law of the colonies, and, perhaps most important, by the Framers of the United States Constitution. This historically fundamental role adds significant weight to the conclusion that the right to an independent adjudicator constitutes the floor of due process.

The rule *Nemo Judex in re sua*, or that no man is to be a judge in his own cause, was so central a tenet of the common law that Lord Coke insisted upon a court's right to invalidate acts of Parliament that ignored

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counsel."

Id. at 471 (quoting Broz v. Schweiker, 677 F.2d 1351, 1364 (11th Cir. 1982)).

100. *See* Friendly, *supra* note 4, at 1282–87, 1291–92. Judge Friendly points out that, as a general matter, "English judges and scholars consider that we [Americans] have simply gone mad" in our tendency to judicialize administrative procedures. *Id.* at 1269. Thus, it is all the more relevant that one of the two elements of "natural justice" which British courts hold essential in all adjudicatory contexts is the right to an unbiased adjudicator. *Id.* at 1269 n.10. *See* H. WADE, ADMINISTRATIVE LAW 175–86 (3d ed. 1971).

101. *See supra* notes 85–86 and accompanying text.

it. In *Dr. Bonham's Case*,[102] a graduate of Cambridge University brought a false imprisonment action against the Board of Censors of the Royal College of Physicians. The Board had had him imprisoned for refusing to subject himself to its competency tests. Had the Board found Bonham incompetent, it was authorized by statute to subject him to imprisonment and a fine, one half of which would go to the College itself. Lord Coke held that the statute in question could not possibly have vested a finding power in the College. The College itself was an interested party because it would reap a financial benefit by finding the accused guilty. Though Lord Coke construed the statute narrowly, had he not, the inherent bias of the tribunal would have invalidated the Act as "against common right and reason, or repugnant, or impossible to be performed."[103]

The framers brought this concern about potential adjudicatory bias from England, and a number of provisions of the United States Constitution reflect the framers' sensitivity to the problem. Indeed, several provisions of Article III show that the framers considered judicial independence crucial to the success of the new nation.

Article III provides that "[t]he Judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."[104] Hamilton characterized the good behavior provision as "one of the most valuable of the modern improvements in the practice of government."[105] In an address to the people of New York, he explained that one of the goals of the provision was to protect the judiciary from being overpowered by the other branches of government. And he continued:

> [I]t is not with a view to infractions of the constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partisan laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.[106]

Hamilton further explained that the good behavior provision was "conformable to the most approved of the State constitutions" and that the "experience of Great Britain affords an illustrious comment on the excel-

102. 77 Eng. Rep. 646, 8 Coke 114(a) (1610).
103. *Id.* at 648, 8 Coke at 118(b).
104. U.S. CONST. art. III, § 1.
105. THE FEDERALIST No. 78, at 503 (A. Hamilton) (E. Earle ed. 1937).
106. *Id.* at 509.

lence of the institution."[107] Thus, it is evident that the concern for independent adjudicators was a common theme in both the Colonies and in England.

The salary provisions of Article III were similarly designed to protect the independence of the judiciary. They were based on the premise that "[i]n the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*"[108] Finally, the diversity jurisdiction provided for in Article III[109] also points to the framers' sensitivity to the distorting effects of judicial bias. Chief Justice Marshall explained:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.[110]

That the framers worried over the more distant possibility of a court's partiality toward the resident of its own state further underscores the centrality of their concern about independence.[111]

B. *Non-Instrumental Values*

Notwithstanding its language in *Mathews*,[112] many of the Supreme Court's decisions cannot be understood in purely instrumental terms. Some of these decisions address the boundaries of procedural due process in the criminal context, but they apply equally in the civil context. Both types of cases may involve deprivations of life, liberty or property, thus bringing the due process clause into play; indeed, in many cases a non-criminal deprivation can be a more grievous loss than a criminal penalty.

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107. *Id.* at 503.

108. THE FEDERALIST No. 79, at 583 (A. Hamilton) (E. Earle ed. 1937) (emphasis in original). The Supreme Court has recently taken note of the great importance that these provisions have in ensuring judicial independence. *See* Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

109. "The judicial power shall extend to . . . controversies . . . between citizens of different states." U.S. CONST. art. III, § 2.

110. Bank of the United States v. Deveaux, 9 U.S. (5 Cranch.) 61, 87 (1809). For a general discussion of the reasons for diversity jurisdiction, see Friendly, *The Historic Basis of Diversity Jurisdiction,* 41 HARV. L. REV. 483 (1928).

111. The possibility of bias in favor of a fellow state resident is certainly far more remote than many situations in which the Court has refused to disqualify itself. *See infra* notes 150–80 and accompanying text.

112. Mathews v. Eldridge, 424 U.S. 319 (1976). *Mathews*'s emphasis on instrumental values is discussed *supra* at note 77 and accompanying text.

Thus, the criminal due process cases are fertile ground for discovering due process values.

The cases on coerced confessions are prime examples of the Court's merging of instrumental and non-instrumental values. In *Brown v. Mississippi*,[113] the Court overturned a conviction based on confessions that had been obtained after a number of brutal beatings. If accurate factfinding were the only objective of the cases beginning with *Brown*, one would expect the Court to have found that any obviously true confession, whether or not coerced, is admissible. But the Court sought a broader rationale, explaining that "neither the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake."[114] These non-instrumental values are discussed more fully in the next section of this Article. The point here is that these values inform at least some of the Court's due process cases.[115]

C. *Evaluating The Non-Instrumental Values*

Professor Mashaw's thorough canvassing of the values underlying his dignitary due process theory provides a useful springboard for our analysis.[116] In discussing these values, we must determine the extent to which each is truly "non-instrumental." In other words, to what degree is each value actually separate and distinct from the "instrumental" concern of producing an accurate finding? Our analysis will demonstrate that most of the proposed values are inherently tied to the instrumental justification, and cannot be separated from the individual's interest in his entitlement. Because each of them, with one possible exception, is a variation on the instrumental theme, each of them, in the end, requires the same basic

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113. 297 U.S. 278, 287 (1936).

114. Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

115. Some academics have argued that no due process case is explainable on purely instrumental grounds, at least after *Roth* and *Sindermann*. This argument has been raised as a response to the "paradox" that those two cases created when they held that the legislature has uncontrolled discretion to shape substantive rights, while courts are responsible for defining the procedures necessary before an individual can be deprived of those rights. If due process protects only instrumental concerns, commentators argue, it makes no sense for courts to involve themselves at all. But, argue these scholars, there is a wide array of non-instrumental values that do justify—and in fact mandate—judicial definition of due process. *See, e.g.*, Mashaw, *supra* note 3; Michelman, *supra* note 3. Because Easterbrook's positivist position basically writes due process out of the Constitution, *see supra* notes 37–66 and accompanying text, this alternative explanation appears quite attractive.

But the relevance of the non-instrumental concerns is not dependent on the fact that they offer a solution to the paradox. Even if one accepts some alternative solution to the paradox, the fact remains that due process, as we have understood it for the past century, does take into account issues that go beyond the substantive outcome of a case. The fact that these theories have been advanced in response to the "paradox" does not mean that their viability is contingent upon the existence of the "paradox." Although the non-instrumental approach might prove unnecessary to respond to the "paradox," it is, indeed, necessary to a full understanding of the values that due process protects.

116. Mashaw, *supra* note 3, at 899.

procedures for its achievement. As we have already shown, attainment of the instrumental value demands use of a truly independent adjudicator. Therefore, logically the same must be true for the so-called "non-instrumental" values. In any event, we will show that, wholly apart from their link to the accuracy concern, none of the so-called "non-instrumental" values can be accomplished without the participation of an independent adjudicator.

1. *The Appearance of Fairness*

The goal of fostering an appearance of fairness represents the flip side of the accuracy value embodied in the instrumental approach. The instrumental approach views accuracy as the ultimate goal, and defines the value objectively. The goal is to apply efficiently a broad legislative choice to specific factual contexts, and the test of a procedure's utility is its capacity to implement that legislative criteria with observable success.

But not all deviations can be observed, and given two untested procedural models, the accuracy value cannot mandate that one be utilized instead of the other. At this point, the value of appearance-of-fairness becomes relevant. It requires that even if a given procedure does not clearly advance the goal of accuracy, it is nonetheless worthwhile insofar as it "generate[s] the feeling, so important to a popular government, that justice has been done."[117]

Of all the values informing the due process guarantee, the perception-of-fairness value most clearly dictates use of a truly independent adjudicator. Whether or not it can be proven that a particular decisionmaker allows her personal interests to sway her resolution of a dispute, the perception-of-fairness value demands that she be enjoined from deciding the case if she has some identifiable *potential* bias. Few situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors.

The Supreme Court has forcefully recognized this truth. Describing its prophylactic rules regarding disqualification of judges, the Court explained that "[s]uch a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, '*justice must satisfy the appearance of justice.*'"[118] There can be little question that use of a truly independent adju-

117. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171–72 (1951) (Frankfurter J., concurring).

118. *In re* Murchison, 349 U.S. 133, 136 (1955) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)) (emphasis added).

dicator is essential to attainment of this goal. Indeed, if there exists any reasonable doubt about the adjudicator's impartiality at the outset of a case, provision of the most elaborate procedural safeguards will not avail to create this appearance of justice.

2. *Equality*

One value that might conceivably be fostered by procedural due process is the goal of equality. According to Mashaw, the equality value demands that "the techniques for making collective decisions not imply that one person's or group's contribution (facts, interpretation, policy argument, etc.) is entitled to greater respect than another's merely because of the identity of the person or group."[119] To a certain extent, the goal of equality is uncontroversial, though at most its attainment amounts to a necessary, not a sufficient, condition for the realization of due process.[120] Perhaps most important, it is evident that the equality principle represents no values independent of those embodied in the instrumental approach.

Professor Summers claims that the question of procedural fairness, or equality, is wholly separate from the question of who wins or loses. As he explains, "an adjudicator might choose to hear only one side via both oral and written briefs, but the other side via only written briefs. . . . Whether the advantaged party wins or loses, the procedure itself is unfair, for the adjudicator does not accord equal procedural rights to parties similarly situated in relevant respects."[121] But why are the parties, or society for that matter, concerned about this bias if not because it might alter the outcome of the case? It is probably true that even an inequality in procedure that does not relate to the outcome of the case could be deemed an affront to dignitary values. For example, there can be little doubt that a procedural rule allowing the friends and relatives of a white litigant to sit near the front of the courtroom while requiring those of a black litigant to sit in the back would violate the equality principle, even though it is difficult to see how such an inequality could have a substantial impact on the case's outcome. But to the extent that such inequality is unrelated to the case's outcome, it would seem to be a part of a broader concern for equality that pervades *all* rules governing the lives of individuals. Thus, the fact that equality in this sense also reaches judicial and administrative

119. Mashaw, *supra* note 3, at 899.

120. As Mashaw recognizes, equality is a thin protection for due process, even on a theoretical level. "If we provided everyone confronting any administrative decision with the process made available to K in *The Trial*, equality would be maintained, but the protection afforded individual self-respect would be modest indeed." *Id.* at 901 (footnote omitted).

121. Summers, *Evaluating and Improving Legal Processes—A Plea for Process Values*, 60 CORNELL L. REV. 1, 25 (1974).

procedures does not make it a unique aspect of procedural due process. To the extent that equality is integrally bound up with procedural due process, it would seem to be part of a broader concern for reaching an accurate result. If procedures are employed that unfairly or irrationally give an advantage to one side over the other,[122] the danger arises that the ultimate finding will also be unfairly influenced.

Viewed in this light, there can be no doubt that the goal of procedural equality requires the use of a truly independent adjudicator. Indeed, use of a non-independent adjudicator represents the essence of procedural inequality: even if the parties are equally afforded every other procedural protection, the most rudimentary equality cannot be achieved if the adjudicator is subject to irrational factors that skew her decisionmaking towards one of the litigants.

3. *Predictability, Transparency and Rationality*

The values of predictability, transparency and rationality all relate to the "participants' ability to engage in rational planning about their situation, to make informed choices among options."[123] This value, which Summers calls "procedural rationality,"[124] constitutes part of the essential groundwork of a successful legal system. As Lon Fuller has stated, "[c]ertainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him."[125] Although revelation of legal rules usually arises from statutory sources or prior judicial decisions, revelation of the reason for government action in a particular case frequently requires some individualized process of explanation.

But is this value separable from "good result efficacy"?[126] Summers argues that "of two legal processes yielding more or less the same results, only one of which is a rational process, we should generally prefer the rational one."[127] But is not the reason that we prefer the rational process because in the long-run we estimate that it will indeed achieve better results? Indeed, perhaps the decisionmaking process is rational or irrational

122. It is, of course, conceivable that a particular procedure will seem to provide an advantage to one litigant over another, yet still not violate the equality principle. This is because, in certain instances, provision of an advantage to one litigant is rationally dictated by external considerations. For example, one party will bear a burden of production or persuasion not borne by the other party. In this instance, whatever inequality that exists between litigants is dictated by rational considerations. Similarly, some apparent inequalities might be justified inasmuch as they represent legitimate efforts to reverse already existing procedural advantages. *See Mashaw, supra* note 3, at 900–01.

123. Mashaw, *supra* note 3, at 901.

124. Summers, *supra* note 121, at 26.

125. L. FULLER, THE MORALITY OF LAW, 39 (Rev. ed. 1969).

126. Summers, *supra* note 121, at 26.

127. *Id.*

precisely according to its efficacy in achieving good results. Accuracy—a wholly instrumental value—may indeed be the defining characteristic of rationality.

More fundamentally, it is dangerous to create an illusion of predictability when the decision was in fact reached on the basis of irrational factors. As Mashaw explains, "[i]n the end, there must also be some guarantee, usually by articulation of the basis for the decision, that the issues, evidence, and processes were *in fact meaningful to the outcome.*"[128] Without this assurance, the appearance of procedural fairness is a sham causing more harm than good. The deprived individual may be lulled into believing that he has contributed to the decisionmaking that so importantly affects him. His inaccurately positive perception of reality is likely to diminish his motivation to bring about the type of political change that would afford him real benefit—*i.e.*, a substantive entitlement.[129]

When an adjudicator injects irrelevant factors into the decisionmaking process because she is biased, the values of predictability, transparency and rationality are vitiated. Individuals cannot accurately plan their actions, for the decisionmaker has abandoned the course shaped by the law in her reliance on illegitimate considerations. Without a sufficiently independent adjudicator, therefore, these values cannot be protected. By contrast, the elimination of some other procedures would not automatically threaten the achievement of these values. As long as the procedural rules are set out in advance, in certain cases these values can still be fulfilled without the rights to oral presentation, cross-examination and the like.

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128. Mashaw, *supra* note 3, at 901 (emphasis added) (footnote omitted).

129. Indeed, it has been suggested that the entire substance/procedure dichotomy can be explained in terms of political and administrative goals. *See* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1258–63 (1982). By forcing a state to announce its decision in substantive rather than procedural terms, the court ensures that the citizenry is aware of the real nature of state action. The theory is of course based on the proposition that the public is more aware of a legislature's decisions on *substantive* matters than on *procedural* matters. Easterbrook argues that it is not true "that procedural rules are less visible [insofar as] there are lots of poorly perceived substantive rules." Easterbrook, *supra* note 3, at 111; *see also* Allen, *The Restoration of* In Re Winship: *A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 44 n.60 (1977) (no documentation that there is ". . . *significant* differential in the public's understanding of substantive and procedural rules") (emphasis in original). It seems beyond doubt, however, that the media and the public are typically far less involved in procedural minutae than they are in substantive issues. It is not generally understood that a tiny procedural nuance can have a huge effect on the question of who is entitled to a given benefit. *See* Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1323–25 (1977) (discussing "truth-in-labeling" function to remedy public's misunderstanding of procedural rules).

4. *Participation*

The value of participation in the decisionmaking process appears on the list of virtually every author who discusses nonformal approaches to due process.[130] Michelman explains that:

> the individual may have various reasons for wanting the opportunity to discuss the decision with the agent. Some pertain to external consequences: the individual might succeed in persuading the agent away from the harmful action. But again a participatory opportunity may also be psychologically important to the individual: to have played a part in, to have made one's apt contribution to decisions which are about oneself may be counted important even though the decision, as it turns out, is the most unfavorable one imaginable and one's efforts have not proved influential.[131]

Aside from this individual psychological benefit, Michelman also describes a societal benefit derived from participation. Affording an individual an opportunity to participate in the proceedings, he posits, counters the perception of an atmosphere in which public officials act silently or secretively, without interchange with those whom their actions affect.[132]

The two values that Michelman sees in nonformal procedures, revelation and participation, are mirror images of each other. Under the revelation value, the participant is a passive listener trying to digest as much information as possible. By contrast, in his participatory role, the individual attempts to communicate his feelings to the opposing party and to the decisionmaker. This participation only makes sense, though, if the individual harbors some hope of bringing about substantive change in the state agent's action or attitude. Of course, the change in attitude might affect only future cases, not this participant's situation, but nonetheless the focus remains results-oriented. We value participation because we believe that it can bring about a different outcome. Even as Michelman defines it, participation means "full and frank interchange,"[133] and thus focuses on the litigant's opportunity to inform the agent in the hopes of changing her decision.

The connection that many have drawn between "control" and "participation" demonstrates the inseparable connection between participation

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130. In fact, the Supreme Court has characterized the "two central concerns of procedural due process" as "the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

131. Michelman, *supra* note 3, at 127.

132. *Id.* at 128.

133. *Id.*

and result efficacy.[134] Imagine a situation in which the state agent announces that his mind is absolutely made up and that he will not reconsider his decision. Does participation at that stage afford any opportunity for "control" over one's own destiny? Would there be any benefit to allowing participation after a decision has been implemented irrevocably? There may be something to be said for allowing an individual to "vent" his feelings through access to his decisionmaker even then. But there are myriads of other, more politically effective, ways of releasing steam, and it is hard to believe that the Constitution mandates a confrontation for frustration's sake alone. More important, the deprived individual may be unaware that he is merely letting off steam. He is again being misled into believing that he has a participatory role, when in reality he does not.

We can say, then, that the participation value recognizes an individual's interest in confronting the decisionmaker in order to attempt to persuade her to rule in his favor, or alternatively, simply to gain the psychological satisfaction of having had some input into the decision. As far as the first interest goes, it is obvious that the ability to persuade presupposes a persuadable decisionmaker. Though it cannot be said that there is absolutely no chance of persuading a decisionmaker who has some predispositions or biases, it is certainly far less likely. A system that holds itself out as promoting this value cannot tolerate the input of a decisionmaker whose presence so dilutes the possibility of meaningful participation. Indeed, the Supreme Court has recognized that the "requirement of neutrality in adjudicative proceedings safeguards . . . the promotion of participation and dialogue by affected individuals in the decisionmaking process."[135]

The second aspect of the participation value recognizes the individual's psychological interest in getting his point of view across to the decisionmaker, even if there is absolutely no chance of changing the decisionmaker's mind. Though it is debatable whether this "steamletting" function really amounts to a due process requirement, the participation of an independent decisionmaker can substantially further the goals of such a function. For example, when a non-tenured professor is fired, fulfillment of the participation value requires that even though the dean's decision is final, the professor still has some interest in getting his point of view across. Toward this end, a number of scholars have suggested that due process requires the opportunity for an informal personal encounter between the two.[136] But what possible assurances are there that the dean will do anything more than give the professor the chance to scream while

134. *See, e.g.*, Saphire, *supra* note 3, at 160-63.

135. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

136. *See, e.g.*, Michelman, *supra* note 3; Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 78 (1976).

the dean pays absolutely no attention? If it is important to ensure that the professor have the opportunity to *communicate with* the dean, and not just *talk to*, or *at* him, then some independent monitor is needed to take the steps necessary to ensure that the dean pays attention.[137] The independent figure could impose procedures that guarantee at least a minimal amount of meaningful communication between the participants.[138]

5. *Revelation*

The value of revelation seems to be truly unrelated either to the outcome of the case or to any hope of changing that outcome. As explained by Michelman:

> The individual may have various reasons for wanting to be told why, even if he makes no claim to legal protection, and even if no further participation is allowed him. Some of those reasons may pertain to external consequences: the individual may wish to make political use of the information, or use it to help him ward off harm to his reputation. Yet the information may also be wanted for introspective reasons—because, for example, it fills a potentially destructive gap in the individual's conception of himself.[139]

All three of these potential uses of information concerning decisions governing liberty and property interests are distinct from any effort to alter the outcome of the case. Nonetheless, Michelman arguably misses the most crucial contribution of revelation—affording the individual and others the opportunity to base their future behavior on more complete information. For example, a professor might take a job with a university confident that, though he has no legal entitlement, the dean will deal humanely with him. If he is later told upon termination that he was fired for no reason, then he and others will use this information when considering whether to accept non-tenured positions in the future—both with this particular dean and in general.

But the fact that the goal of the revelation value is separate from that of the more formal values does not mean that attainment of that goal constitutes a sufficient condition for the preservation of the "dignitary" interests

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137. It has been proposed that a litigant might be allowed to insist that he be given an opportunity for oral presentation "so that the arguer will have some small assurance that his views have reached the decider's ears if not his mind." W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW: CASES AND COMMENTS 814 (7th ed. 1979).

138. These procedures might include a requirement that the decider make a point-by-point report of her position on each of the issues raised by the litigant. Such a requirement is already in place for formal adjudication and rulemaking under the Administrative Procedure Act. 5 U.S.C. § 557(c) (1982).

139. Michelman, *supra* note 3, at 127.

thought to be served by procedural due process. An official's revelation that he has acted arbitrarily in dealing with an individual, though perhaps helpful in certain senses to the individual, does not, in and of itself, treat that individual with dignity. As long as the individual can do nothing to alter the outcome, the revelation does not alter the morally unacceptable fact of arbitrary governmental treatment.

Moreover, it is by no means clear that the methods generally deemed necessary to attain the revelation value are likely to bring about the sought-after result. Unlike those nonformal values that share procedures with the formal approach, the revelation value, according to commentators, requires a direct, non-coerced meeting between the agent and the individual at which the individual would receive a basic explanation about the nature of the decision taken or to be taken. Yet a superior is unlikely to tell his fired employee that he was fired for "no reason," even if that were the case. Rather, the employer may focus upon some aspect of the worker's character or work performance and attribute the termination to that. Alternatively, there may be a real reason for the termination which the employer feels uncomfortable telling the employee. Therefore the employer may invent some other reason or attribute the firing to his own arbitrariness. In either case the employee has not benefited by the revelation. He and other interested people are perhaps better off acting in the future on the basis of their own assessments of what happened, rather than upon the false or ambiguous reasons given by the employer.

Michael Perry recognizes that a revelation entitlement is a tenuous one. But, he argues, "except with respect to officials acting in bad faith—and there is no reason to assume that most do—a requirement to give a fair explanation could be expected to have some effect."[140] It is true that most officials do not act in bad faith. But legal rules are made with the bad official—not the good one—in mind. The good supervisor would take his employee aside and provide an explanation for his firing, whether or not it was constitutionally required. But in shaping the behavior of supervisors who would not otherwise provide explanations, it is not at all clear that those officials will always, or even often, be truthful in their revelations.

Further, although the revelation principle does represent values distinct from those explicitly recognized in the traditional, instrumentalist approach, its costs are high. Those costs do not relate only to the fiscal burden that the new procedures would place on government agencies. If those were the only costs, they would have to bow before any serious due pro-

140. Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383, 428 (1977).

cess claim.[141] Rather, the costs involve the dilution of the due process guarantee.

The informal interchange required by the revelation value would be undermined by the intrusion of a neutral, third party adjudicator.[142] However, the problem with such an informal approach, as we have shown, is that it does not guarantee accurate revelation. The participation of an independent figure, on the other hand, can ensure some degree of accuracy. For example, the independent figure could require the production of particular evidence that would ensure, to a much greater degree, accurate revelation. Absent such control, the revelation principle threatens to serve not as a supplement to the accuracy goal of due process, but as a replacement for it. It is therefore apparent that even the paradigmatic non-instrumental value requires the participation of an authoritative, independent figure for its realization.

6. *Privacy-Dignity*

There is strong support in the Supreme Court's decisions for the proposition that the government violates due process when it invades individuals' dignitary rights through physical or mental intrusion.[143] The line of cases condemning coerced confessions exemplifies this principle. But this concern for individual autonomy is not relevant to the discussion here. Unlike other nonformal values that call for *added* procedures, the privacy value only restricts the way in which procedures can be carried out. It is a negative, rather than a positive, mandate, which has no impact on the types of procedures necessary to justify a deprivation of due process or on what procedures best serve that value.

V. Defining Adjudicatory Independence

Examination and application of the due process values—both instrumental and non-instrumental—demonstrate that none can be realized without the participation of an independent adjudicator. Though the participation and revelation values should not be treated as part of the core of due process, even their vitality depends upon the participation of some independent person. "Independence," however, is a vague and relative term. The requirement of an "independent adjudicator," when described abstractly, seems relatively uncontroversial. The greatest difficulties arise in determining what degree of independence will satisfy the due process requirement.

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141. *See supra* notes 79–86 and accompanying text.
142. Saphire, *supra* note 3, at 165 n.239.
143. *See* discussion at *supra* notes 113–14 and accompanying text.

A. *The Scope of the Problem*

It is useful to divide the situations that threaten the independence of the adjudicator into three categories of partiality.[144] First, the decisionmaker may have a financial stake in the outcome of the case. Second, the decisionmaker may have some personal bias toward a party in the case. Finally, the decisionmaker may be predisposed toward a certain position that a party maintains in the case. These categories of bias differ mainly in degree, not in kind. Each of these predispositions is potentially threatening, and it would be difficult to measure just how much temptation there exists in each instance. Indeed, in the best of all possible worlds, even the slightest possibility of bias would be sufficient to disqualify a judge from hearing a case. But under such a scheme there would probably be no one left to adjudicate anything. Reality forces us to tolerate some bias. The degree of bias that we are willing to tolerate should be limited, however, by our ability to avoid it. If, in a given circumstance, it is not extremely burdensome to remove potential bias, the fact that the bias is relatively slight should not justify the failure to avoid it.

The idea of tolerating potential biases out of necessity is not a new one. Indeed, it can be traced back over five and a half centuries.[145] The Supreme Court's most recent affirmation of the necessity doctrine came in *United States v. Will*.[146] In that case, the Court had to decide whether Congress could constitutionally reduce previously authorized cost of living increases for article III judges. Any decision would directly and substantially affect the finances of every federal judge, and the Court had long held that financial interest represents the strongest type of temptation to an adjudicator. The Court nonetheless held that it was not disqualified, reasoning that "although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise."[147]

In a sense, of course, use of the term "necessity" in this context is disingenuous. Rarely, if ever, would it be truly impossible to provide independence. In *Will*, for example, reliance on article III judges could have been circumvented by relying exclusively upon the state judiciaries, whose judges are not predisposed to either side of the case and who are fully competent and obligated to adjudicate issues of federal constitutional

144. This categorization is roughly based on Professor Davis's description of five kinds of bias. K. DAVIS, *supra* note 93, § 19:1, at 713.

145. In United States v. Will, 449 U.S. 200 (1980), the Court traced the origin of the necessity rule to the Chancellor of Oxford in 1430. The Court pointed out that many early cases "confirmed the vitality of the Rule" in this country as well. *Id.* at 213–14.

146. 449 U.S. 200.

147. *Id.* at 213 (quoting F. POLLACK, A FIRST BOOK OF JURISPRUDENCE 270 (6th ed. 1929)).

law.[148] However, the opportunity for a uniform, dispositive judicial resolution of this delicate constitutional issue—a resolution that could come only from the United States Supreme Court, itself composed of article III judges—would have been lost through such a means. Each of the fifty state court decisions on the issue would have constituted a binding construction of federal constitutional law. Federal judges in some states would benefit from a finding of the unconstitutionality of the challenged congressional action, while those in other states would not receive such protection. Such inconsistency in interpretation on so important and difficult an issue of constitutional law is perhaps best avoided. However, it would be incorrect to characterize Supreme Court resolution of the matter as "necessary." Although the potential for interstate inconsistency on the question is certainly to be deplored, it would surely be an exaggeration to view it as an "impossible" result. Use of the term "necessity" tends to convey a misleading sense of inescapability that disguises the delicate analytical process that is actually conducted.

Under our analysis, a particular procedure essential to the attainment of the values served by procedural due process can be discarded only upon the showing of a truly compelling government interest.[149] Moreover, we frankly acknowledge, as the *Mathews* test did not, that the denial of a procedure does not satisfy the demands of due process, but instead constitutes one of the exceptional situations in which the constitutional protection must yield to the competing interest. In *Will*, unlike all of the other cases in which the issue of judicial independence rises to the level of due process, the potential for undue influence is actually in favor of the *individual litigant*, rather than the government. The Justices' possible bias in the case favored the federal judges who were challenging the congressional action, because their own financial interests would have been directly improved by a finding in favor of the judges. Although as a general matter *any* judicial bias should be avoided, the purpose of the due process clause—and indeed, of the entire Bill of Rights—is to protect the individual against the government. Arguably, then, the potential for judicial bias in *Will* does not even implicate the due process clause, because it negatively affects only the government. At the very least, the concern for judicial independence is so diluted in such a situation that it is overcome with relative ease by the competing need for a dispositive, unifying Supreme Court decision on an important and unsettled constitutional issue.

In other cases, the problem of cataloging the factors that should be deemed sufficiently compelling to override the interest in having an inde-

148. *See* Testa v. Katt, 330 U.S. 386 (1947) (state courts have duty to adjudicate claims arising under federal law).

149. *See supra* notes 79–86 and accompanying text.

pendent adjudicator is more complex. One possible method of resolving the question focuses not on the nature of the competing interest, but on the definition of "independence." In other words, we might simply define the term in such a manner that, as a practical matter, it would avoid most conflicts with competing interests. For example, we might exclude from the prohibited category cases in which there exists merely the *potential* for an improperly influenced decision, confining it to those cases in which it can be demonstrated that the adjudicator's decison was in fact influenced by improper factors. As so defined, the concept of independence would only rarely conflict with other interests, because it would only rarely be found to be absent.

Such a definition must be rejected, however, both because it insufficiently protects the values served by procedural due process and because it is unrealistic and impossible to apply. It is extremely difficult to marshall objective evidence that an adjudicator's decison was, in fact, the product of improper influence. In many instances the pressures on an adjudicator may be so subtle that not even she is aware that her decison has been shaped by improper influences. Thus, if it is to be at all meaningful, the concept of adjudicatory independence must be interpreted to require at least some prophylactic protections against improper external influence.

In the following sections, we will examine three different issues: (1) the types of external influences that may threaten an adjudicator's independence; (2) the degree to which prophylactic protections of independence should be required by the due process clause; and (3) the circumstances, if any, in which the due process requirement of prophylactically protected independence may be overcome by compelling government interests. A resolution of these issues will indicate the degree to which prophylactic protections must extend in order reasonably to assure adjudicatory independence.

B. *Threats to Adjudicatory Independence: Delimiting the Scope of the Prophylactic Guarantees*

1. *Direct Financial Interest*

The decisionmaker who has a direct financial interest in the outcome of a case presents perhaps the clearest instance of partiality. As early as 1610, at the time of *Dr. Bonham's Case*,[150] the proposition that no man can judge a case in which he has a financial interest was firmly established. Since that time, courts and legislatures, including the United States Supreme Court, have repeatedly held that "officers acting in a judicial or

150. 77 Eng. Rep. 646, 8 Coke 114a (C.P. 1610).

quasi-judicial capacity are disqualified by their interest in the controversy to be decided."[151] But at the same time that it so held, the Court cautioned that "[n]ice questions . . . often arise as to what the degree or nature of the interest must be."[152]

In *Tumey v. Ohio*,[153] the Supreme Court's first decision on judicial impartiality, Tumey had been convicted of unlawful possession of intoxicating liquor by Mayor Pugh of North College Hill, Ohio. Under the Ohio statute, one half of whatever fine was imposed went to the State and the other half went to the township, municipality, or county that prosecuted the case. North College Hill had, in turn, passed an ordinance providing that, in the case of a conviction, the Mayor would receive his costs in each case from the village's share. In a unanimous decision, the Court held that the scheme violated the due process clause of the Fourteenth Amendment.[154] Importantly, the Court's holding was not based on a finding that the Judge-Mayor was *in fact* partial. There was no evidence to indicate that he had actually taken his financial interests into consideration in deciding the cases. Nor was there any evidence that might have implicated him circumstantially. The Court seemed to recognize that actual influence could rarely be proven. The Court was thus willing to create a prophylactic rule of law disqualifyng judges when the objective circumstances increased the likelihood of actual influence. The Court's decision, however, also regarded potential financial influence as an evil in itself. The perception of unfairness that a financial interest creates was a factor in the Court's analysis.[155]

The legal standard in *Tumey*—"possible temptation to the average man as a judge"—has not been seriously disputed. There has, however, been considerable debate as to how much and how direct a financial interest must be to create the "possible temptation." The Court has required neither analysis of the judge's financial position nor inquiry into the effect of a particular biasing factor on the judge's frame of mind. In light of the severe practical barriers to conducting such analyses and the substantial dangers to judicial independence that derive from such financial pres-

151. Tumey v. Ohio, 273 U.S. 510, 522 (1927); *see also* Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972).

152. *Tumey*, 273 U.S. at 522.

153. 273 U.S. 510 (1927).

154. The Court held that paying a judge for his services only when he convicts cannot be regarded as due process of law, "unless the costs usually imposed are so small that they may be properly ignored as within the maxim *de minimis non curat lex* [the law does not care for trifling matters]." *Id.* at 531. Under our model, of course, even such minimal payments are intolerable if they are avoidable. Indeed, the Court seems to have come to this conclusion as well. *See* Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 148 (1968) ("Nor should it be at all relevant . . . '[t]hat the payments received were a very small part of [the arbitrator's] income.'").

155. 273 U.S. at 533. The Court was explicit regarding its pursuit of the appearance of justice in Offutt v. United States, 348 U.S. 11, 14 (1954).

sures,[156] it seems reasonable to conclude that *any* financial temptation, regardless of how indirect or insubstantial, presents a *possibility* of temptation.

This conclusion has considerable relevance for the current appointment practices that pervade state judiciaries. Unlike article III federal judges, most state court judges do not enjoy salary and tenure protection.[157] Rather, they are appointed or elected for fixed terms, and are subject to legislative control. At the close of the term, the judge must stand for reappointment or re-election. Yet such judges are often called upon to decide cases involving the very person who holds the appointment power—typically the Governor[158]—or to rule in cases involving a constitutional challenge to legislation enacted by a body that could lower judicial salaries. In the case of election, the role of party politics makes this problem equally severe because the judge is usually dependent on the party for an endorsement.[159] Although the level of undue influence may be less than in a case like *Tumey* in which the judge stands to gain or lose financially as a direct result of her decision in each case, this situation offers "possible temptation to the average man acting as a judge . . . which might lead him not to hold the balance nice and clear" between the parties to the suit.

Thus, if no costs were incurred as a result, the due process guarantee would seem to require constitutional protections of state judicial salaries and tenure to remove possible bias in those cases in which a liberty or property interest is asserted and the state or a state agency is a party to the case. As the framers of article III apparently assumed, absent such

156. At a minimum it is unlikely that there can be any real *proof* of the role of subconscious motivation in any decisionmaker's thought process. In Withrow v. Larkin, 421 U.S. 35 (1975), however, the Court seemed to demand such proof when it stated that, in order to overcome a presumption of honesty and integrity of administrative officials, a party must "convince the court that, under a realistic appraisal of psychological tendencies and human weakness[es]" a combination of investigatory with adjudicative functions poses an undue risk of partiality. *Id.* at 47. The error in the Court's analysis is its preoccupation with the presumption of integrity. One need not doubt the integrity or honesty of an official to argue that it is inevitable that personal factors will, perhaps subconsciously, enter his mind.

157. Only Massachusetts, New Hampshire, and Rhode Island afford life tenure to all their judges. New Jersey affords life tenure to judges only after they have been reappointed from their first set term. *See* L. BERKSON, S. BELLER & M. GRIMALDI, JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS 277 (American Judicature Society 1981).

158. In states that elect judges, the problem is a bit more subtle, but nonetheless real. First, in many elections, the support of the party leaders is essential. Second, when there is a clear consensus among the electorate as to a desired outcome, the pressure on a judge to decide the case that way is just as extreme, and just as illegitimate, as when the pressure emanates from a single political figure.

159. Of the 47 states without life tenure, 9 hold partisan elections for all judgeships (first or subsequent term), 13 hold non-partisan elections, 16 have judicial retention elections where the judge runs unopposed but must receive a specified percentage of the vote, and 9 have provisions for reappointment. L. BERKSON, S. BELLER & M. GRIMALDI, *supra* note 157.

prophylactic protections, there is no way to assure the necessary judicial independence.

The problem, of course, is that recognition of a due process right to state judiciaries with salary and tenure protections would dictate a substantial restructuring of the judicial organization in most states,[160] resulting in significant new burdens and costs to the states. Thus, the problem of ensuring the independence of state courts squarely presents the question of when these additional costs outweigh the need for prophylactic protections of adjudicatory independence.

Yet balancing of increased administrative costs against the need for adjudicatory independence is a dangerous practice. The goal of procedural fairness necessarily implies an imposition of financial costs and administrative burdens that would not otherwise exist absent the due process requirement. Frequent reliance upon this factor to overcome the need for a procedural protections might well consume the entire concept of due process. Further, as noted above, in weighing immediately recognizable costs against benefits which, though of substantial importance in the long run, may be more difficult to recognize, this balancing inevitably favors the government.[161]

Thus, arguably an increase in financial cost and administrative burden should never overcome the need for even broad prophylactic protections of adjudicatory independence. In any event, that the financial costs imposed by insulation of judicial salary and tenure are not prohibitive is evidenced by the fact that article III of the United States Constitution has imposed similar costs on the federal government for almost two hundred years.

Providing salary and tenure protection to all state judges, however, might be thought to carry with it huge non-financial costs, for states would no longer be able to insure judicial competence through the political process. However, because the problem of bias is strongest when the state itself is a party, it would not be necessary for the states to provide salary and tenure protection to every state judge to avoid the problem of undue bias.[162] Rather, a select group of proven judges could be appointed to the court that would hear this category of cases.[163] Finally, the federal

160. Presumably, this constitutional requirement would not apply to cases in which the state was not a party, or in which no liberty or property interest was asserted.

161. *See* discussion *supra* at note 83.

162. In the typical case between private litigants affecting private rights, there is likely to be no pressure upon the judge to rule in a certain way for political reasons. But there are a number of cases, such as private civil rights actions or antitrust actions, where political pressure might be applied, or where the judge might at least know how the people in charge would like him to rule. For this reason, the preferred system would include salary and tenure protection for *all* state judges. The alternative suggested in the text should not come into play unless the state can show a significant need for maintaining direct oversight over a group of judges.

163. New Jersey's system of providing life tenure for judges who are reappointed after a first

Constitution would seem to settle the question of which interest—independence or accountability—should be constitutionally fostered within the judicial branch. There is no evidence that the state courts differ from the federal tribunals in a way that modifies the balance that the framers achieved for the federal system.[164] Thus, in cases involving the assertion of a liberty or property interest in which the state is a party, the use of non-tenured state judges seems to be a clear violation of procedural due process. The potential for bias can be removed without unacceptable costs.

Federal judges may also feel pressure to decide certain cases for reasons of self-interest. A district court judge with aspirations for an appointment to the court of appeals may be tempted to please the President with his decisions.[165] This same problem occurs when a number of court of appeals judges are considered candidates for an appointment to the Supreme Court. This problem is most severe when a case involves heated political issues or claims against the President himself. There is potential for bias in this situation, but this case differs from the state judge context because it is not possible to change this state of affairs without incurring huge institutional costs. The only remedy would be to disqualify all judges from elevation within the judiciary, or, for that matter, from appointment to any other branch of government. Such a system would deprive the higher courts of many able lower court judges, currently the largest pool for higher judicial appointments. Moreover, few people would be willing to accept a lower court appointment knowing that it would effectively lock

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term of set years is an example of the type of program that could be implemented. *See supra* note 157.

164. It should be emphasized that we do not argue that Article III applies of its own force to the states. Rather, we contend that the Fourteenth Amendment's due process clause should today be construed to incorporate by reference the standards of judicial independence imposed by Article III upon the federal judiciary.

165. *See* Macey, *Conservative Judgment Time*, Wall St. J., Aug. 23, 1985, at 14, col. 4:

> Everyone knows that for you to get a promotion, the boss must be happy with your work. This appears to hold true in the process that will decide who will fill the next U.S. Supreme Court vacancy. Frank Easterbrook, Richard Posner, Robert Bork and Antonin Scalia are the four federal appeals court judges most widely perceived to be in contention. In their recent opinions and scholarly writings, each of these men is now sending President Reagan subtle but unmistakable signals, through slight changes in philosophy, that he is the man for the job.

But see L'Acovara, *A Talk with Judge Robert H. Bork*, DISTRICT LAWYER, May/June 1985, at 33, where Judge Bork stated:

> I don't know of anybody who has written anything differently or decided differently because of [the screening process for Supreme court appointments]. . . . Obviously when you're considering . . . a judicial appointment, you would like to know what that man or woman thinks, you look for a track record, and that means that you read any articles they've written, any opinions they've written. That part of the selection process is inevitable, and there's no reason to be upset about it.

The promotion problem has received some attention as it applies to the Administrative Law Judge system. Attorney General Katzenbach recognized that the "carrot of [a promotion] could be used to exert a subtle influence on the examiner to decide as the agency wishes. . . . Congress recognized that such possibilities can never be wholly eliminated. . . ." 42 Op. Att'y Gen. 289, 299 (1964).

them into that position forever. Thus, in the case of federal judges the potential for undue influence should probably be tolerated, though this conclusion is by no means free from doubt.

One final example of a situation in which financial self-interest may tempt the adjudicator is decisionmaking by an Administrative Law Judge (ALJ). ALJs occupy their positions for an unlimited number of years and are removable for cause.[166] That tenure is unlimited in years alleviates the problem faced by many state judges, but the "for-cause" removal provision constitutes an even greater invasion of independence.

Evidence suggests that various agencies have used the possibility of removal as a tool for coercing decisions that are consistent with the agency's wishes.[167] Through its authority to "review" an ALJ's competence and work habits, the agency can quite directly make its irritation known to a judge and his colleagues. As in the case of the state judiciaries, however, a system so replete with potential encroachments on adjudicatory independence could be rectified with a minimum of cost. Through the provision of salary and tenure protections, this entire problem can be eradicated: ALJs would then be shielded from such pressures in much the same way that article III judges are. A statutory impeachment practice, similar to that established by the Constitution for federal judges, could be established to deal with the truly derelict administrative judge. Such a mechanism safeguards both the due process guarantee and the adherence to separation of powers principles.

Of course, the decisions of administrative law judges are subject to some degree of judicial review.[168] It might therefore be argued that the due process requirement of adjudicatory independence could be satisfied at the

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> An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

5 U.S.C. § 7521(a) (1982).

167. *See generally* Rosenblum, *Contexts and Contents of "For Good Cause" as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors*, 6 W. NEW ENG. L. REV. 593 (1984). In recent years there have been a multitude of cases filed by Administrative Law Judges challenging the pressures that various agencies—typically the Social Security Administration—exert upon them. *See, e.g.*, Nash v. Califano, 613 F.2d 10 (2d Cir. 1980) (allegation that Health and Human Services officials used delay-avoidance procedures to interfere with decisional independence of ALJs); Association of Admin. Law Judges v. Heckler, 594 F. Supp. 1132 (D.D.C. 1984) (challenging Health and Human Services Department's program of performance appraisal of ALJs). Notwithstanding this development, some courts continue to express satisfaction with the level of independence that ALJs enjoy. *See, e.g.*, N.L.R.B. v. Permanent Label Corp., 657 F.2d 512 (3d Cir. 1981) (en banc) (ALJ need only provide list of factors giving rise to recommendation that bargaining order be issued, and is not required to state each inference drawn from these factors), *cert. denied*, 455 U.S. 940 (1982); *see also* Butz v. Economou, 438 U.S. 478, 513-14 (1978) (discussing safeguards ensuring independence of hearing examiners).

168. *See* 5 U.S.C. §§ 701-706 (1982).

appellate stage. But the scope of judicial review at that stage—particularly in regard to factual findings—is so limited[169] as to provide dubious assurance that an individual has received a truly meaningful hearing before an independent adjudicator. If federal judicial review took the form of a complete *de novo* examination of both facts and law, due process arguably would be satisfied, even if the ALJ lacked the requisite independence. We need not seriously consider that question, however, because the burden such a practice would place on the federal judiciary would, as a practical matter, be prohibitive.[170] Providing the ALJ's with the requisite protections of independence would be much less costly and perhaps a more effective solution.[171]

2. *Personal Bias*

In *Tumey* the Supreme Court distinguished financial interests from other types of potential bias. As the Court announced, "[a]ll questions of judicial qualification may not involve constitutional validity. Thus, matters of kinship, personal bias, state policy, remoteness of interest, would seem to be matters merely of legislative discretion."[172] The Court did not explain why a "possibility" of a judge being swayed by financial self-interest is a constitutional matter, while the fact that a judge harbors either a personal prejudice against or a predisposition toward a litigant is not. Yet this unjustified proposition has to a certain extent survived. The Court has been extremely reluctant to disqualify a judge when no direct financial interest is involved, finding a due process violation only in cases

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169. It has long been recognized that the impartiality of the judges hearing an appeal does not cure the due process problems created by a biased adjudicator at the trial level. *See* Ward v. Village of Monroeville, 409 U.S. 57, 61–62 (1972) (rejecting argument that *de novo* trial is cure and explaining that litigant is entitled to "neutral and detached judge in the first instance").

In North v. Russell, 427 U.S. 328 (1976), the Court limited the holding of *Ward* to cases involving bias and held that trial *de novo* does cure any difficulties created by a trial before a nonlawyer police court. Two differences might justify this limitation of *Ward*. First, although a trial before a nonlawyer-judge can create feelings of frustration in the parties, it does not necessarily create the appearance of unfairness. Assuming that the trier is impartial, both parties are at least playing with the same dice. A second distinction relates to the nature of a *de novo* proceeding. It seems unrealistic to assume that a trier in a *de novo* proceeding can totally ignore the fact that the issue has already been adjudicated to a specific result. When the flaw with the first trier is his lack of legal education, the second trier will know this and take account of it in the way he regards the nonlawyer's findings. In the case of a biased initial adjudicator, however, the trier *de novo* will not necessarily discount the value of the initial adjudication, because he might be unaware of the bias or fail to attribute sufficient significance to it.

170. *See* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 148–49 (1985).

171. It should be emphasized that the due process issue of adjudicatory independence arises in the ALJ context only to the extent that a liberty or property interest is implicated. The issue of ALJ independence reaches a constitutional level largely because of the Supreme Court's recent expansion of those concepts to encompass statutorily created rights.

172. 273 U.S. 510, 523 (1927).

where the judge and one of the litigants or attorneys are embroiled in a heated personal dispute.[173]

This distinction in constitutional treatment between personal bias and financial interest cannot be justified by a difference in the degree of temptation involved. A judge is likely to be far more concerned with giving his brother-in-law a break than with securing $5.00 for a traffic conviction. Similarly, the temptation to get revenge against a party that the judge dislikes may be as alluring as pecuniary gain.

There are some differences, however, in our capacity to rectify these different biases. When a strong relationship exists between judge and litigant, it is almost always possible to find a more disinterested judge. But, to some extent, personal feelings are unavoidable. For example, judges might be a bit more prone to accept the arguments of attorneys who appear before them on a frequent basis, or who occupy some official governmental post such as district attorney or solicitor general. There seems no way to avoid this potential for bias. To the extent that the category of personal biases includes such inevitable feelings, the Court is correct in rejecting any constitutional interest. But to the extent that the category also includes more specific and identifiable, and therefore more avoidable, predispositions, courts should respond as in the case of a judge with a direct financial interest in the outcome of the case.

Issues of this sort often arise in the context of the summary contempt power.[174] The Court has recognized that a judge who is embroiled in a personal dispute with a litigant or attorney may be very tempted to be influenced by his own anger. But the Court has found this potential for bias a necessary evil in all but the most exceptional cases. According to the Court, "such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent. . . ."[175] The Court seems to assume that a judge must possess authority to enforce her contempt power in order to preserve a semblance of order.

But how is the judicial process protected by having the same judge who is subjected to the contemptible behavior mete out the punishment for it?

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173. *See generally* Sedler, *The Summary Contempt Power and the Constitution: The View From Without and Within*, 51 N.Y.U. L. REV. 34 (1976).

174. *See, e.g., In re* Murchison, 349 U.S. 133 (1955); Offutt v. United States, 348 U.S. 11 (1954). For a thorough discussion and critique of the Court's treatment of the summary contempt power, see Sedler, *supra* note 173.

175. *Ex parte* Terry, 128 U.S. 289, 313 (1888). The *Terry* Court relied in part on the fact that such power was "settled doctrine in the jurisprudence both of England and of this country . . . ." *Id.* The Court has since continued to rely on the long tradition of that power. But reliance on history is not a proper substitute for functional analysis of the current necessity of the doctrine. *See supra* notes 62-69 and accompanying text (discussing Court's repudiation of historical approach).

There is no reason why the judge could not swear out a complaint that would be heard before another judge on an expedited basis. The only possible advantage to allowing the same judge to hear the case is the heightened fear that this arrangement creates among litigants and attorneys who contemplate resisting the court's commands. But because this extra fear reflects the anticipated bias, it can hardly constitute a legitimate reason for maintaining the current system.

3. *Predisposition to Facts or Law*

The Supreme Court has never held that prior exposure to facts or prior adherence to a legal position violates due process. As with the other categories, the rule of necessity has played its part in the creation of doctrine concerning this category of bias. There can certainly be no bias more pervasive than a predisposition to the exact issues—factual or legal—before the court.[176] To the extent that such predisposition arises out of a judge's general knowledge in the area of law, it is impossible, and certainly undesirable, to eliminate it. But this category also includes predispositions that arise out of a decisonmaker's prior involvement in a case. In this latter situation, the potential for bias is relatively easy to eliminate, and therefore should not be tolerated.

It is simply impossible to eliminate all predisposition to legal issues. As Justice Rehnquist pointed out in *Laird v. Tatum*, "[p]roof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."[177] In *Laird*, the Justice refused to disqualify himself from participating in a decision which turned on a legal issue that he had publicly spoken about before his appointment to the Court. This decision seems reasonable, because once it is assumed that it is impossible to eradicate predispositions, the fact that the Justice was outspoken on the issue should make no difference.

The bias that comes from the judge's intellectual or political position, however, differs from the type of bias that occurs when an individual adjudicates an issue with which she has had prior involvement, either in the position of an advocate or as a judge in an earlier stage of the case. The judge then has a strong motivation to hold that her initial decision was the

176. In the case of pecuniary interest, the decider might or might not allow the irrelevant factor to enter his mind. The fact that it is so clearly irrelevant is to some extent helpful since the decider has no doubt that it is impermissible for him to consider it. Yet predispositions that result from prior prosecutorial experience in the case at hand are also irrelevant. The judge should base his decision exclusively on that information brought out during the course of the adjudication. The fact that the previously gained impressions are close to the issues being adjudicated makes it inevitable that they will enter the decisionmaker's mind.

177. 409 U.S. 824, 835 (1972).

correct one, and to a certain extent she acts as judge in her own case. This problem often presents itself in administrative decisionmaking when the adjudicator was previously responsible for initiating the prosecution. Notwithstanding the ease with which this problem could be eradicated by implementing a clear separation-of-functions requirement, the Court has been quite tolerant of the administrative agencies in this context. In *FTC v. Cement Institute*, for example, the Court refused to disqualify the Commission from adjudicating the case, even though the Court assumed that a prejudgment of the issues "had been formed by the entire membership of the Commission as a result of its prior official investigations."[178] The Court did not justify its decision with the argument that the risk of bias is minimal under the circumstances. Rather, the Court pointed out that if the Commission were disqualified, no government agency would be able to act on a complaint without disqualifying itself from adjudicating the case.[179]

The Court, once again, exaggerated the necessity of its decision. The question should not have been whether, under the current scheme of administrative process, disqualification would affect all adjudicatory authorities. Rather, the question should have been whether some scheme might be devised in which the threat of bias could be eliminated. Because there is no compelling reason that makes strict separation of functions impossible, the Court simply could have held that the due process clause dictates separation of the prosecutorial and adjudicatory functions in the agency context.[180]

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178. 333 U.S. 683, 700 (1948).

179. *Id.* at 701. One could certainly explain the Court's opinions in this area as relying on the ground of necessity—in many cases misperceived. As for the existence of the potential for bias, the Court has at times required institutional changes to cope with the problem. In Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), the Court ordered the separation of functions in the context of deportation proceedings. In so doing, the Court seemed to accept the position of a number of commissions that had dealt with the issue. As for the level of bias, the Court quoted a report which concluded that "[a] genuinely impartial hearing, conducted with critical detachment, is psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible." *Id.* at 44 (quoting Secretary of Labor's Comm. on Admin. Proc., The Immigration and Naturalization Service 81–82 (mimeo. 1940)). As for the necessity, the Court cited another committee that had concluded that "[t]hese types of commingling of functions . . . are . . . plainly undesirable. But they are also avoidable and should be avoided by appropriate internal division of labor." 339 U.S. at 44, (quoting REP. ATTY. GEN. COMM. AD. PROC., S. DOC. NO. 8, 77th Cong., 1st Sess. 56 (1941)).

180. In order to make the right to a non-biased adjudicator meaningful, parties should be afforded an opportunity to present their case for disqualification before some judge other than the one charged with potential bias. The federal recusal statute does not make any such provision and is in this sense severely deficient. *See* 28 U.S.C. § 455 (1983) (instructing individual judge to disqualify himself under certain circumstances). Although the ABA standards do go a bit further, they do not, in our opinion, go far enough. *See* ABA STANDARDS OF JUDICIAL ADMINISTRATION 2–32. The Standards recommend that *factual issues* raised by the motion should be heard and resolved by another judge. The focus on factual issues ignores the reality that *legal issues* about disqualification may be the dispositive issues in many contexts.

VI. Conclusion

The balancing scheme that the Supreme Court has adopted to deal with the competing interests of individuals and government under the due process clauses runs counter to the purpose and function of those clauses. As integral aspects of the Bill of Rights, the due process clauses were devised as protections of individual rights, and must not be subordinated to government interests that are short of overwhelming. Courts should not use the flexibility inherent in the clauses as a means of reading them out of the Constitution.

We have been unable to envision even one situation in which the values of due process can be achieved without the participation of an independent adjudicator. Moreover, in defining the term "independence," even the slightest hint of bias or undue influence must, as a general matter, disqualify a particular decisionmaker.[181] Only when it is all but impossible to rectify bias should a potential lack of independence be tolerated. Once such an adjudicator is given power to implement procedures that she finds necessary, the Court can rest a bit more assured that the values of procedural due process will be protected.

In applying our model we have found that the right to an independent adjudicator—and hence the promise of due process itself—continues to go unfulfilled in a great many contexts. Specifically, we argue that due process is inadequately protected when an individual must depend on an adjudicator who lacks salary and tenure protection (such as most state court judges and all ALJs) to protect an entitlement to a life, liberty, or property interest. Similarly, we challenge the practice of allowing an adjudica-

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To force a litigant to argue the legal issues before the very judge in question is especially problematic in view of some courts' holdings that a judge's refusal to disqualify himself is not a final order and may not be appealed interlocutorily. *See* Liddell v. Board of Educ., 677 F.2d 626, 643 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982); *In re* Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir. 1980); U.S. v. Washington, 573 F.2d 1121 (9th Cir. 1978). Although a writ of mandamus is usually available, that writ places exceedingly heavy burdens on the party seeking it. *See* Keer v. U.S. Dist. Ct., 426 U.S. 394, 403 (1976) (party seeking writ must prove "clear and indisputable" right to it). Moreover, some courts of appeals have been reluctant to exercise the mandamus power and have forced litigants to raise disqualification issues at the end of the entire proceeding. *See, e.g., In re* Corrugated Antitrust Litigation, 614 F.2d 958 (5th Cir. 1980); City of Cleveland v. Krupansky, 619 F.2d 576 (6th Cir.), *cert. denied*, 449 U.S. 834 (1980). These courts' assumption that going through a trial presided over by a biased judge is not a sufficiently severe harm to merit extraordinary relief seems at odds with the Supreme Court's pronouncement that due process affords a right to an impartial adjudicator at all stages of judicial proceedings. *See supra* note 169.

For a disqualification procedure more consistent with the spirit of true judicial independence, see Cal. Civ. Proc. Code § 170(e) (West 1982) ("No judge, against whom a statement of objection or disqualification has been filed . . . shall hear or pass upon any question of *fact or law* concerning his disqualification.") (emphasis added). The California approach is also noteworthy in that it provides for automatic disqualification of a judge if a party files a motion and affidavit asserting that the judge is prejudiced. *Id.* § 170.6. A party is given only one such opportunity in the course of a proceeding, and after expending that opportunity he must resort to the normal disqualification procedure. *Id.*

181. Of course, this rule applies only when a liberty or property interest has been found present.

tor who has been the subject of allegedly contemptuous behavior to serve as prosecutor, judge, and jury through the summary contempt power. These contexts are, of course, only exemplary, and we suspect that further application of our model will reveal that amidst all of the debate about what interests trigger due process, courts and commentators have ignored the fact that without prophylactic protection of adjudicatory independence, the Constitution's majestic guarantee of due process of law may in reality be no more than a deceptive facade.