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THE EFFECT OF PROCEDURAL DUE PROCESS ON STATE AND LOCAL GOVERNMENTAL DECISION MAKING: BEYOND *ROTH* AND *EASTLAKE*

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The fifth[1] and fourteenth[2] amendments to the United States Constitution recognize certain fundamental individual interests—broadly categorized as "life," "liberty," and "property"—as worthy of protection against deprivation by federal, state, and local governments. These amendments, however, do not state that such a deprivation of interests is always prohibited. Rather, deprivation may be condoned when accompanied by "due process of law."

Procedural due process[3] serves a dual function; it acts as a check on overzealous governmental administration while concurrently protecting individuals against unfettered deprivation of their protected interests. Yet, " 'due process', unlike some legal rules, is not a technical conception with

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1. The fifth amendment provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property without due process of law. . . ." U.S. CONST. amend V.

2. The fourteenth amendment provides, in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV.

3. *See supra* notes 1-2. In the American legal system, the due process clause is divided into two broad concepts: substantive due process and procedural due process. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 502 n.4 (1978) [hereinafter cited as TRIBE]. Substantive due process involves limitation of the content or scope of various governmental activities. During the first few decades of the twentieth century, substantive due process involved judicial protection of railroads, corporations, and other business and economic interests through the invalidation of state laws regulating the health, safety, and welfare of citizens. Comment, *The Growth of Procedural Due Process Into a New Substance: An Expanding Protection for Personal Liberty and a "Specialized Type of Property . . . In Our Economic System,"* *66* NW. U.L. REV. 502, 503 n.5 (1971) [hereinafter cited as Comment]. As a consequence of the Industrial Revolution, courts tried to shield the expanding free enterprise system from governmental interference. *Id.* at 503. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (statute restricting bakers to 60 hour work week invalidated because state police powers could not interfere with individual freedom of contract). Modern courts have abandoned the use of substantive due process to determine the propriety of economic and business regulations. Courts now limit use of substantive due process to the protection of interests in privacy, autonomy, and family relations. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977) (zoning ordinance limiting occupancy of urban dwellings to members of immediate family unconstitutional); Roe v. Wade, 410 U.S. 113 (1973) (fourteenth amendment liberty right includes a woman's choice to have an abortion within certain period following conception).

In contrast, procedural due process concerns the constitutional limits placed upon the procedures through which governmental decisions affecting individual interests are made and enforced. *See Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1502 n.5 (1978) [hereinafter cited as *Developments in the Law—Zoning*].

a fixed content unrelated to time, place and circumstances."[4] Accordingly, the application of the due process clause has become one of the most difficult and tedious tasks in American constitutional law.

In *Board of Regents v. Roth*,[5] the Supreme Court developed an analytical framework for resolving issues in the procedural due process area. Although an effective method for resolving procedural due process issues, this framework is threatened by an emerging doctrine which effectively precludes the applicability of procedural due process protection in certain areas of governmental decision making. This doctrine predicates application of procedural due process on a superficial dichotomy between legislation and adjudication. Only those deprivations created by an adjudicative, as opposed to a legislative, decision making body will be subject to procedural due process. This doctrine effectively permits state and local governments to deprive individuals of fundamental constitutional interests without due process of law. The emergence of this doctrine and its potentially deleterious ramifications in the procedural due process area require a reexamination of the analytical framework developed in *Roth*.

This Article first traces the evolution of procedural due process from its origin to its present role in American society.[6] The primary area of concentration will be the scope of the "property interest"[7] under procedural due

4. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

5. 408 U.S. 564 (1972).

6. Procedural due process has acquired a separate identity in criminal law. There, the emphasis has been on apprising the defendant of what behavior is illegal. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (local vagrancy ordinance void for vagueness because it failed to give adequate notice of what conduct it prohibited); Coates v. City of Cincinnati, 402 U.S. 611 (1971) (local gathering and assembly ordinance void for vagueness). Examination of due process in criminal cases is beyond the scope of this Article.

7. The rationale behind focusing on the property interest to the exclusion of other individual interests is that the property interest typically is affected by state and local governments. For example, states and municipalities historically have exercised control over individual property interests in real estate through zoning, land-use regulation and real estate assessment powers. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926) (zoning power and regulation is a legitimate exercise of the state's police power); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (tax assessment and property valuation are proper matters for state and local government concern). Moreover, state and local governments have traditionally engaged in a wide variety of regulatory functions that affect individual property interests. For example, education, welfare, unemployment and worker's compensation programs are typically state administered. Additionally, both state and local governments often impose sales and income taxes, require adherence to building and health codes, provide public services and utilities, employ governmental workers, and institute licensing procedures for numerous functions and activities. For further discussion of how state and local governments engage in regulatory functions affecting individual property interests, see B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITITION 113-67 (1977); J. FAIRLIE & C. KNEIR, COUNTY GOVERNMENT AND ADMINISTRATION 39-77, 221-38, 302-28, 373-87 (1930); D. MENDELKER & D. NETCH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 27-48 (1977); Sandalow, *Federal Grants and the Reform of State and Local Government*, in FINANCING THE METROPOLIS 175-80 (J. Crecine ed. 1970). In this Article, emphasis on the property interest over other areas of procedural due process is not to imply that there is any special treatment by the courts of this interest.

process analysis. Second, this Article will carefully examine the current approach used by the judiciary in analyzing and applying procedural due process. Such an approach looks first to the scope of the interests protected by the due process clause, and second to the type of procedural safeguards that must be afforded upon a proper showing of a deprivation. This second section also will examine the controversial issue of how much deference should be paid to state and local statutory law and judicial precedent in resolving due process issues. Third, this Article will focus on the judicial trend toward creating a dichotomy, for due process purposes, between legislative and judicial actions. This third section will reveal the problems inherent in this dichotomy and will propose that the legislative-adjudicative dichotomy not be considered a separate prong in procedural due process analysis.

I. The Evolution and Application of Procedural Due Process

Constitutional scholars have expended much effort analyzing the functions served by procedural due process.[8] Justice Frankfurter, in his celebrated concurrence in *Joint Anti-Fascist Refugee Committee v. McGrath*,[9] expressed the notion that the utility of due process is to promote fairness and justice in resolving issues.[10] In *Fuentes v. Shevin*,[11] Justice Stewart recognized that certain procedural requirements are necessary to prevent unfair, arbitrary, and mistaken deprivation of property.[12] Justice Harlan, in *Boddie v. Connecticut*,[13] determined that due process rights enable the settling of differences in an orderly, predictable manner.[14] While the foregoing theories

8. For a discussion of the interests served by procedural due process, see *Developments in the Law—Zoning*, *supra* note 3, at 1505. The authors identify three interests: (1) the "efficiency interest" assures that governmental decisions affecting individuals are made correctly and efficiently; (2) the "representational interest" assures that the person affected by a decision will be able to argue before the relevant body about application and interpretation of the substantive rules; and (3) the "dignity interest" assures individual dignity by requiring that the government explain its actions to those directly affected. *Id.*

9. 341 U.S. 123, 161-62 (1951) (Frankfurter, J., concurring).

10. According to Justice Frankfurter:

> The validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Id. at 171-72.

11. 407 U.S. 67 (1972).

12. *Id.* at 80-81. According to Justice Stewart:

> The purpose of the due process right to be heard is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantially unfair or mistaken deprivations of property, a danger that is especially great when the state seizes goods simply upon the application of and for the benefit of a private party.

13. 401 U.S. 371 (1971).

14. *Id.* at 374. According to Justice Harlan, due process, as part of the "system of rules defining the various rights and duties" of citizens, is a principle feature of an organized society.

should not be considered exclusive interpretations of the interests served by procedural due process, they do provide a succinct and authoritative representation of the interests that the majority of authorities believe due process protects.[15]

Because of the fundamental interests served by procedural due process, the Supreme Court has had difficulty devising an exact formula to determine the doctrine's scope and application. Traditionally, the Court used an imprecise balancing test to ascertain the applicability of procedural due process safeguards to a certain set of facts.[16] In his concurring opinion in *Joint Anti-Fascist*,[17] Justice Frankfurter explained that this balancing test required that the governmental interest in carrying out certain activities be balanced against individual interests in freedom from such governmental intrusion.[18] Yet, this balancing process was so often slanted in favor of the government that the governmental interest almost uniformly would prevail over the individual interest.[19]

The balancing approach traditionally offered little protection for individual liberty and property interests. Consequently, in the late 1960's and early 1970's, the Supreme Court began to reject this imprecise approach to procedural due process. Concurrently, the Court laid the groundwork for the

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Such a system promotes individual achievement by lessening the anxieties concomitant with disorganization, and makes social cohesion possible. *Id.*

15. For additional perspectives on the functions served by procedural due process, see TRIBE, *supra* note 3, at § 10-7; Subrin & Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449, 451-58 (1974); Van Alystyne, *Cracks in "The New Property:" Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 487 (1977) [hereinafter cited as Van Alystyne].

16. *See, e.g.*, Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 894-95 (1961) (to determine the procedures required by due process, the court must consider both the nature of the governmental action and the private interest affected). *See generally* Comment, *supra* note 3, at 505-06 (under traditional approach of assessing the procedures required by due process, the individual interest was balanced against the governmental interest).

17. 341 U.S. at 163 (Frankfurter, J., concurring).

18. It is important to note the specific language used by Justice Frankfurter in describing this balancing test because his concurring opinion has been regarded as seminal in early procedural due process analysis:

> Again, it is fair to emphasize that the individual's interest is here to be weighed against a claim of the greatest of all public interests, that of national security. In striking the balance the relevant considerations must be fairly, which means coolly, weighed with due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.

Id. at 164 (Frankfurter, J., concurring).

19. *See, e.g.*, Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 897 (1961) (applying balancing test to revocation of naval officer's installation access privilege for his failure to satisfy security requirements; Court upheld revocation and subsequent dismissal of employee without notice or hearing pursuant to "settled principle" that government employment was terminable at will of officer in charge); Vitarelli v. Seaton, 359 U.S. 535, 539 (1959) (government employees can be summarily discharged at any time without a reason).

establishment of a new, systematic approach.[20] In *Goldberg v. Kelly*[21] and *Boddie v. Connecticut*,[22] the Court paid greater deference to the individual interest in procedural safeguards such as "prior notice" and "opportunity to be heard" prior to finding that the governmental deprivation of protected rights was constitutionally permissible. For instance, although the Court in *Goldberg* paid lip service to the traditional balancing approach to procedural due process,[23] it elevated individual interests over governmental interests throughout the opinion. One example of this approach is the Court's liberal conceptualization of statutory public welfare benefits. Relying on little precedent or authority, the Court raised welfare entitlements to the level of a protected property interest.[24]

The movement toward abandoning the traditional approach to procedural due process is evidenced by Justice Harlan's concurrence in *Sniadach v. Family Finance Corp.*[25] and the majority opinion in *Fuentes v. Shevin.*[26] *Sniadach* concerned a Wisconsin pre-judgment garnishment scheme which permitted a creditor to seize a debtor's wages without notice or a hearing. Both the majority and Justice Harlan agreed that the Wisconsin scheme violated fundamental principles of due process.[27] Harlan, however, employed a unique approach; he first determined that the deprivation of property involved was not de minimus. Only then did he conclude that the notice and hearing provisions of the Wisconsin scheme failed to satisfy due process.[28] In sum, Harlan placed little emphasis on the balancing of governmental and individual interests. Instead, if a protected interest (e.g., property) was significantly

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20. Although the Court has never expressly stated a reason for this "revolution," one possible explanation is that the Court was responding to an increased social desire to afford judicial protection of civil liberties. *Cf.* Comment, *supra* note 3, at 503-04 (increased judicial recognition of individual rights based on greater access to courts and implementation of legal services for the poor).

21. 397 U.S. 254 (1970).

22. 410 U.S. 371 (1971).

23. The *Goldberg* Court purported to balance the extent of the individual's loss and his interest in avoiding that loss with the governmental interest in summary adjudication. 397 U.S. at 262-63.

24. The Court asserted that "[i]t may be more realistic today to regard welfare entitlements as more like 'property' than a 'gratuity'. . . ." *Id.* at 262 n.8. In his dissent, Justice Black labeled the majority opinion as a "drastic and dangerous departure" from well-settled precedent. *Id.* at 277.

A second example of the *Goldberg* Court's implicit abandonment of the traditional approach to procedural due process is demonstrated in the Court's discussion of the applicable remedy. Although the Court recognized that post-termination hearings served the important governmental interest of fiscal management, it nevertheless concluded that only a pretermination evidentiary hearing provided the recipient with adequate procedural due process before terminating welfare benefits. *Id.* at 264.

25. 395 U.S. 337, 342-43 (1969) (Harlan, J., concurring).

26. 407 U.S. 67 (1972).

27. 395 U.S. 337, 342 (Harlan, J., concurring).

28. *Id.* at 342-43.

deprived, then due process applied notwithstanding the outcome of the balance.[29]

In *Fuentes*, the majority of the Court adopted the logical approach used by Justice Harlan in *Sniadach*. *Fuentes* involved a Florida statute that authorized state agents to summarily seize a person's possessions upon the ex parte application of anyone who claimed a right to them. The statute failed to provide for notice or an opportunity to be heard. The Court first examined the individual property interests at stake. Although the appellant debtors lacked full title to the replevied goods, the Court broadly interpreted the fourteenth amendment's protection of property to include "any significant property interest,"[30] including the interest in continued possession and use of the goods.[31] After finding appellant's property interest to be protected by the fourteenth amendment, the Court ruled that the Florida statute was unconstitutional because it failed to provide for an opportunity to be heard at a meaningful time.[32] Again, the Court effectively discarded the traditional balancing of interests approach in favor of a simple examination of whether a fundamental interest had been infringed.

Two weeks after it handed down the *Fuentes* opinion, the Court, in *Board of Regents v. Roth*,[33] formally abolished the use of balancing to determine whether the due process clause initially is applicable.[34] After recognizing the validity and the utility of the approach implicitly adopted in *Goldberg, Boddie*, and *Fuentes*, the Court observed that the constitutional requirements of due process should not depend upon "such a narrow balancing process."[35] Consequently, the "new" systematic approach of making a threshold determination of the existence of a constitutionally cognizable and protected interest was explicitly adopted by the *Roth* Court.[36]

In *Roth*, an assistant political science professor at Wisconsin State University was informed, without explanation, that he would not be rehired. According to a Wisconsin statute in force at the time of respondent Roth's employ-

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29. *See* Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531 (1975) [hereinafter cited as Rendleman]. Rendleman considers Harlan's concurrence to be the "intellectual foundation of the new due process."

> When the threshold interest and the requirement of due process were established, it made no difference that the loss was not permanent, that interim relief was possible, or that notice was received when the property was taken. If a constitutionally cognizable interest in the use of property was affected, prior notice and an opportunity for a hearing were required.

Id. at 535-36.

30. 407 U.S. at 86.

31. *Id.*

32. *Id.* at 96. In so doing, the Court quickly disposed of arguments in support of the statute such as the existence of damages, *id.* at 81-82, and that "an emergency obviated notice and a hearing." *Id.* at 93.

33. 408 U.S. 564 (1972).

34. *Id.* at 570-71.

35. *Id.* at 570-71 & nn.7-8.

36. *Id.* at 577.

ment, a nontenured teacher was not "entitled" to anything beyond his one-year employment.[37] Additionally, the rules promulgated by the Board of Regents during Roth's employment merely provided that a nontenured teacher "dismissed" before the end of the term may have some opportunity for review of the "dismissal."[38] The rules were silent, however, with respect to decisions not to rehire. Roth argued that the unchallengeable decision not to rehire him abridged his fourteenth amendment right to procedural due process.[39] In resolving the case, Justice Stewart, speaking for a five-person majority, delineated a simple formula for applying the due process clause.[40] Stewart concluded that Roth's fourteenth amendment right to procedural due process had not been violated.[41]

II. THE *ROTH* PROCEDURAL DUE PROCESS ANALYSIS

Justice Stewart's systematic procedural due process formula involves a two-pronged analysis: (1) Is the individual interest allegedly abridged encompassed by the fourteenth amendment's protection of life, liberty or property? (2) If so, what procedures will satisfy the amendment's due process requirement?[42] The first prong essentially determines whether due process safeguards are warranted. If an individual is not deprived of a recognized liberty or property interest, then constitutional due process protection is unnecessary.[43] Conversely, if the interest is protected, then some form of

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37. The statute stated that "[a]ll teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher." WIS. STAT. § 37.31(1) (1967).

38. *Roth*, 408 U.S. at 567.

39. *Id.* at 569.

40. *Id.* at 569-71.

41. *Id.* at 578-79. Stewart reasoned that neither Roth's original employment nor any University policy or rule gave Roth a right to subsequent employment. Stewart defined a protected property interest as "the security of interests that a person has already acquired in specific benefits." *Id.* at 576. Therefore, although Roth might have had a personal interest in being rehired, he did not have a property interest which would require a hearing. It is ironic that while *Roth* is the leading case expanding individual rights under procedural due process, the plaintiff's due process rights in that case were not found to have been infringed.

For a more elaborate discussion of the *Roth* decision, particularly with respect to its impact on the field of education, see Rosenblum, *Legal Dimensions of Tenure*, in FACULTY TENURE 160 (1973) [hereinafter cited as Rosenblum]. Professor Rosenblum observes that Stewart's opinion in *Roth* opened the door to the applicability of empirical research findings in a procedural due process analysis. *Id.* at 178.

42. *Roth*, 408 US. at 570-71. This approach has been enthusiastically received and adopted in Supreme Court and lower court cases. For recent application of this approach, see Haig v. Agee, 453 U.S. 280 (1981) (failure to afford hearing prior to revocation of passport based on statutory construction similar to *Roth* analysis); Parratt v. Taylor, 451 U.S. 527 (1981) (*Roth* test used to determine that administrative procedures for negligent loss of prisoner's property by guards provides due process); Holbrook v. Pitt, 643 F.2d 1261, 1277 (7th Cir. 1981) (plaintiff-tenants had property interests in HUD-insured mortgages under *Roth* analysis).

43. *Roth*, 408 U.S. at 569.

due process protection is required. The unique aspect of this analysis is that it involves looking "not to the 'weight' but to the *nature* of the interest at stake."[44] Provided that the interest at stake merits protection, the second prong of this two part test entails determination of what "process" is due. The requirements of due process will vary according to "the importance of the interests involved and the nature of the subsequent proceedings."[45] At first glance, the foregoing analysis may appear relatively simple. Subsequent application of the *Roth* two prong test, however, has created a great deal of confusion.[46] Accordingly, further elaboration of the fundamental aspects of both prongs is necessary.[47]

Phase I: Is the Interest Involved Protected?

Although the scope of interests shielded by the fourteenth amendment has greatly widened in the last decade,[48] the Court has stated that the range of protected interests is not infinite.[49] Thus, it is essential to determine which governmental actions trigger procedural due process protection. Traditionally, the property interest has been the area most affected by governmental decision making.[50] The concept of property steadily expanded until recent

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44. *Id.* at 570-71.

45. *Id.* at 570 n.8 (citing Boddie v. Connecticut, 401 U.S. 371, 378 (1971)). While a balancing test has been eliminated from the first prong of this analysis, it plays a central role in determining what process is due under the second prong. *See infra* text accompanying notes 107-40.

46. *Compare* Goss v. Lopez, 419 U.S. 565 (1978) (student must be given oral or written notice of charges against him and opportunity to be heard before temporarily suspended from public school) *with* Board of Curators v. Horowitz, 435 U.S. 78 (1978) (no hearing required for dismissal of medical student by faculty evaluation committee). For further discussion of judicial application of the *Roth* test in public school settings, see Note, *Procedural Due Process and Short Suspensions From the Public Schools: Prologue to Goss v. Lopez*, 50 NOTRE DAME LAW. 364, 370-77 (1975).

47. Significantly, Justice Stewart omitted a third prong: the determination of whether the deprivation was effected by a legislative or an adjudicative body. The third section of this Article will discuss the propriety of including analysis of this issue as a de facto third prong to the *Roth* test.

48. *See* Rendleman, *supra* note 29, at 531-34. The *Roth* Court, in recognizing the expansive nature of the interests encompassed by the fourteenth amendment, stated:

> "Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposefully left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.

Roth, 408 U.S. at 571 (quoting National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

49. *Roth*, 408 U.S. at 570.

50. For a discussion of the relationship of the property interest to state and local governments, see *supra* note 7. Of course, governments also should be wary of infringing upon the life and liberty interests. For many years, the Supreme Court has broadly defined the activities it considered embraced by the term "liberty." In a frequently cited passage, the Court defined liberty to include:

> [N]ot merely freedom from bodily restraint but also the right of the individual

Burger Court decisions effectively curtailed its growth.[51]

Historically, only chattels and real estate were considered "property."[52] While such a limitation may have made the property interest easier for courts to grasp,[53] it significantly restricted the type of cases that could be brought under the fourteenth amendment.[54] Moreover, the courts made little effort to emphasize the significance of property as a distinct due process interest.[55] Courts were often hesitant to provide due process protection to property interests, reasoning that the availability of a subsequent suit for redress adequately protected individuals against wrongful deprivation of their property.[56]

In the 1969 *Sniadach* case,[57] Justice Douglas' majority opinion struggled

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> to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (dictum). For a detailed discussion of the expansion of the liberty interest, see Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405 (1977) [hereinafter cited as Monaghan]; Comment, *supra* note 3, at 518-24.

The "life" interest is implicated in capital punishment cases. While the Supreme Court has concluded that the imposition of the death penalty is not unconstitutional per se, the Court has demanded that the imposition of this penalty must not be arbitrary or capricious. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). *See generally* Black, *Due Process for Death: Jurek v. Texas and Companion Cases*, 26 CATH. U.L. REV. 1 (1977) (arguing that the death penalty is wrong in all cases, regardless of the procedures adopted to ensure that it is not arbitrarily imposed).

51. *See* O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980); City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976).

52. Curry v. McCanless, 307 U.S. 357, 363 (1939); Transcontinental Oil Co. v. Emmerson, 298 Ill. 394, 399-400, 131 N.E. 645, 647 (1921) (quoting Rigney v. City of Chicago, 102 Ill. 64, 77 (1882)). An individual interest in such property was considered a "right," whereas an interest in intangible property was considered merely a "privilege." *See, e.g.*, Bailey v. Richardson, 182 F.2d 46, 59 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951) (no right or guarantee exists to government employment). *See also* Van Alystyne, *supra* note 15, at 446-49 (Supreme Court's rejection of the right-privilege distinction indicated that the fourteenth amendment did not exempt government from due process limitations when dealing with government's own employees).

53. *See* Rendleman, *supra* note 29, at 543.

54. As Professor Monaghan observed, "[t]he existence, *vel non*, of 'property' seldom raised any issue reaching the Supreme Court in the first half of the twentieth century." Monaghan, *supra* note 50, at 434-35.

55. At most, property was considered to be part of the broad "liberty" interest. "As late as the turn of the last century justices were not yet distinguishing between liberty and property; in the universes beneath their hats liberty was still the opportunity to acquire property." *Id.* at 435 n.189 (quoting Hamilton, *Property According to Locke*, 41 YALE L.J. 864, 877 (1932)).

56. *See, e.g.*, Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931) ("Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."); Central Trust Co. v. Garvan, 254 U.S. 554, 567-68 (1921) (rights relating to enemy property seized by President pursuant to wartime powers may be protected by suit following deprivation).

57. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). For a discussion of *Sniadach*, see *supra* text accompanying notes 25-29.

with the narrow definition of property. Although Douglas found the Wisconsin pre-judgment wage garnishment statute at issue to be inherently unfair,[58] he was reluctant to resolve the matter by broadly interpreting the property concept. Instead, Douglas merely distinguished wages as being "a specialized type of property presenting distinct problems in our economic system."[59] Therefore, garnishment of wages was accorded procedural due process protection; however, because intangible property such as bank accounts or general debts were not "necessities," attachment of such intangibles was not accorded due process protection.[60]

Conversely, Justice Harlan's concurrence in *Sniadach* expanded the property interest concept. Instead of attempting to place wage garnishments into a special category, Harlan argued that any deprivation not characterized as de minimis must be afforded due process safeguards.[61] This approach explicitly covered wage garnishments[62] and implicitly included a broad range of intangible property interests.[63]

The following year, in *Goldberg v. Kelly*,[64] the Court further expanded the property concept. In *Goldberg*, the expectation of financial aid in the form of welfare assistance was elevated to a property interest.[65] The Court reasoned that although welfare entitlements might not fall within the common law concept of property,[66] it was realistic to regard such benefits as property rather than gratuities.[67] This marked the first time that the Court was willing to permit an "expectation" to be within the scope of the four-

58. According to Justice Douglas, the result of such a statute "may, as a practical matter drive a wage-earning family to the wall." 395 U.S. at 341-42.

59. *Id.* at 340.

60. *Id.* at 340-42. *See* Comment, *supra* note 3, at 525 & n.94 (citing Termplan, Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969) (Arizona court literally interprets *Sniadach* and holds that notice is not required in garnishments of property other than wages)). Some courts have applied Douglas' opinion literally and refused to extend the prohibition of pre-judgment attachment to property other than wages. *See, e.g.*, Johnston v. Cunningham, 12 Cal. App. 3d 123, 90 Cal. Rptr. 487 (1970) (attachment of debtor's prune crop did not fall within the notice requirements of *Sniadach*). *See also* Note, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942, 949-50 (1970) (*Sniadach* demonstrates that the Court recognizes a constitutional dichotomy within the due process property concept whereby some types of property may be attached without prior notice and a hearing, while others require certain pre-deprivation safeguards).

61. 395 U.S. at 342-43 (Harlan, J., concurring).

62. *Id.* at 343.

63. For example, Harlan's approach covers non-de minimis intangible property interests such as those in welfare entitlements, tenured employment, and goods obtained through conditional sales contracts.

64. 397 U.S. 254 (1970).

65. *Id.* at 262 n.8.

66. *Id.*

67. *Id.* The Court's reasoning rests in part on recognition of the importance of "property" in society. "Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community." *Id.* at 265.

teenth amendment property interest. Consequently, *Goldberg* provided the long-awaited judicial recognition of the "new property" concept.[68]

Three 1972 Supreme Court cases broadened the concept of property and clarified its meaning. In *Fuentes v. Shevin*,[69] the Court adopted Justice Harlan's threshold approach developed in his *Sniadach* concurrence.[70] The *Fuentes* majority held that the interest in continued possession and use of goods obtained by an installment sales contract was considered property—despite the fact that the debtor lacked full legal title to the goods.[71] Two weeks later, the Court attempted to limit due process litigation under a *Goldberg*-type expectation/entitlement approach. In *Board of Regents v. Roth*,[72] the Court mandated that such interests must constitute a "legitimate claim of entitlement."[73] To prove a case of "legitimate entitlement," the claim must stem from sources independent of the Constitution such as state laws, rules, or even interpersonal understandings.[74]

The scope of the property interest as redefined by *Roth* is best understood

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68. The term "the new property" is derived from Professor Reich's famous article, *The New Property*, 73 YALE L.J. 733 (1964). Reich observed that the increasing growth of "government largess" has caused the wealth of more and more Americans to depend upon their relationship to the government. Consequently, Reich believed that it was necessary to expand the "institution called property" beyond its traditional, tangible form. *Id.* at 733, 786-87.

The *Goldberg* Court quoted a lengthy passage from a second, equally famous article by Professor Reich which further exemplified the expanding concept of property:

> [S]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity.

Goldberg, 397 U.S. at 262 n.8 (quoting Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)).

69. 407 U.S. 67 (1972). For a discussion of *Fuentes*, see *supra* text accompanying notes 30-32.

70. 407 U.S. at 90 n.21.

71. *Id.* at 86-87. The *Fuentes* Court extended the property concept when it noted that it is not significant for due process purposes that the property involved be considered a "necessity" for individual survival. *See supra* text accompanying note 60. According to the Court:

> The Fourteenth Amendment speaks of "property" generally. And, under our free-enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are "necessary."

Id. at 90 (footnote omitted).

72. 408 U.S. 564 (1972).

73. *Id.* at 577. Specifically, Justice Stewart stated that to have a property interest in a benefit, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*

74. *Id.*

by examining its application in that case and its companion, *Perry v. Sindermann*.[75] In *Roth*, Justice Stewart reasoned that the statutorily created property interests of the welfare recipients in *Goldberg*[76] were analogous to Roth's interest in continued employment[77] as manifested by the terms of his appointment.[78] Therefore, because the terms of Roth's contract made no provision for renewal of employment after one year, and there was no state statute creating an interest in continued employment, Roth did not have a sufficiently significant property interest to fall within the fourteenth amendment.[79]

Sindermann also involved the nonrenewal of a teacher's employment contract. As in *Roth*, Justice Stewart recognized that the mere fact that the teacher was not rehired did not amount to an unconstitutional loss of property.[80] In contrast to the teacher in *Roth*, however, the teacher in *Sindermann* demonstrated that there was a "mutually explicit understanding" in his employment contract that gave him a legitimate claim of entitlement.[81]

While the Stewart property interest test clarified the scope of the property interest, it also created a perplexing problem. Stewart's test requires courts, in certain instances,[82] to make a dual determination. First, the courts must defer to state law to determine the initial creation or existence of legitimate claims of entitlement.[83] After this initial assessment, courts then must determine the constitutional significance of the entitlement in terms of the fourteenth amendment.[84] On this issue, federal constitutional law is exclusively controlling.[85] The difference between these two steps cannot be emphasized enough.[86] Unfortunately, courts have blurred the line between these two steps and, consequently, have incorrectly allowed the application of the due process clause to hinge in each case on interpretation of state law.

Illustrative of imprudent deference to state law is *City of Eastlake v. Forest City Enterprises, Inc.*[87] There, Chief Justice Burger, speaking for a six-person

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75. 408 U.S. 593 (1972) (considered along with *Roth*).

76. For a discussion of *Goldberg*, see *supra* text accompanying notes 64-66.

77. For a discussion of *Roth*, see *supra* notes 33-41 and accompanying text.

78. *Roth*, 408 U.S. at 578.

79. *Id.*

80. *Sindermann*, 408 U.S. at 599.

81. *Id.* at 601. The Court treated the written contract, with its explicit tenure provision, as evidence of the respondent's claim to continued employment—absent a showing of sufficient cause for discharge. *Id.* For further discussion of the *Sinderman* case, see Rosenblum, *supra* note 41, at 165-67.

82. Such instances include situations where, as in *Roth* and *Sindermann*, the entitlement is alleged to arise out of some arrangement with a state or local government.

83. Justice Stewart explained that property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Roth*, 408 U.S. at 577.

84. *Id.* at 573.

85. *See* Monaghan, *supra* note 50, at 435.

86. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 489-94 (2d ed. 1973).

87. 426 U.S. 668 (1976). For further discussion of the *Eastlake* case, see *infra* text accompanying notes 127-32.

majority, deferred to the Ohio Supreme Court's characterization of a rezoning process as a legislative act.[88] Consequently, Burger allowed this characterization to control the question of whether the due process clause applied.[89]

In a dissenting opinion, Justice Stevens criticized the *Eastlake* majority for allowing a state court characterization to control a federal constitutional question.[90] Yet, just eleven days earlier, in his majority opinion in *Bishop v. Wood*,[91] Stevens had committed the same sin. In *Bishop*, a city police officer in Marion, North Carolina was discharged without being afforded a hearing to determine the sufficiency of the cause for his dismissal. The officer argued that in light of a city ordinance that classified him as a permanent employee, he had a legitimate claim of entitlement and, hence, a valid property interest.[92] Although Justice Stevens conceded that the ordinance, on its face, could be read as conferring a guaranteed property interest,[93] he further noted that the ordinance also could be construed as "granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures."[94] Accordingly, Justice Stevens ruled that the police officer did not have a valid property interest sufficient to warrant application of the fourteenth amendment due process clause. In formulating his opinion, Stevens relied on a district court opinion which had concluded that the ordinance merely meant that city employees hold their positions "at the will and pleasure of the City."[95] Stevens permitted this lower court opinion to foreclose an indepen-

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88. 426 U.S. at 673-74. Article 8, § 3 of the Eastlake City Charter provided, *inter alia*, that any changes to existing land uses must be approved by a 55% affirmative vote at a city general election. To be subject to this referendum procedure, the question must be one within the scope of legislative power. *Id.* at 673. The Ohio Supreme Court characterized the Eastlake City Council's action in rezoning the respondent's property from light industrial to high density residential use as being "legislative" in nature. *Id.* at 670-71.

89. The characterization of a particular action as legislative or administrative is often allowed to determine whether or not procedural due process protection will be afforded. This issue will be discussed at length in the third section of this Article.

90. 426 U.S. at 686 (Stevens, J., dissenting). According to Justice Stevens, "the fact that a state may give [a procedure] a 'legislative' label should not save an otherwise invalid procedure." *Id.* Stevens suggested that when a state's highest court characterized a procedure as "an arbitrary and unreasonable way of handling a local problem," particular deference was due that conclusion. *Id.* He added, however, that "courts . . . may well differ in their selection of the label to apply to this action" and "many state courts would have characterized [this action] as administrative." *Id.* at 692.

91. 426 U.S. 341 (1976). *Bishop* was argued on March 1, 1976, and decided on June 10, 1976. *Eastlake* was also argued on March 1, 1976, but was not decided until June 21, 1976.

92. *Id.* at 344. Article 2, § 6 of the Personnel Ordinance of the City of Marion provided that a permanent employee could be discharged only if his work was unsatisfactory over a period of time, if he failed to perform up to his classification's standard, or if he continually was negligent, inefficient, or unfit to perform his duties. Any discharged employee who so requested had to be given written notice stating the reason for his discharge. *Id.*

93. *Id.* at 345.

94. *Id.*

95. Bishop v. Wood, 377 F. Supp. 501, 504 (W.D.N.C. 1973).

dent examination by the Supreme Court of the procedural due process issue.[96]

It is difficult to reconcile Stevens' opinion in *Bishop* with his dissent in *Eastlake*. In the former, he curiously allowed the procedural due process analysis to play second fiddle to the interpretations of a state court. But, in *Eastlake*, he condemned the majority of the Court for doing the same thing. Perhaps Stevens realized he was theoretically incorrect in *Bishop*. If so, the *Eastlake* dissent represents Stevens' acknowledgment of an earlier mistake and attempt to rectify the error. If other members of the Court follow Stevens' initiative, then deference to state law will be limited to determining the existence of claims of entitlement and not the applicability of procedural due process.

Judicial Interpretation of the Property Interest

Notwithstanding the state deference problem, the *Roth* and *Sindermann* decisions established a practical method for determining the existence of a constitutionally protected property interest.[97] Perhaps the most straightfor-

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96. 426 U.S. at 346.

97. *See* Rosenblum, *supra* note 41, at 179. The courts have analyzed the scope of the property interest in a variety of factual settings. In Bell v. Burson, 402 U.S. 535 (1971), the Supreme Court invalidated a Georgia statute which provided for the suspension of the drivers license of an uninsured motorist involved in an accident unless he posted security to cover the amount of damages claimed. The Court ruled that a drivers license was a constitutionally protected property interest, and therefore, the statute was unconstitutional for failing to provide adequate due process protection. *Id.* at 541-42. The *Bell* Court reasoned that the continued possession of a drivers license was "essential in the pursuit of a livelihood." *Id.* at 539. Interestingly, the Court observed that the statute would not have violated the fourteenth amendment if it "barred the issuance of licenses to all motorists who do not carry liability insurance. . . ." *Id.* What the Court intended to accomplish by making this distinction is not clear. One possibility, which could prove to be significant in later cases, is that property-type expectations that have not yet been "issued" by the state or local government do not constitute cognizable due process interests. Alternatively, the Court merely may have been distinguishing between a statute which involved *all* motorists and the Georgia statute which was limited, perhaps arbitrarily, only to motorists involved in accidents. *Id.* at 541.

In Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978), a municipally owned utility terminated the respondents' service after they failed to pay disputed bills. The respondents argued that they were being double billed because two sets of gas and electric meters were serving their premises. *Id.* at 4-5. Tennessee case law distinguished between utility bills that were the subject of a "bona fide dispute" and those that were not, permitting public utilities to terminate service for nonpayment of bills in the latter category. *Id.* at 9-10. In resolving the issue of whether the interest in receiving public utility service was constitutionally protected, Justice Powell stated the general proposition that while the underlying substantive interest was created by state law, federal constitutional law determined whether it rose to the level of a legitimate property interest. *Id.* Yet, like Chief Justice Burger in *Eastlake* and Justice Stevens in *Bishop*, Justice Powell based his determination of whether a protected property interest existed on a state court decision. *Id.* In concluding that the provision of utility service merited due process safeguards, Justice Powell reasoned that although the customer's right to continued service was conditioned on the payment of charges properly due, such a condition was irrelevant since the fourteenth amendment's protection of property "has never been interpreted to safeguard only the rights of undisputed ownership." *Id.* at 11.

It should be noted, however, that the Supreme Court has held that willful termination of

ward example of a property interest is ownership of land. Yet, an extremely important proposition that, unfortunately, often is overlooked is that not all governmental actions affecting individual land ownership result in due process violations. While the imposition of a special assessment or zoning regulation may work some hardship on the property owner, such acts nevertheless will not wholly deprive him of the substantial enjoyment and use of his property. In such instances, courts may hesitate to conclude that a deprivation of property has occurred.[98]

Conversely, authority exists for the proposition that the unrestricted use of property is a right that may be protected even from temporary deprivation.[99] According to this view, a deprivation occurs "when the free use and enjoyment of the . . . [property] or the power to dispose of it at will is affected."[100] These cases are most commonly distinguished through

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electric service by a privately owned utility does not fall within the scope of the fourteenth amendment, regardless of whether the company is subject to extensive state regulation. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), reaffirmed the well-settled rule that there is a "dichotomy between deprivation by the state, [activity] subject to scrutiny under the fourteenth amendment, and private conduct, however discriminatory or wrongful, against which the fourteenth amendment offers no shield." *Id.* at 349 (citing Shelley v. Kraemer, 334 U.S. 1 (1948)).

In Endicott v. Huddleston, 644 F.2d 1208 (7th Cir. 1980), a county supervisor of assessments alleged that he received an inadequate hearing after he was not reappointed to a second four-year term. An Illinois statute, in effect when the plaintiff assumed his post, provided that in counties not having an elected board of assessors, the office of supervisor of assessments was to be filled by appointment by the county board for a four-year term. ILL. REV. STAT. ch. 120 § 484(a) (1980). The statute also required the board to notify the incumbent of their decision not to reappoint him and, upon request, to grant him a public hearing to review this decision. *Id.* The Seventh Circuit interpreted the Illinois law as not conferring upon the plaintiff a property interest in continued employment because it only guaranteed him a four-year term. According to the court, "[t]he statute in no way intimates that an incumbent is granted tenure or has any entitlement to further employment." 644 F.2d at 1214. The court further noted that the statute's provision of various procedural safeguards did not elevate the plaintiff's interest to a property interest mandating fourteenth amendment protection. *Id.* Rather, the purpose of the hearing was to give the incumbent an opportunity to preserve his reputation, not his job. Finally, the court concluded that the plaintiff's mere subjective anticipation of reappointment was not protected by the fourteenth amendment. *Id.*

98. In *Eastlake*, for example, where plaintiff's rezoning request had been denied, the majority supported its conclusion that the plaintiff did not merit due process protection because neither his land use rights nor the value of his land had been significantly affected. 426 U.S. at 679 n.13.

99. *See* United States v. Causby, 328 U.S. 256 (1946) (a taking of property occurs when government creates an easement for low-flying air traffic); Griggs v. Allegheny County, 369 U.S. 84 (1962) (reaffirms *Causby* rule); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (a taking of property occurs by regular firing of cannon over owner's property).

100. McInnes v. McKay, 127 Me. 110, 116, 141 A. 699, 702, *aff'd*, 279 U.S. 820 (1928). *See also* Bay State Harness Horse Racing and Breeding Ass'n, Inc. v. PPG Indus., Inc., 365 F. Supp. 1299 (D. Mass. 1973) (law allowing attachment of realty without prior notice or hearing unconstitutionally restricted owner's ability to sell or mortgage the property at full value).

examination of the nature or degree of the deprivation on the land owner. The general rule is that the more onerous the deprivation, the more likely such deprivation will trigger application of due process protections.[101]

The case of *O'Bannon v. Town Court Nursing Center*[102] illustrates the reluctance of the Supreme Court to further expand the scope of the property interest. In *O'Bannon*, a seven-justice majority held that nursing home residents had no constitutionally protected property interest in the home's continued participation in the Medicaid program.[103] The Court recognized that the ability of many residents to live in the home was contingent upon the nursing center's continued certification status. The Court reasoned, however, that because residents were obligated to pay for use of the home regardless of the home's certification status, they were only indirect beneficiaries of the center's participation in the Medicaid program.[104] As such, nursing center residents had no right to a hearing before the home was decertified for failing to meet certain government health standards.

The *O'Bannon* opinion demonstrates that the Burger Court favors a narrow construction of the due process proprerty interest. Moreover, the Court's direct-indirect effect distinction in *O'Bannon* has limited the ability of lower courts to recognize some new property interests.[105] Consequently, to protect certain interests, courts have read *O'Bannon* narrowly[106] or identified these interests with the due process right to liberty.[107] To be sure, the *Roth-Sindermann* property interest criteria still constitute the applicable standard, but the *O'Bannon* decision demonstrates that due process property rights will be narrowly construed.

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101. *See* 8 E. McQUILLIN, MUNICIPAL CORPORATIONS § 25.44, at 101-03 (3d ed. 1965) [hereinafter cited as E. McQUILLIN]. One commentator noted that generally, four categories of property entitlements give rise to procedural due process requirements: (1) expectations of the free use and enjoyment of land; (2) entitlements to the economic value of the land itself; (3) expectations that the type of neighborhood will not change suddenly; and (4) expectations that zoning patterns will evolve gradually, not suddenly. *See Developments in the Law—Zoning*, *supra* note 3, at 1523.

102. 447 U.S. 773 (1980).

103. *Id.* at 786.

104. *Id.* at 787-88.

105. *See, e.g.*, Heille v. City of St. Paul, 671 F.2d 1134 (8th Cir. 1982) (loss of customers due to city's entering into waste collection business did not deprive plaintiff collector of property because adverse effect merely incidental to valid governmental action); Dialysis Centers Ltd. v. Schweiker, 657 F.2d 135 (7th Cir. 1981) (competition for patients engendered by Department of Health and Human Services approval of federally-subsidized program at medical facility did not constitute deprivation of property of nearby facility because patients directly benefited from program); Dostal v. Haig, 652 F.2d 173 (D.C. Cir. 1981) (taxpayers' expectation that public park would remain free of building construction too remote and insignificant to constitute property right).

106. *See, e.g.*, Spivey v. Barry, 665 F.2d 1222, 1228 (D.C. Cir. 1981) (since *O'Bannon* did not hold that entitlements based on location of government-run health service never gave rise to a due process hearing, this issue may be litigated).

107. Yaretsky v. Blum, 629 F.2d 817, 821 (2d Cir. 1980) (patients' property interest affected when moved to facility providing lower level of state-subsidized health care, but only liberty interest affected when move to unit providing higher level of care was denied).

Phase II: What Process is Due?

Once the threshold question of Justice Stewart's two prong test has been answered affirmatively (i.e., the Court has established that a constitutionally cognizable liberty or property interest has been abridged), it then must be determined what procedural safeguards the plaintiff is constitutionally entitled to receive.[108] The Court has adopted an entirely separate set of factors for conducting this second phase of the *Roth* analysis.[109] Although the Court abandoned a balancing approach for determining the existence of a valid protected interest in Phase I, balancing is a crucial element in Phase II. More importantly, while the Court was willing to defer to state and local law in ascertaining the existence of a protected liberty or property interest,[110] strict adherence to federal constitutional law has been determined necessary in examining what process is due.[111]

The Court has stated that due process is a flexible concept and mandates such procedural safeguards as the particular situation requires.[112] Accordingly, in *Mathews v. Eldridge,*[113] the Court delineated a framework, in the form of a balancing test, for analyzing the adequacy of due process protections accompanying the deprivation of a protected interest. The Court stated that identification of the specific dictates of due process depends upon the balancing of three distinct factors:

> 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.[114]

The *Mathews* balancing test has become the standard analysis for determining what process is due under the second prong of *Roth.*

In *Mathews,* a social security recipient had been notified that his disability benefits would be terminated in accordance with elaborate administrative pro-

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108. *Roth,* 408 U.S. at 570 n.8. Although Justice Stewart made it clear that the "what process is due" question is an important part of his two-step analysis, the facts of *Roth* did not permit him to adequately examine the specific elements of this second phase because the Court determined that the respondent had not been deprived of a liberty or property interest. Thus, no process was due in that case. *See supra* notes 33-47 and accompanying text for a discussion of *Roth.*

109. *See* TRIBE, *supra* note 3, at §§ 10-12.

110. *See supra* text accompanying notes 82-86.

111. *See* TRIBE, *supra* note 3, at §§ 10-12.

112. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

113. 424 U.S. 319 (1976).

114. *Id.* at 335. *Cf.* Mashaw, *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) (*Mathews* Court's formulation of due process standards erroneously emphasized questions of technique, rather than due process values) [hereinafter cited as Mashaw]. For a recent application of the *Mathews* balancing test, see United States v. Raddatz, 447 U.S. 667 (1980).

cedures established by the Secretary of Health, Education and Welfare (HEW).[115] Dissatisfied with the established procedures, the recipient filed suit claiming that his due process property rights had been abridged.[116] Before the case reached the Supreme Court, lower courts had concluded that despite the elaborate character of the HEW administrative procedures, due process had not been satisfied.[117] The Supreme Court reversed, finding that the administrative burden on the government agency if a pretermination hearing was required outweighed any possible injury to the interests of the disability benefit recipient.[118]

By definition, the second prong of the *Roth* analysis requires a determination of what procedural safeguards are mandated by the fifth and fourteenth amendments to the United States Constitution.[119] Thus, it should be indisputable that in determining whether a specific procedure comports with due process, federal constitutional law should be exclusively controlling. Yet, the Supreme Court has twice failed to adhere to this ostensibly mandatory precept.

In his opinion for the plurality in *Arnett v. Kennedy*,[120] Justice Rehnquist set forth an analysis that effectively would give local governmental units unfettered discretion in determining the type of process that is due subsequent to their deprivation of an individual's protected interest. *Arnett* in-

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115. The sequence of procedures for both acceptance and termination of social security benefits is contained in 20 C.F.R. §§ 404.900-.995 (1982). For a complete and detailed discussion of these administrative procedures, see Mashaw, *supra* note 114, at 31-33.

116. 424 U.S. at 324-25. In light of *Goldberg* and its progeny, the Court had no trouble concluding that the individual interest in continued receipt of statutorily created benefits such as social security payments is a constitutionally protected property interest. *Id.* at 332.

117. Specifically, the district court ruled that the recipient must be afforded a prior evidentiary hearing before termination of his disability payments. Eldridge v. Weinberger, 361 F. Supp. 520, 527-28 (W.D. Va. 1973), *aff'd per curiam*, 493 F.2d 1230 (4th Cir. 1974), *rev'd sub nom.* Mathews v. Eldridge, 424 U.S. 319 (1976).

118. *Id.* at 347-49. The Court distinguished *Goldberg* by reasoning that while the disabled worker can subsist on welfare payments until his case is heard, the welfare recipient has no further recourse once his benefits are suspended. Consequently, a pretermination hearing is necessary only in the latter circumstance. *Id.* at 343. Additionally, the *Mathews* Court noted that the disabled worker has access to both private resources (such as charitable contributions) and governmental aid (such as welfare benefits) in the event that the termination of his disability benefits reduces his income below the subsistence level. *Id.* at 342.

The Seventh Circuit recently applied the *Mathews* balancing test in Labor Party v. Oremus, 619 F.2d 683 (7th Cir. 1980). *Oremus* concerned the Illinois village of Bridgeview's revocation of the plaintiffs' solicitation permits, thereby preventing them from advocating their views in the village. Under the first step of the *Mathews* test, the court determined that the permits might be considered property because they "allowed plaintiffs to exercise a privilege which [the village] led them to believe was available." *Id.* at 689. Applying the *Mathews* balancing test, the Seventh Circuit concluded, however, that the town officials' substantial interest in a safe and efficient traffic system outweighed the plaintiffs' interests in solicitation. *Id.* at 690. The court further noted that negotiations with town officials, resulting in a conditional reissuance of permits, had provided plaintiffs with adequate procedural protection. *Id.*

119. *See supra* notes 42-47 and accompanying text.

120. 416 U.S. 134 (1974).

volved a federal civil servant employed by the Office of Economic Opportunity who was discharged for publicly accusing his superiors of bribery. The statute that created the employee's job contained explicit removal procedures. These procedures afforded discharged employees various due process protections,[121] although a trial-type hearing before an impartial agency official was not permitted. Justice Rehnquist dismissed the employee's due process claim and held that the statutory procedures adequately satisfied due process. The Justice reasoned that where the individual's substantive right is statutorily derived, the individual also must be bound by any limitations on procedural safeguards inherent in the statute.[122] Justice Powell, in a concurring opinion joined by Justice Blackmun, criticized the plurality's "take the bitter with the sweet" approach.[123] According to Powell, Justice Rehnquist misconceived the origin of the right to procedural due process. This right is derived from constitutional mandate and not legislative largess. Accordingly, "[w]hile the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."[124] Justice Powell was justifiably concerned. Under a strict interpretation of Justice Rehnquist's opinion, states would be able to circumvent the procedural mandate of the fourteenth amendment merely by integrating minimal procedural safeguards into statutes that create property interests.[125]

In *City of Eastlake v. Forest City Enterprises, Inc.*,[126] Chief Justice Burger also failed to exclusively follow federal constitutional law in determining the appropriate process that should be provided by a municipal government once it has deprived an individual of a property interest.[127] The respondent in

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121. 5 U.S.C. § 7503(b) (1976). In relevant part, the statute provided:

> (b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to know the reasons for his removal in writing and to—
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> (1) notice of the action sought and of any charges preferred against him;
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> (2) a copy of the charges;
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> (3) a reasonable time for filing a written answer to the charges, with affidavits; and
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> (4) a written decision on the answer at the earliest practicable date. Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay.

Id.

122. 416 U.S. at 153-54.

123. The two justices concurred in the result only. *Id.* at 166 (Powell, J., concurring). After applying the *Mathews* balancing test, the justices concluded that the government's interest in being able to act expeditiously to remove an unsatisfactory employee outweighed the employee's interest in a prior evidentiary hearing. *Id.* at 167-70.

124. *Id.* at 167.

125. Although Justices Powell and Blackmun concurred in the result, they disapproved of Justice Rehnquist's approach. Justices White, Douglas, Marshall, and Brennan disagreed with both the result and the Rehnquist approach.

126. 426 U.S. 668 (1976).

127. It is interesting to note that in a footnote, Chief Justice Burger suggested that the plaintiff in *Eastlake* may not have been deprived of a property interest at all; thus, due process analysis

Eastlake, having been denied a rezoning request in a statutorily mandated referendum vote, claimed that he had been deprived of a property interest by a local governmental unit without being afforded adequate procedural safeguards. Specifically, the respondent argued that Eastlake's referendum requirement for all zoning changes[128] lacked proper standards to guide voter decisions; consequently, the referendum requirement permitted the deprivation of property through arbitrary and capricious exercise of the police power.[129]

In rejecting this claim, the Chief Justice concluded that the respondent had received adequate due process protection through the referendum requirement because the power to make zoning decisions was properly reserved to the people of Eastlake under the Ohio Constitution.[130] It is difficult to rationalize Chief Justice Burger's conclusion that adequate due process existed, for as Justice Powell observed in a dissenting opinion, "[the Eastlake referendum] procedure, affording no realistic opportunity for the affected person to be heard, even by the electorate, is fundamentally unfair."[131] The Chief Justice focused on the validity, under the Ohio Constitution, of the referendum procedure.[132] Curiously, little emphasis was placed on the fact that at least two Supreme Court decisions, interpreting *federal* constitutional law, had found popular decision making to be an inadequate provision of procedural due process.[133]

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would not have been triggered. *Id.* at 679 n.13. However, Justice Stevens pointed out in his dissenting opinion that protected interests indeed may have been implicated. *Id.* at 681 (Stevens, J., dissenting). Rather than resolve whether a constitutionally protected property interest was involved in this particlular case, the Court focused on the plaintiff's challenge to the referendum process of initiating zoning changes in general. Having found that this process was not per se unreasonable, the Court reversed the decision of the Ohio Supreme Court and remanded the case for a determination of whether utilization of this process was reasonable in this particular situation. *Id.* at 679. It would be incorrect, however, to assume that the Court believed that all referenda impacting property interests were per se reasonable under the fourteenth amendment.

128. *See supra* note 87.

129. 428 U.S. at 671-72.

130. *Id.* at 670-71 n.1.

131. *Id.* at 680 (Powell, J., dissenting). Powell noted further that Eastlake's " 'spot' referendum technique appears to open disquieting opportunities for local government bodies to bypass normal protective procedures for resolving issues affecting individual rights." *Id.*

132. *Id.* at 672.

133. In Eubank v. City of Richmond, 226 U.S. 137 (1912), a city ordinance provided that a "building line" beyond which owners of property abutting the street were not allowed to build would be established by a two-thirds vote of property owners on a particular street. The ordinance was challenged by a property owner who was effectively prevented from building a house on a corner of his lot. *Id.* at 141-42. The *Eubank* Court invalidated the ordinance on grounds that it did not establish a standard by which the power given to the property owners was to be governed. *Id.* at 143-44.

Similarly, in Washington *ex rel.* Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928), the Court struck down a Seattle ordinance that conditioned permission to build a philanthropic home on the approval of two-thirds of the property owners within a 400 foot radius of the proposed site. The Court held that imposition of such arbitrary power in the hands of neighbors was "incompatible with the due process clause." *Id.* at 122.

There exists a line of authority supporting the use of referendum power in certain zoning decisions. According to this authority, due process requirements are satisfied by the political process.[134] Yet, the problems inherent in this rationale are many, especially when examined in light of the interests and functions served by procedural due process.[135]

It is inconceivable that the average voter has the insight, knowledge, and capabilities necessary to resolve finally and efficiently complicated zoning decisions. It is doubtful that the electorate, many of whom are land owners, and all of whom have some interest in the development of the community, will be able to effectively prevent the occurrence of an unfair, arbitrary or mistaken deprivation[136] of another individual's property interest. Consider, for example, the gas station hypothetical mentioned by Justice Stevens in his dissenting opinion in *Eastlake*.[137] As Stevens observed, it would be absurd to use a city-wide referendum to decide whether a service station could be operated on a particular corner in Cleveland.[138] Indeed, zoning decisions entail study of a great deal of analytical data. Such a gas station might be incompatible with the surrounding land use and thereby create a nuisance, endanger the health of nearby residents, create aesthetic or environmental problems in the neighborhood, or sharply decrease the resale value of surrounding real estate. On the other hand, such a gas station might be advantageous to the economic, commercial, and industrial growth of the surrounding neighborhood.

These considerations are all extremely relevant in any zoning decision. In a large municipality, or even in a city with a population of 20,000 (such as Eastlake in 1975), it is unrealistic to assume that these considerations will be properly weighed, if at all, through the "debate and persuasion possible in the political arena."[139] As one prominent zoning expert observed, "[z]oning does itself a disservice when it goes beyond the catholic role of [procedural fairness]."[140] Consequently, it is difficult for the referendum procedure to provide the procedural due process functions of ensuring fairness,

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134. *See, e.g.*, Southern Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291, 294-95 (9th Cir. 1970) (city-wide referendum which nullified a zoning amendment and effectively precluded low-income housing project was not a denial of procedural due process); Dwyer v. City Council, 200 Cal. 505, 516, 253 P. 932, 936 (1927) (proposed zoning by referendum to block chicken farms from city limits not prohibited by state constitution). *See also* Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74, 75 (1976) (California courts have upheld the use of the referendum to challenge zoning decisions, but have not been as approving of the local initiative process). *See generally* Glenn, *State Law Limitations on the Use of Initiatives and Referenda in Connection with Zoning Amendments*, 51 S. CAL. L. REV. 265 (1978) (analysis of state decisions on constitutionality of initiative and referendum).

135. *See supra* text accompanying notes 8-15.

136. *See supra* note 12.

137. 426 U.S. at 694 (Stevens, J., dissenting) (referring to Forest City Enters., Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 200, 324 N.E.2d 740, 749 (1975) (Stern, J., concurring)).

138. 426 U.S. at 694 (Stevens, J., dissenting).

139. *Dwyer*, 200 Cal. 505, 516, 253 P. 932, 936 (1927).

140. R. BABCOCK, THE ZONING GAME 136 (1966).

order, predictability, efficiency, and justice. Nevertheless, Chief Justice Burger permitted this federal constitutional proposition to be undermined by a cursory examination of the delegation of power procedure under Ohio's Constitution.

III. The Tripartite Panoply of Due Process Safeguards

To fully understand what procedures are "due," it is necessary to examine cases that have dealt with this issue. Generally, the case law can be divided into three broad and overlapping categories which, together, comprise the full measure of procedural due process protections: (1) opportunity to be heard, (2) notice, and (3) fair hearing.

Opportunity To Be Heard

The requirement that a hearing be provided as an element of procedural due process is deeply embedded in American jurisprudence.[141] More recently, the Court has recognized that there is a presumption that the constitutional right to due process includes, as a "root requirement," the right to be heard.[142] Although the concept of a hearing usually connotes some type of formal appearance before an official tribunal, the kind of hearing required may vary significantly from case to case. In the 1908 case of *Londoner v. City and County of Denver*,[143] the Court recognized that as long as an individual is provided an opportunity to present arguments and support these arguments with proof, the hearing may be constitutionally adequate.[144]

Goss v. Lopez[145] illustrates the flexibility of the hearing requirement. There, the Supreme Court ruled that before suspending a student for misconduct, the student must be given some explanation of the charges against him. A formal hearing was not necessary because a conference between the disciplinarian and the student immediately following the alleged misbehavior usually was sufficient to protect the student's rights.[146] Similarly, in *Memphis Light, Gas & Water Division v. Craft*,[147] the Court held that by providing customers with the opportunity to present billing complaints to a designated employee before termination of service, a public utility satisfied due process.[148] Moreover, in *Parham v. J.R.*,[149] the Court stated that a formal adversary hearing was not required to institutionalize a child for mental

141. *See, e.g.*, Hovey v. Elliot, 167 U.S. 409, 419 (1897) ("by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without . . . due process of law. . .").

142. Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971).

143. 210 U.S. 373 (1908).

144. *Id.* at 386.

145. 419 U.S. 565 (1975).

146. *Id.* at 581-82.

147. 436 U.S. 1 (1978). *See supra* note 97.

148. *Id.* at 16.

149. 442 U.S. 584 (1979).

health care. Rather, due process merely necessitated that a personal interview by a "neutral fact finder" be conducted with the child.[150]

The significance of the foregoing decisions is that under the *Mathews* balancing test,[151] the Court has the discretion to mold the form of the hearing to fit the particular facts of each case. Therefore, a "hearing" could range from an appearance before the tax appeals board to a brief conference with a teacher or an opportunity to submit written complaints.

Another troublesome issue concerning the hearing requirement is when the procedure must take place. In establishing strict standards in this area, the Warren Court suggested that provision of an opportunity to be heard "at a meaningful time"[152] meant that the hearing must be conducted before a deprivation has occurred. In *Sniadach v. Family Finance Corp.*,[153] the Court invalidated a state law allowing wage garnishment without prior notice or a hearing. The Court noted that the withholding of wages might create undue hardship on a garnishee's family—especially if the garnishment was wrongful.[154] By the same reasoning, the Warren Court, in *Goldberg v. Kelly*, held that due process required a hearing to be held before the government could terminate welfare benefits because these payments provided the sole means of subsistence for most recipients.[155] Two years later, in *Fuentes v. Shevin*,[156] the Court extended the pre-deprivation hearing requirement to seizure of household goods purchased under an installment sales contract. Thus, despite the fact that the Court had hinted that there may exist "extraordinary situations"[157] in which the requirement possibly might be relaxed, due process generally seemed to demand a hearing before individual property rights could be affected.

The Warren Court's position on this issue has since been qualified in a number of ways. Two years after *Fuentes*, the Court, in *Mitchell v. W.T. Grant Co.*,[158] upheld a Louisiana procedure by which a judge could permit a creditor to sequester private property before holding a hearing.[159] Although *Mitchell* did not involve an "extraordinary situation,"[160] the majority reached its decision by balancing the interests of both parties[161] and concluded that

150. *Id.* at 607.

151. *See supra* text accompanying notes 113-14.

152. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

153. 395 U.S. 337 (1969).

154. *Id.* at 341-42.

155. 397 U.S. at 264.

156. 407 U.S. 67 (1972).

157. According to the *Fuentes* Court, an "extraordinary situation" exists when: "a) a seizure of property is necessary to achieve a compelling governmental or public interest; b) prompt action is required; and c) a government official is responsible for authorizing the seizure pursuant to a narrowly drawn statute." *Id.* at 91.

158. 416 U.S. 600 (1974). The *Mitchell* Court split five to four.

159. *Id.* at 610.

160. *See supra* note 157.

161. The Court explicitly stated that in such cases the interests of both the seller and the buyer had to be considered. 416 U.S. at 604. For example, the interests of a seller with a vendor's lien include the fear that the buyer will damage, destroy, or dispose of the property

the statute provided adequate safeguards to protect the debtor.[162] Among other provisions, the Louisiana statute entitled the debtor to a hearing immediately after the property deprivation.[163] The following year, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[164] the Court invalidated a Georgia garnishment statute after consideration of the debtor safeguard criteria in the *Mitchell* statute.[165] The majority emphasized the fact that the Georgia statute did not even require an "early hearing,"[166] let alone one immediately following the garnishment. While the *North Georgia* case demonstrated that the Supreme Court still disapproved of such pro-creditor statutes, it also indicated that the days of strict pre-deprivation hearing requirements were gone.

Indeed, in the 1976 case of *Mathews v. Eldridge*,[167] the Burger Court firmly established its disavowal of the Warren Court's prior hearing stance. Writing for a six-justice majority, Justice Powell went to great lengths to distinguish the welfare benefits in *Goldberg* from the disability payments in *Mathews* in an attempt to explain why the termination of the latter did not require a pre-deprivation hearing.[168] In so doing, the Court announced its three-part balancing test[169] effectively incorporating the *Mitchell* analysis.[170] Since *Mathews*, the Supreme Court has applied this test to a number of different factual settings and consistently rejected pre-deprivation hearing claims.[171] In contrast to the position of the Warren Court, the Burger Court's prior hearing stance seems to depend largely on "the availability of some opportunity subsequent to the initial taking for a determination of rights and liabilities."[172]

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while the action is pending. *Id.* at 606.

162. The Court noted that the statute provided four safeguards for the debtor: first, it required the creditor to allege specific facts, not conclusory statements, for the writ to issue; second, the creditor had to make his showing before a judge, as opposed to a lesser court official; third, the procedure provided for an immediate post-deprivation hearing and dissolution of the writ if the creditor failed to establish grounds for its issuance; and lastly, the debtor was entitled to damages and attorney fees upon dissolution of the writ. *Id.* at 616-18.

163. *Id.*

164. 419 U.S. 601 (1975).

165. *Id.* at 607.

166. *Id.*

167. 424 U.S. 319 (1976).

168. *Id.* at 340-43. *See supra* text accompanying note 155.

169. *Id.* at 335. *See supra* text accompanying note 114. In parts one and three, the *Mathews* test elaborates on the balancing of interests first mentioned in *Mitchell*. *See supra* text accompanying note 161. Part two of the *Mathews* test impliedly includes *Mitchell*'s debtor safeguards analysis. *See supra* note 162 and accompanying text.

170. *See supra* notes 158-63 and accompanying text.

171. *See, e.g.*, Mackey v. Montrym, 443 U.S. 1 (1979) (constitutional to suspend driver's license for 90 days without pre-deprivation hearing for refusing to take breath-analysis test); Califano v. Yamasaki, 442 U.S. 682 (1978) (pre-deprivation hearing unnecessary if government reduces social security payments to recoup previous overpayment); Dixon v. Love, 431 U.S. 105 (1977) (Illinois law allowing suspension of driver's license without prior hearing is constitutional because the property interest involved did not outweigh the administrative burdens of holding a hearing).

172. Parratt v. Taylor, 451 U.S. 540, 541 (1981).

Notice

The Court has recognized that the due process hearing requirement is "meaningless without notice."[173] Consequently, notice has been considered a crucial component of procedural due process. Ostensibly, the purpose of notice is to apprise the affected individual of an impending hearing regarding his protected interest, thereby giving him a chance to adequately prepare his case.[174] However, notice also serves the practical function of alerting individuals of a forthcoming deprivation of their property. For example, when a local government levies special assessments against property specially benefited by certain public improvements, courts have uniformly held that the government must provide all potentially affected individuals with some form of prior notice.[175]

To fulfill the foregoing functions, courts have required that notice be reasonably calculated to inform affected individuals of the opportunity to present their objections.[176] Moreover, such notice must reasonably convey the necessary information and provide adequate time for interested persons to appear.[177]

In *Memphis Light, Gas & Water Division v. Craft*,[178] the Supreme Court had the opportunity to apply these general principles to the termination of municipal services.[179] The Court ruled that in such instances notice must be calculated to advise customers of the availability of procedures for protesting proposed terminations of service. The Court noted, however, that notice procedures developed by a utility "may be entirely adequate" in

173. Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956).

174. *See* Wolff v. McDonnell, 418 U.S. 539, 564 (1974); Morrissey v. Brewer, 408 U.S. 471, 486-87 (1972); *In re* Gault, 387 U.S. 1, 33-34 (1967).

175. *See, e.g.*, Londoner v. City and County of Denver, 210 U.S. 373, 385-86 (1908) (taxpayer upon whom special assessment is levied "must have notice, either personal, by publication, or by a law fixing the time and place of the hearing"); Cowan Inv. Corp. v. City of Florence, 11 F. Supp. 973, 975 (N.D. Ala. 1935) (notice to property owners of amount of tax assessed against each parcel of property is "necessary to the validity of an assessment"); Tramel v. City of Dallas, 560 S.W.2d 426 (Tex. Civ. App. 1977) (notice and hearing regarding tax assessments for street widening required before assessments become permanently fixed). *See also* McQUILLIN, *supra* note 101, at §§ 38.98-.100 (property owners must be given notice and opportunity to contest impending special tax assessment). For a discussion of the general sufficiency of the notice in special taxation and local assessment cases, see *supra* McQUILLIN, note 101, at § 38.101. For a discussion of sufficiency of notice in the municipal zoning and land use area, see Kahn, *In Accordance With A Constitutional Plan: Procedural Due Process and Zoning Decisions*, 6 HASTINGS CONST. L.Q. 1011, 1038-41 (1979) [hereinafter cited as Kahn].

176. This requirement emanates from the following oft-quoted passage in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. at 314 (citations omitted).

177. *Id.*

178. 436 U.S. 1 (1978).

179. *See supra* note 97 for a discussion of *Memphis*.

meeting the notice standards,[180] especially if such procedures included a detailed list of personnel available to respond to customer complaints concerning their bills.[181]

Fair Hearing

To comply with the Court's mandate that hearings be conducted in "a meaningful manner,"[182] hearings must be administered in a responsible, nonpartisan fashion.[183] Yet, because due process is flexible and must adapt to a variety of situations,[184] it is often difficult to predict exactly what type of hearing is necessary.[185] Perhaps the most authoritative source regarding the scope of the due process hearing requirement is Judge Friendly's article entitled *Some Kind of Hearing*.[186] Therein, Judge Friendly delineated and ranked eleven different elements which, under varying circumstances, have been determined as necessary for a fair hearing.[187] Judge Friendly's analysis

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180. 436 U.S. at 15 n.16.

181. Specifically, the notice procedure at issue in *Memphis* concerned the following statement made to all customers: "Credit Counselors are available to clear up any questions, discuss disputed bills or to make any needed adjustments. There are supervisors and other management personnel available if you are not satisfied with the answers or solutions given by the Credit Counselors." *Id.*

182. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

183. *See* Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV. C.R.-C.L. L. REV. 48, 93 (1976) ("Due process means that an individual has a realistic and not just theoretical opportunity to have his claim decided by an impartial forum and not to be subjected to a private or bureaucratic will which he is powerless to contest.").

184. *See* Morrisey v. Brewer, 408 U.S. 471, 481 (1972).

185. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 566-72 (1974) (prison disciplinary hearing requires notice, opportunity to present evidence, and time to call witnesses unless unduly hazardous; confrontation and cross-examination are at warden's discretion; prison must supply written statement of reasons for discipline; prison not required to supply counsel for inmate); Morrisey v. Brewer, 408 U.S. 471, 487-90 (parole revocation hearing must include notice, opportunity to cross-examine and confront witnesses unless risk of danger too great, and informal statement of reasons given by impartial decision maker); Gray Panthers v. Schweiker, 652 F.2d 146, 172-73 (D.C. Cir. 1981) (where Federal Medicare program participants are denied statutory benefits, claimants must have access to evidence forming basis of denial, opportunity to present written or oral evidence, opportunity to interview witnesses, and meaningful explanation of reasons for denial); Kletschka v. Le Sueur County Bd. of Comm'rs, 277 N.W.2d 404, 405 (Minn. 1979) (landowners requesting conditional use permit at zoning proceeding have a right to reasonable notice of hearing and opportunity to be heard, but do not have right to cross-examination because such proceedings are not conducted under oath).

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

187. Judge Friendly listed the 11 elements in the following order:

> (1) an unbiased tribunal (2) notice of the proposed action and grounds asserted for it (3) an opportunity to present arguments why the proposed action should not be taken (4) the right to call witnesses (5) knowledge of the evidence against one (6) decisions based only on evidence presented (7) the right to counsel (8) the making of a record (9) statement of reasons for the government's position (10) public attendance (11) judicial review.

Id. at 1279-95.

revolves around the same balancing test prescribed by the Supreme Court in Prong II of the *Roth* analysis.[188] While it is not necessary to dwell on all eleven elements noted in Judge Friendly's article,[189] at least one element, an impartial and unbiased tribunal, merits further examination.

The Supreme Court often has stressed that a "biased decision maker is constitutionally unacceptable."[190] In *Withrow v. Larkin*,[191] the Court identified two situations in which the probability of actual bias on the part of the decision maker is too high to be constitutionally tolerable:[192] (1) where the adjudicator has a pecuniary stake in the controversy's resolution;[193] and (2) where the adjudicator has been criticized by the party before him.[194]

A revolutionary doctrine has originated in the State of Washington requiring the "appearance of fairness" in governmental processes. First enunciated in the 1969 case of *Smith v. Skagit County*,[195] the major tenet of the doctrine is that the right of an opportunity to be heard "imports a reasonable expectation of being heeded."[196] In *Fleming v. City of Tacoma*,[197] the Washington court recognized that an important aspect of the "fairness doctrine" concerns the motives of the persons involved in conducting the hearing.[198] In *Fleming*, a citizen challenged a local rezoning amendment on grounds that one of the members of the council voting in favor of the amendment allegedly had a conflict of interest. The alleged conflict centered around the fact that less than forty-eight hours after the vote on the rezoning application, a councilman became employed by the successful proponents of the amendment.[199] The court ruled that the inference of impropriety on the

188. According to Judge Friendly, the required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for the usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording the safeguards. *Id.* at 1278. *See supra* notes 113-14 and accompanying text.

189. *See also* Kahn, *supra* note 175, at 1041-44 (to determine the fairness of the hearing, Kahn examines the nature and conduct of the proceeding, the right to counsel, use of ex parte evidence, and the presentation of arguments); Comment, *Land Use and Due Process—An Examination of Current Federal and State Procedures*, 9 ST. MARY'S L.J. 846 (1978) (discusses federal and state land use regulations in relation to Friendly's 11 elements); *Developments in the Law—Zoning*, *supra* note 3, at 1526 (a fair hearing requires that a decision maker be impartial and have standards to guide his judgment).

190. Withrow v. Larkin, 421 U.S. 35, 47 (1975); Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973); Ward v. Village of Monroeville, 409 U.S. 133, 136 (1955); Tumey v. Ohio, 273 U.S. 510, 522 (1927).

191. 421 U.S. 35 (1975).

192. *Id.* at 47.

193. *Id.* (referring to Gibson v. Berryhill, 411 U.S. 564, 574 (1973)).

194. *Id.* (referring to Taylor v. Hayes, 418 U.S. 488, 501-03 (1974)).

195. 75 Wash. 2d 715, 453 P.2d 832 (1969). For further discussion of the *Smith* case, see Comment, *Public Hearings—An Appearance of Fairness*, 5 GONZ. L. REV. 324 (1970).

196. 75 Wash. 2d at 739, 453 P.2d at 846.

197. 81 Wash. 2d 292, 502 P.2d 327 (1972).

198. *Id.* at 298-99, 502 P.2d at 331.

199. *Id.* at 294, 502 P.2d at 328. At an earlier reading of the same proposal, the councilman had voted against the amendment. *Id.*

part of the councilman was sufficient cause to invalidate the amendment.[200] In overcoming the general judicial reluctance to inquire into legislative motives[201] the court determined that it was essential that decisions involving zoning amendments be reached fairly.[202]

IV. THE LEGISLATIVE VERSUS ADJUDICATIVE HURDLE

An erroneous proposition has found its way into the procedural due process analysis. Instead of relying exclusively on the two-pronged test prescribed by Justice Stewart in *Roth*,[203] many courts have predicated application of procedural due process on the nature of the forum creating the deprivation.[204] Only deprivations created by an adjudicative, as opposed to a legislative body, are subject to procedural due process requirements. This proposition rests on the theory that the procedural aspects of legislative decision making are relatively free from judicial inquiry[205] and, therefore, legislatures are in effect

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200. *Id.* at 300, 502 P.2d at 332.

201. *See* MCQUILLIN, *supra* note 101, at § 16.90 (instead of investigating motives, courts usually restrict their inquiry to whether the legislature had the power to pass the act).

202. 81 Wash. 2d at 298-300, 502 P.2d at 330-31. *Accord* Fleck v. King County, 16 Wash. App. 668, 558 P.2d 254, 257 (1977). For a general discussion of impartiality in zoning decisions, see Kahn, *supra* note 175, at 1048-50.

The appearance of fairness doctrine has not garnered much support outside the zoning area. In a recent Washington state opinion, for example, the doctrine was held inapplicable to a quasi-legislative decision making process whereby the state's Department of Licensing adopted a "direct supervision" rule for apprentice opticians. Somer v. Woodhouse, 28 Wash. App. 262, 623 P.2d 1164 (1981). The *Somer* court reasoned that, as opposed to quasi-judicial administrative actions, quasi-legislative administrative acts provided greater protection for the individual. Such protection lay in the political process itself, rather than in "elaborate procedural safeguards." *Id.* at 270, 623 P.2d at 1171.

Moreover, for all practical purposes, Chief Justice Burger ignored the neutrality requirement in the *Eastlake* decision by allowing city residents to have the power to decide whether one of their number could be deprived of his property. *See Eastlake*, 426 U.S. at 680 (Powell, J., dissenting).

203. *See supra* text accompanying note 42-45.

204. Most of the cases arise out of local zoning or special tax assessment disputes. *See, e.g.*, City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976). *See also* Rogin v. Bensalem Township, 616 F.2d 680 (3d Cir. 1980) (zoning board acting in legislative capacity did not deny developer due process), *cert. denied*, 450 U.S. 1029 (1981); Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d 511, 620 P.2d 947, 169 Cal. Rptr. 904 (1980) (cites *Eastlake* in concluding that there was no due process violation because rezoning is a legislative matter); Cooper v. Board of County Comm'rs, 101 Idaho 407, 614 P.2d 947 (1980) (zoning boards are quasi-judicial and therefore subject to due process); Westside Hilltop Survival Comm. v. King County, 96 Wash. 2d 171, 634 P.2d 862 (1981) (since zoning is legislative, inquiry limited to whether or not acts were arbitrary and capricious). *See generally* Kahn, *supra* note 175, at 1027-28 (legislative acts are not limited by procedural due process and therefore courts will not consider extent of protection required); *Developments in the Law—Zoning*, *supra* note 3, at 1508 (the Constitution does not require that legislative action afford due process protection).

205. *See, e.g.*, McQuail v. Shell Oil Co., 40 Del. Ch. 396, 408, 183 A.2d 572, 580 (1962) (courts will not ordinarily inquire into motives of members of a legislative body to determine validity of ordinance enacted within the scope of their powers). *See also* MCQUILLIN, *supra* note 101, at § 15.23 (presumption is that ordinances affecting personal and property rights are enacted in good faith unless proof to the contrary is shown).

immune from procedural due process.[206] The "nature of the forum" factor has garnered so much judicial support that it is not surprising that many courts mistakenly have recognized it as a third prong to be added to the *Roth* test.[207]

Origin of the Nature of the Forum Factor

The distinction between the legislative and the adjudicative forum and its relevance to due process is illustrated by comparing the Supreme Court cases of *Londoner v. City and County of Denver*[208] with *Bi-Metallic Investment Co. v. State Board of Equalization.*[209] *Londoner* involved a challenge by land owners to a special assessment tax imposed by the city of Denver for the cost of paving the street abutting their property. The tax was assessed under provisions of the Denver City Charter, which conferred upon the city the power to make local improvements and to assess the costs upon property specially benefited.[210] The charter authorized a process whereby a board of public works, upon the petition of a majority of the owners of the assessed frontage, could recommend to the city council the type of improvement requested. Although the city charter assessment procedure afforded land owners some procedural safeguards,[211] the Court ruled that the imposition of assessments in this fashion constituted a deprivation of property without due process of law.[212] Although the Court recognized that the assessment of taxes upon property generally was a matter within the discretion of local government, it held that the full panoply of due process protections should be provided where the state legislature delegates this responsibility to a subordinate body.[213] The Court found that the mere opportunity, afforded to the affected landowners, to submit written objections and complaints did not meet the requirements of due process.[214]

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206. *See, e.g.*, Willapoint Oysters v. Ewing, 174 F.2d 676, 694 (9th Cir.) ("in legislation, or rulemaking, there is no constitutional right to any hearing whatsoever"), *cert. denied*, 383 U.S. 860 (1949); State Bd. of Milk Control v. Newark Milk Co., 118 N.J. Eq. 504, 523, 179 A. 116, 126 (1935) (legislative functions do not require notice of hearing).

207. *See, e.g.*, Thompson v. Washington, 497 F.2d 626 (D.C. Cir. 1973). In *Thompson*, the D.C. Circuit, after examining Supreme Court precedent, concluded that the existence and extent of due process procedural requirements turn upon consideration of three factors. Two of these factors closely resembled the two prongs in the *Roth* test. The third factor, according to the court, was "the nature of the forum through which the Government acts." *Id.* at 634.

208. 210 U.S. 373 (1908).

209. 239 U.S. 441 (1915).

210. 210 U.S. at 375.

211. The charter called for notice by publication both before and after the improvement to inform landowners of the assessment upon their property. The charter also allowed for the filing of written objections with the city clerk. *Id.* at 376-77. Although the plaintiffs' objections were proper and timely, the city council nevertheless enacted an ordinance approving the proposed assessments. *Id.* at 377.

212. *Id.* at 386.

213. *Id.* at 385-86.

214. *Id.* at 386.

Bi-Metallic involved a suit to enjoin the Colorado Board of Equalization from enforcing an order to increase the value of all taxable property in Denver by forty percent. Taxpayers brought suit on the ground that they were given no opportunity to be heard before the increase came into effect and, consequently, were deprived of their property without due process of law.[215] Justice Holmes, speaking for a unanimous Court, found that when such broad legislative decisions were involved, no procedural due process, in its traditional form of notice and hearing, need be provided.[216] According to Holmes, "[w]here a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption."[217] Holmes distinguished *Londoner*, reasoning that the decision therein was made by a local adjudicative board and involved specific, individualized issues concerning a relatively small number of persons.[218]

Read together, these two decisions create a dichotomy, for procedural due process purposes, between adjudicative and legislative decisions. Procedural due process is necessary for the former, not for the latter. The theories offered for making this dichotomy typically fall into two related categories: the separation of powers theory and the democratic system theory.

The separation of powers theory is premised on the notion that because legislating entails political compromise and ad hoc decision making, policies that approximate a fair and equitable distribution of both social resources and obligations necessarily will result.[219] Legislation typically applies to a large number of citizens within the jurisdictional authority of the legislative body. In contrast, decisions involving individualized issues are made by the judicial branch of government. Those who support the separation of powers theory assert that affording individual due process protection to the large number of citizens affected by legislation would be costly, inefficient, and impracticable.[220]

According to the democratic system theory, the traditional safeguards of procedural due process are unnecessary in the legislative setting because a comparable substitute exists: the voting power of the electorate.[221] Since legislators are ultimately responsible to the electorate for their actions,[222] pro-

215. 239 U.S. at 442.

216. *Id.* at 445.

217. *Id.*

218. *Id.* at 445-46.

219. Rogin v. Bensalem Township, 616 F.2d 680, 693 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981). *See also* Booth, *A Realistic Reexamination of Rezoning Procedure: The Complimentary Requirements of Due Process and Judicial Review*, 10 GA. L. REV. 753, 778 (1976) (presumption that legislative action is constitutional is based on theory that such action has broad impact, is highly visible, and can be corrected at the polls) [hereinafter cited as Booth].

220. *Bi-Metallic*, 239 U.S. at 445.

221. *Id. See also* Comment, *Due Process Rights of Participation in Administrative Rulemaking*, 63 CALIF. L. REV. 886, 889 (1975) (legislatures not required to provide procedural due process requirements because theoretically they respond to the will of the people) [hereinafter cited as *Due Process Rights*].

222. Southern Ry. Co. v. Virginia, 290 U.S. 190, 197 (1933).

ponents of the democratic system theory believe that public pressure will prevent legislators from wrongfully abridging the interests of individual citizens.[223]

In light of the two foregoing theories, many courts and commentators have attempted to create workable methods for distinguishing between adjudication and legislation for due process purposes. The approach attributed to Justice Holmes examines the number of people that will be affected by a pending decision.[224] If the decision involved applies to only a small number of "exceptionally affected" people, the act is adjudicative and, therefore, subject to procedural due process requirements.[225] Conversely, procedural due process is not applicable to legislative acts which affect many individuals.[226] The problem with this result-oriented approach is Holmes' lack of specificity as to what constitutes a sufficient number of people to preclude due process.[227]

A rather simplistic approach, stemming, perhaps, from the Supreme Court's opinion in *Southern Railway Co. v. Virginia*,[228] distinguishes between adjudicative and legislative decision making on the basis of traditional separation of powers labels. For example, all decisions made by administrative, executive, or judicial bodies are considered "adjudicative"; in contrast, decisions made by city councils or state legislatures are viewed as "legislative" in nature.[229] Due process is unnecessary for the latter group because "the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public."[230] The trouble with this rigid labeling approach is that it is insensitive to the realities underlying the actual decisions. Quite often legislatures will engage in activities that more closely resemble adjudicatory hearings than traditional legislative decision making.[231] Similarly, judicial bodies often participate in activities characteristic of the legislative branch of government.[232] Moreover, this approach permits the availability of procedural rights to turn upon the allocation of power among local legislatures, agencies and other governmental bodies—an allocation

223. *See Due Process Rights*, *supra* note 221, at 889.

224. *See Bi-Metallic*, 239 U.S. at 445; *supra* text accompanying notes 217-18.

225. *Bi-Metallic*, 239 U.S. at 446.

226. *Id.* at 445.

227. The fact that Justice Holmes dissented, without an opinion, in *Londoner*, 210 U.S. at 386 (Holmes, J., dissenting)—thereby voting for no due process in a case involving a small number of persons—makes his approach even more confusing.

228. 290 U.S. 190 (1933).

229. *See* Couf v. DeBlaker, 652 F.2d 585, 590 (5th Cir. 1981).

230. *Southern Ry.*, 290 U.S. at 197.

231. *See, e.g.*, Groppi v. Leslie, 404 U.S. 496 (1972) (legislative contempt proceeding); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973) (zoning ordinance amendment proceeding).

232. *See, e.g., In re* Oliver, 452 F.2d 111, 114 (7th Cir. 1971) (local court rule unconditionally forbidding attorneys from making extrajudicial comments on pending cases viewed as "legislative" in nature and subject to the same constitutional scrutiny as statutes restricting free speech).

determined by political expediency and administrative efficiency rather than by the fundamental interest underlying due process.[233]

Professor Kenneth Culp Davis, renowned for his attempts to distinguish between legislative and adjudicative decision making, suggests making an assessment of the kinds of facts involved in the decision making process before determining whether procedural due process is mandated.[234] Facts that concern questions of policy and law are deemed to be legislative facts.[235] Because decisions based on these kinds of facts are "legislative" in nature, they are not subject to due process.[236] Davis asserts, however, that due process is required when the facts to be evaluated in the decision making process wholly concern the immediate parties to a controversy. In such circumstances, no decision should be made without affording the parties various due process protections.[237]

Although the Davis approach has been widely followed,[238] it nevertheless is flawed. Davis' analysis does not differ significantly from the two approaches discussed above.[239] Notwithstanding that the framework Davis sets out goes beyond the simple labeling technique utilized in *Southern Railway*, Davis' approach is susceptible to such semantic manipulation that courts can use it to achieve the result desired in a particular situation.[240] Consequently, the Davis approach merely provides courts with an arsenal of words and phrases with which to justify decisions.

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233. *See Developments in the Law—Zoning*, *supra* note 3, at 1510.

234. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02 (1958) [hereinafter cited as DAVIS].

235. *Id.*

236. *Id.*

237. *Id.* The rationale Davis offers for this proposition is that adjudicative facts are "intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and meet any evidence that may be unfavorable to them." *Id.* Davis cites the 1955 Supreme Court case of Gonzales v. United States, 348 U.S. 407 (1955), as support for his proposition. The Court therein distinguished certain cases on the ground that "they do not involve individualized fact finding and classification, but legislative determinations, political judgments, and the exercise of judicial discretion. . . ." 348 U.S. at 413, *quoted in*, DAVIS, *supra* note 223, at § 7.02.

238. *See, e.g.*, Nolan v. Ramsey, 597 F.2d 577 (5th Cir. 1979) (plaintiff unsuccessfully challenged legislative policy decision to employ new stenographic methods); Lakey v. Richardson, 527 F.2d 949 (9th Cir. 1975) (prisoner entitled to hearing when adjudicative facts of his custody classification are at issue); Jackson County Public Water Supply Dist. No. 2 v. State Highway Comm'n, 365 S.W.2d 553 (Mo. 1963) (decision whether to assess cost of moving water lines in state highway to state or property owner is legislative in nature).

239. See *supra* text accompanying notes 218-27 for a discussion of the separation of powers theory and the democratic system theory. According to Professor Nathaniel Nathanson: "[i]n actual application [Professor Davis' approach] is as elusive as all the other magic keys which have been offered for the solution of the right to hearing problem." Nathanson, Book Review, 70 YALE L.J. 1210, 1211 (1961).

240. *See* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 503-04 (1970) (discussing Transcontinental Television Corp. v. FCC, 308 F.2d 339 (D.C. Cir. 1962)) [hereinafter cited as Robinson].

The Adjudicative-Versus-Legislative Issue as a Third-Prong to the Roth *Due Process Analysis*

As a result of the continued reliance on the legislative-adjudicative dichotomy, courts typically permit their determination of the type of forum involved to control the entire due process question, notwithstanding the outcome reached in prong-one of the *Roth* test. In other words, if a Court finds that a "legislative" forum is involved, no process will be due, despite the fact that a valid constitutionally protected interest is found to be at stake.[241]

In *City of Eastlake v. Forest City Enterprises, Inc.*,[242] the Court asserted that its characterization of a municipal zoning procedure as "legislative" controlled the procedural due process issue. Despite the fact that resident property interests were at stake and the zoning procedures might have provided inadequate protection against capricious governmental deprivation, the majority concluded that the "legislative" nature of the zoning ordinance meant that due process was satisfied.[243] Similarily, in *New Motor Vehicle Board v. Fox*,[244] the Supreme Court held that the California Automobiles Franchise Act (Act) did not violate procedural due process by requiring motor vehicle manufacturers to secure the approval of the California New Motor Vehicle Board (Board) before opening a retail dealership within the market area of an existing fanchisee, if the latter protests.[245] Although the Act directed the Board to notify the manufacturer of the statutory requirement if and when an existing franchisee filed a protest, it did not require the Board to hold a hearing on the merits of the protest before sending notice to the manufacturer. Justice Brennan, speaking for the majority, characterized the provisions of the Act as reflecting "general legislative policy."[246] Brennan concluded that even if the right to franchise was a protected interest, legislatures are constitutionally empowered to enact business regulations that impose reasonable restrictions upon the exercise of such rights.[247]

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241. The following passage from a Louisiana Supreme Court decision illustrates this procedure:

> A determination of the applicability of the requirements of procedural due process to the administative process is generally based upon the distinction between legislative and judicial functions. *If the activity of the administrative body tends to assimilate the exercise of the legislative function, then procedural due process is not demanded since no such limitation is placed upon the legislature itself.* If however, a judicial function is involved, an analogy to judicial process is made, and the procedural safeguards developed in the administration of justice must be observed.

Tafaro's Inv. Co. v. Division of Hous. Improvement, 261 La. 183, 186, 259 So. 2d 57, 60 (1972) (emphasis added).

242. 426 U.S. 668 (1976). See *supra* text accompanying notes 126-33 for a discussion of *Eastlake*.

243. 426 U.S. at 677.

244. 439 U.S. 96 (1978).

245. *Id.* at 108.

246. *Id.* at 105-06.

247. *Id.* Justice Brennan cited *Bi-Metallic* as support for his conclusion that legislative policy is not subject to procedural due process. *Id.* at 108.

Justice Stevens, in his dissent in *Fox*, recognized the unfairness involved in allowing a legislative label to preclude imposition of due process protections. According to Stevens, the statute, in providing existing franchisees unfettered discretion to restrain the liberty of new competitors, "blatantly offends the principles of fair notice, attention to the merits, and neutral dispute resolution that inform the Due Process Clause of the Fourteenth Amendment."[248]

The Fifth Circuit recently allowed the characterization of a zoning act as legislative to be determinative of a procedural due process issue. In *Couf v. DeBlaker*,[249] the City Commission of Clearwater, Florida had instructed the city planning department to "down zone"[250] all property within 500 feet of the city's waterfront, thereby preventing the plaintiff from building a condominium on his property. The Fifth Circuit observed that because its prior opinions "repeatedly characterize[d] local zoning decisions as legislative in nature,"[251] plaintiff could not claim that his due process rights had been abridged, notwithstanding the deprivation of plaintiff's property interest.[252]

The Case Against the Legislative-Adjudicative Distinction of a Third-prong to the Roth *Due Process Analysis*

Given that procedural due process provides fairness, justice, and order and prevents arbitrary and mistaken deprivation of constitutionally protected

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248. *Id.* at 127 (Stevens, J., dissenting). Stevens also noted:

> The Court places great store in the fact that the California legislature, rather than some administrative or adjudicative body, stands behind the deprivation at issue in this case. But . . . a legislative adjudication of power to private citizens who are prone to act arbitrarily is no less unconstitutional than the arbitrary exercise of that power by the state officials themselves.

Id. at 126 n.30.

249. 652 F.2d 585 (5th Cir. 1981).

250. The term "down zone" was defined by the court to mean "the reduction of the number of building units which may be constructed in a given area." *Id.* at 586 n.1.

251. *Id.* at 590 (citing Hernandez v. City of Lafayette, 643 F.2d 1188, 1196 (5th Cir. 1981)). *See* South Gwinnett Venture v. Pruitt, 491 F.2d 5 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 837 (1974); Higginbotham v. Barrett, 473 F.2d 745 (5th Cir. 1974).

252. *Couf*, 652 F.2d at 590. The legislative-adjudicative dichotomy also has been utilized by many state courts. In the 1979 case of Horn v. Ventura, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979), for example, the California Supreme Court ruled that a local administrative agency's approval of a tentative subdivision map was "adjudicative" in nature. *Id.* at 614, 596 P.2d at 1138, 156 Cal. Rptr. at 722. Therefore, the agency was required to provide various due process protections before any deprivation of property occurred. *Id.* at 616, 596 P.2d at 1140, 156 Cal. Rptr. at 724.

One year later, in Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980), the California Supreme Court held that due process was not offended by a local ordinance that made rezoning of property contingent upon approval by public referendum. Unlike the subdivision approval process in *Horn*, the *Arnel* court characterized the referendum measure as legislative in nature. Consequently, the court emphasized that despite the significant property interests implicated by the rezoning procedures, no due process violations had occurred. *Id.* at 517, 620 P.2d at 568, 169 Cal. Rptr. at 907.

interests,[253] it is paradoxical to allow certain governmental acts affecting protected interests to be automatically excluded from the dictates of the due process clause. The legislative label, however defined, effectively permits legislatures to enjoy absolute immunity from procedural due process. This infirmity in American jurisprudence, buoyed by both the "democratic system theory"[254] and the "separation of powers theory,"[255] seems to ignore certain realities of the modern world.

First, there is growing awareness that legislators often succumb to pressures placed upon them by private economic interests.[256] It is unrealistic to believe that review by the electorate will justify or rectify every legislative deprivation. The problem is particularly acute when the issue before the legislature concerns only one segment of the population represented by the legislative body. As one commentator observed, "[m]ost voters are unaware or unconcerned that individual rights may have been sacrificed in the procedural informality which accompanies action deemed to be legislative."[257] In sum, the contemporary democratic process simply is not capable of adequately protecting the fundamental rights guaranteed by the due process clause.

Moreover, it is no longer impracticable to afford procedural due process in the legislative setting. The increased size, capabilities, and expertise of legislative staffs have enabled legislators to conduct additional hearings together and disseminate data.[258] In addition, technological advances within the electronic broadcasting mediums have allowed for the widespread, live coverage of legislative sessions and hearings.[259] Such coverage, which is certain to increase as the cable television market expands, has invited mass public participation in the legislative process. In sum, legislative bodies are perfectly capable of providing the bare rudiments of procedural due process.[260]

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253. See *supra* text accompanying notes 8-15 for a discussion of the functions of procedural due process.

254. *See supra* text accompanying notes 221-23.

255. *See supra* text accompanying notes 219-20.

256. Fasano v. Board of County Comm'rs, 264 Or. 574, 588, 507 P.2d 23, 30 (1973). *See also* Ward v. Village of Skokie, 26 Ill. 2d 415, 424, 186 N.E.2d 529, 533 (1962) (Klingbiel, J., concurring) ("[t]o place [certain zoning decisions] in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government"); Satter, *Changing Rules of Courts and Legislatures*, 11 CONN. L. REV. 230, 244 (1979) (examples of legislators passing a law under pressure by special interest groups).

257. Booth, *supra* note 219, at 778.

258. L. DODD & R. SCHATT, CONGRESS AND THE ADMINISTRATIVE STATE 194-95 (1979). *See also* W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE PROCESS (5th ed. 1981) (general discussion of the increased legislative efficiency resulting from specialized investigatory committees regarding certain legislation).

259. *See* Stein, Box Populi: Report from Television Land, 3 PUB. OPINION 18 (1978); CONGRESSIONAL QUARTERLY, INC., INSIDE CONGRESS 147-49 (2d ed. 1979).

260. Professor Robert Hamilton, in an article based on a report he made to the Administrative Conference of the United States in 1972, discussed in great detail the feasibility of imposing procedural safeguards on the legislative process. *See* Hamilton, *Procedures For the Adoption of Rules Of General Applicability: The Need For Procedural Innovation In Administrative Rulemaking*, 60 CALIF. L. REV. 1276 (1972). After noting initially that full-scale trial-type for-

In *Groppi v. Leslie*,[261] for example, the Supreme Court determined that while a state legislature, in conducting a legislative contempt proceeding, might not be obligated to conduct a full-scale trial, it nevertheless should provide defendant reasonable notice of the charge and an opportunity to be heard before punishment was imposed.[262] Similarly, in *Powelton Civic Home Owners' Association v. Department of HUD*,[263] residents of an area affected by a proposed urban renewal project challenged the procedures followed by the federal government in determining the funds to be distributed to the project. Initially, the district court determined that the government's decisions involved legislative facts; thus, the residents had no right to an adjudicatory hearing.[264] Nevertheless, the court concluded that it would not be unreasonable to afford the residents an opportunity to submit written and documentary evidence.[265]

The Second Circuit took similar action in *Burr v. New Rochell Municipal Housing Authority*.[266] There, a municipal housing authority imposed a service charge of two dollars a month on all tenants. This charge was imposed without notice or a public hearing. Because the court found the authority's action to be legislative in nature, no adversary hearing was required.[267] Yet, the Court held that the authority nevertheless should provide minimal procedural safeguards such as notice of rent increases and an opportunity to file written objections.[268]

The increased ability of modern legislatures to provide at least minimal procedural due process safeguards also is reflected in the recently approved Model State Administrative Procedure Act.[269] For example, one section of the Model Act specifies the procedure to be followed for public participation in legislative rulemaking.[270] While the Model Act falls short of making

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mal hearings often "tended to be drawn out, repetitious, and unproductive." *Id.* at 1287, Professor Hamilton set out numerous procedural safeguards that could adequately be employed in the rulemaking setting. *Id.* at 1330-36. *See also* Robinson, *supra* note 240, at 525-26 (strong argument against the generalization that legislative bodies are unable to provide procedural safeguards).

261. 404 U.S. 496 (1972).

262. *Id.* at 502-03. *Cf.* McCarley v. Sanders, 309 F. Supp. 8 (N.D. Ala. 1970) (in proceeding to expel a member, legislature must provide basic due process requirements such as adequate notice, formal charges, hearing before full senate and opportunity to present evidence and receive a transcript).

263. 284 F. Supp. 809 (E.D. Pa. 1968).

264. *Id.* at 830.

265. *Id.* at 835.

266. 479 F.2d 1165 (2d Cir. 1973).

267. *Id.* at 1169.

268. *Id.* at 1170.

269. MODEL STATE ADMINISTRATIVE PROCEDURE ACT, 14 U.L.A. 371 (1981).

270. *Id.* § 3-104 [Public Participation]. The section provides as follows:

> (a) For at least [30] days after publication of the notice of proposed rule adoption, an agency shall afford persons the opportunity to submit in writing, argument, data, and views on the proposed rule.
>
> (b)(1) An agency shall schedule an oral proceeding on a proposed rule if, within [20] days after the published notice or proposed rule adoption, a written request for an oral proceeding is submitted by [the administrative rules review committee],

trial-type hearings an absolute requirement,[271] it nevertheless recognizes that legislative bodies are capable of providing procedural safeguards such as published notice of proposed rule adoptions or public proceedings.

Recently, there has been a movement toward requiring legislatures to provide due process protections in the land use and zoning area.[272] The leading case in this breakthrough is *Fasano v. Board of County Commissioners*.[273] There, the Oregon Supreme Court determined that the traditionally "legislative" county zoning process was a "quasi-judicial" act, subject to the full panoply of due process safegurds.[274] In so doing, the Oregon court effectively removed automatic legislative immunity from the procedural due process analysis.[275] Similarly, in *Fleming v. City of Tacoma*,[276] the Supreme

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[the administrative rules counsel], a political subdivision, an agency, or [25] persons. At that proceeding, persons may present oral argument, data, and views on the proposed rule.

(2) An oral proceeding on a proposed rule, if required, may not be held earlier than [20] days after notice of its location and time is published in the [administrative bulletin].

(3) The agency, a member of the agency, or another presiding officer designated by the agency shall preside at a required oral proceeding on a proposed rule. If the agency does not preside, the presiding official shall prepare a memorandum for consideration by the agency summarizing the contents of the presentations made at the oral proceeding. Oral proceedings must be open to the public and be recorded by stenographic or other means.

(4) Each agency shall issue rules for the conduct of oral rule-making proceedings. Those rules may include provisions calculated to prevent undue repetition in the oral proceedings.

Id.

271. In the Commissioners' Comment following § 3-104, it is specifically noted that it would be undesirable to require a trial-type hearing on most rules of general applicability. *Id.*

272. *See* Kahn, *supra* note 175, at 1030 n.105 and cases cited therein; Wolfstone, *The Case for a Procedural Due Process Limitation on the Zoning Referendum: City of Eastlake Revisited*, 7 ECOLOGY L.Q. 51, 83-84 (1978). *See also* Booth, *supra* note 219, at 777-79 (theory that legislative decisions of a consistently ad hoc nature can be considered judicial for due process purposes).

273. 264 Or. 574, 507 P.2d 23 (1973).

274. *Id.* at 586, 507 P.2d at 29. According to the *Fasano* court, the following procedural safeguards must be afforded by the local legislature when it engages in zoning amendment decisions:

> Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter—i.e., having had no pre-hearing or ex parte contacts concerning the question at issue—and to a record made and adequate findings executed.

Id. at 588, 507 P.2d at 30.

275. *See* Sullivan, *Araby Revisited: The Evolving Concept of Procedural Due Process Before Land Use Regulatory Bodies*, 15 SANTA CLARA L. REV. 50, 59-62 (1974) [hereinafter cited as Sullivan]. Unfortunately, the Oregon Supreme Court has failed to follow its own lead with respect to procedural due process issues outside the area of zoning. *See, e.g.*, Western Amusement Co. v. City of Springfield, 274 Or. 37, 42, 545 P.2d 595, 594 (1976) (imposition of a special assessment tax is the exercise of a legislative function and, as such, is subject to limited judicial review).

276. 81 Wash. 2d 292, 502 P.2d 327 (1972). See *supra* text accompanying notes 197-202 for a discussion of *Fleming*.

Court of Washington imposed procedural constraints on municipal legislative bodies engaged in certain zoning decisions.[277]

Although both *Fasano* and *Fleming* recognize the existence of the legislative-administrative dichotomy,[278] the rationale proffered by the two cases for making the distinction is less protective of the legislative process than any approach previously developed. In *Fasano*, for example, the Oregon court considered the following three elements in making the distinction: (1) the party initiating the change; (2) the size of the parcel affected; and (3) the number of affected owners and the diversity of their interests.[279] The Model Land Development Code[280] adopted a standard for legislative authorization of special amendments to zoning codes that is remarkably similar to the one established in *Fasano*.[281] As one commentator observed, *Fasano* and the Model Land Development Code exemplify the basic trend of increased emphasis on procedural fairness in land use law.[282]

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277. 81 Wash. 2d at 298-99, 502 P.2d at 311 (application of appearance of fairness doctrine).

278. *See Fasano*, 264 Or. at 579-81, 507 P.2d at 25-27; *Fleming*, 81 Wash. 2d at 298, 502 P.2d at 331.

279. 264 Or. at 586, 507 P.2d at 29. *See* Kahn, *supra* note 175, at 1032. The *Fasano* test was recently applied in another zoning case by the Oregon Supreme Court in South of Sunnyside Neighborhood League v. Board of Comm'rs, 280 Or. 3, 569 P.2d 1063, 1071 n.5 (1977). The Washington Supreme Court in *Fleming* was less specific than Oregon's Supreme Court, requiring only that all decisions, regardless of their classification as legislative or adjudicative, be "arrived at fairly." 81 Wash. 2d at 298-99, 502 P.2d at 331.

280. MODEL LAND DEV. CODE § 2-312 (Proposed Official Draft No. 1, 1974) [hereinafter cited as MODEL CODE].

281. *Id.* Section 2-312 of the Model Land Development Code provides, *inter alia*, as follows:

> (2) Prior to the adoption of a special amendment, the Land Development Agency shall hold a hearing . . . and make findings and recommendations on the issues presented in regard to the proposed amendment. A special amendment may only be adopted if (a) development at the proposed location is essential or especially appropriate in view of the available alternatives within or without the jurisdiction.
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> . . .

Compare id. with *supra* note 274.

282. Sullivan, *supra* note 275, at 71. However, a number of jurisdictions strictly adhering to the superficial legislative-adjudicative dichotomy have rejected the rationale of the *Fasano* and *Tacoma* decisions. *See* Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977) (since the zoning of property is a legislative function, the city council, in deciding a rezoning request, is not required to make express findings of fact); Hall Paving Co. v. Hall County, 237 Ga. 14, 226 S.E.2d 728 (1976) (County Board of Commissioners was not required to enter findings and conclusions justifying its decision to rezone certain property).

Yet, the net result of *Fasano* is to increase substantially the number of legislative actions subject to procedural due process. Sullivan, *supra* note 275, at 68. Sullivan notes that "to appreciate the significance of the *Fasano* decision, an analysis of its impact on the land use regulatory process is necessary." *Id.* Accordingly, Sullivan discusses in detail the local legislature's ability to provide such procedural safeguards as notice and an opportunity to be heard, an impartial tribunal, an opportunity to present and rebut evidence, and the making of an adequate record for review. *Id.* at 68-71.

In general, Sullivan concludes that the imposition of such requirements will not be problematic, with the possible exception of providing cross-examination for all those affected. As a solu-

Although no court has expressly called for the elimination of the adjudicative-legislative distinction, the overall effect of cases such as *Fasano* and *Fleming* is to pierce the superficial veil that has been placed over the legislative process. The next logical step is to remove the veil altogether and allow proper application of the due process clause. Even assuming that the theories underlying the legislative-adjudicative dichotomy are valid, use of the dichotomy is nevertheless inappropriate for practical reasons. As observed earlier,[283] courts and commentators have failed to develop any workable, nonarbitrary method for distinguishing between legislative functions and adjudicative functions for due process purposes. Therefore, courts would be doing themselves a great service by eliminating the need to make such a distinction.

This is not to say that legislative bodies should always provide the full panoply of procedural due process safeguards. Such a requirement would be both impracticable and inappropriate. Instead, the exact procedure required would be determined under the second prong of the *Roth* analysis.[284] As previously noted, due process is a flexible concept.[285] The Supreme Court has devised a practical and useful balancing test[286] for determining the type and the extent of the process that is due under different circumstances. Thus, by using *Roth*'s second prong,[287] courts may logically calculate the appropriateness of providing due process protections when deprivation has resulted from legislative action.

The dynamics of this proposition are best illustrated through consideration of the following two hypothetical cases. Both cases take place in a city with a population between 500,000 and 1,000,000 and with a city council form of government composed of twenty-five members:

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tion, Sullivan suggests "allowing an individual a degree of procedural rights based on the extent of his interest in the outcome of the hearings. Thus, while all would be allowed to exercise their rights to 'testify' at land-use hearings, only those accorded 'party' status should be able to cross-examine." *Id.* at 70.

283. *See supra* text accompanying notes 230-40.

284. This approach was proposed by James R. Kahn. *See* Kahn, *supra* note 175. The thrust of Mr. Kahn's proposal, which initially calls for the elimination of the legislative-adjudicative distinction as a third prong, is illustrated by the following passage from his recent *Hastings* article:

> [I]t is suggested that there be no threshold distinction [between legislative and adjudicative] at all. As the first half of the *Roth* test eliminates only *de minimis* interests, allowing the second step, balancing, to properly allocate lesser procedures to smaller interests, the legislative-adjudicative distinction should be used to wholly deny due process protection only to what might be called "*de maximis*" interests—those laws passed by state legislatures and Congress. Acts by local legislatures and commissions would be subject to due process protection, though limited by a legislative-adjudicative sliding scale of concerns—that is, those concerns outlined above—employed as part of the *Roth* balancing test.

Id. at 1033-34 (footnotes omitted). Mr. Kahn limits his proposal to the decision making procedure in the area of municipal land-use planning and zoning. There is no reason, however, why this approach cannot be extended to encompass all governmental decision making.

285. *See supra* text accompanying note 112.

286. *See supra* text accompanying note 114.

287. *See supra* text accompanying notes 109-14.

Hypothetical A

A construction company owns a parcel of real property in an unpopulated and remote section of the city. Since enactment of the City Zoning Code twenty years ago, the parcel has been exclusively zoned for residential use. The company properly applies to the city council for rezoning of the property for industrial use so as to permit the operation of a rock quarry. The city council, without conducting a hearing or making any specific findings of fact concerning the company's need for the rezoning, denies the rezoning application. The company files a lawsuit alleging deprivation of property without procedural due process.[288]

Hypothetical B

The city council, in an effort to rejuvenate and attract visitors to the downtown area, orders construction of a major off-street enclosed parking facility on city owned land in the center of town. To pay for the facility, a special assessment is levied on all property within a designated area surrounding the proposed facility. No prior notice or hearing regarding the assessment is given. The property owners within the assessment district file a lawsuit alleging deprivation of property without procedural due process.[289]

Suppose that in both of the above hypotheticals, the court, after properly conducting the analysis required by the first prong of the *Roth* test, determines that petitioners have been deprived of a legitimate property interest. Under the *Roth* analysis, the second prong requires determination of "what process is due." This determination should be made regardless of the fact that in both hypotheticals the deprivation was made by a legislative body or involved legislative facts. The court then has the opportunity to examine the ability of the city council to provide procedural due process in light of the specific facts of each case. It can balance the particular interests of the property owners against the fiscal and administrative burden on the city council caused by imposition of any procedural safeguards. For example, in *Hypothetical A*, the court can weigh the value of a hearing and fact finding process to the construction company against the feasibility and practicality of the city council to engage in such activity. Notwithstanding its conclusions in the first hypothetical case, the court can engage in a similar, yet entirely separate, balancing process under the facts of *Hypothetical B*. The court may very well find that a full-scale formal hearing is necessary in *Hypothetical A* but, in light of the large number of petitioners involved,

288. The following cases involve factual situations analogous to the hypothetical: Hall Paving Co. v. Hall County, 237 Ga. 14, 226 S.E.2d 728 (1976); Hawkins v. Louisville & Jefferson County Planning & Zoning Comm'n, 266 S.W.2d 314 (Ky. 1954); Humble Oil & Ref. Co. v. Board of Aldermen, 284 N.C. 458, 202 S.E.2d 129 (1974); Reinauer Realty Corp. v. Borough of Paramus, 34 N.J. 406, 169 A.2d 814 (1961).

289. The following cases present factual situations analogous to this hypothetical: Kissane v. City of Anchorage, 159 F. Supp. 773 (D. Alaska 1958); Crampton v. City of Royal Oak, 362 Mich. 503, 108 N.W.2d 16 (1961); Patterson v. City of Bismark, 212 N.W.2d 374 (N.D. 1973); Northern Pac. Ry. v. City of Grand Forks, 73 N.W.2d 348 (N.D. 1955); Wing v. City of Eugene, 249 Or. 367, 437 P.2d 836 (1968).

merely an opportunity to submit written objections is necessary in *Hypothetical B*. In either case, the court would have conducted a complete and fair analysis instead of arbitrarily concluding at the outset that no process is due simply because legislative facts are involved.

The proposal to eliminate the adjudicative-legislative dichotomy as a third prong in the procedural due process analysis is not without drawbacks. It is conceivable that, in certain instances, the only impact of this approach may be pro forma. In other words, the merging of the adjudicative-legislative prong into the second prong of the balancing test often may do nothing more than change the point at which a court determines that procedural due process is unnecessary for governmental actions. Moreover, if due process is required for legislative actions, the extra cost and burden of holding hearings and making records ultimately will be borne by the general public, the very persons sought to be protected by procedural due process.

While each of the foregoing criticisms is reasonable, the problems created by eliminating the adjudicative-legislative dichotomy are not insurmountable. This is especially true when those criticisms are examined in light of the overall benefits to be achieved by this proposal. The extinction of the legislative-adjudicative dichotomy as a separate prong of the *Roth* analysis will remove the shield protecting federal, state, and local legislative bodies from compliance with due process guarantees. Less arbitrary, more responsible legislative decisions can only result.

CONCLUSION

Individuals are afforded procedural due process to protect their constitutional interests from arbitrary and capricious governmental deprivation. In response to increasing confusion surrounding the applicability of the due process concept, the Supreme Court, in *Roth*, developed a systematic, two-pronged analytical framework for resolving procedural due process issues. Yet, notwithstanding this straightforward analysis, there is widespread misunderstanding regarding the degree of deference that should be accorded state and local decision making.

Moreover, a judicially created doctrine has evolved which predicates applicability of procedural due process on a distinction between legislative and adjudicative forums. This entirely arbitrary dichotomy should not be used as an additional prong of the procedural due process test developed in *Roth*. The theories behind the dichotomy are outdated and implausible. Additionally, the methods for making the dichotomy are flawed and unworkable. Finally, any valid distinctions, for procedural due process purposes, between legislative and adjudicative forums can be resolved by the balancing process used in the second prong of the *Roth* test. Therefore, no valid reason exists for courts, in resolving procedural due process issues, to deviate from the sound and practical two-prong test developed in *Roth*.