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The Relationship Between Procedural Due Process and Substantive Constitutional Rights

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THE RELATIONSHIP BETWEEN
PROCEDURAL DUE PROCESS AND
SUBSTANTIVE CONSTITUTIONAL RIGHTS

*Lawrence Alexander**

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I. INTRODUCTION

The Constitution contains two due process clauses. One is in the fifth amendment and applies to actions of the federal government.¹ The other is in the fourteenth amendment and applies to actions of state and local governments.² Together these clauses stand for the proposition that no governmental entity shall "deprive any person of life, liberty, or property without due process of law."

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1. The fifth amendment states: "No person shall be . . . deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V. In *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833), the Supreme Court held that the fifth amendment applied only to actions of the federal government, not to actions of state governments.

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

It is universally agreed that these clauses, which I shall refer to in the singular as *the* due process clause, govern the procedures by which rules and policies are applied in particular cases. This function of the due process clause is commonly referred to as "procedural due process." By contrast, it is a matter of great controversy whether, and to what extent, the due process clause governs the substantive content of rules and policies,³ although some forms of "substantive due process" appear solidly entrenched. For example, the incorporation of the substantive values of the Bill of Rights into the fourteenth amendment's due process clause,⁴ and the "reverse incorporation" of equal protection principles into the fifth amendment's due process clause,⁵ no longer raise eyebrows.

My topic in this paper is procedural due process. I shall argue that the meaning of procedural due process is determined by the various substantive constitutional values at stake when rules and policies are applied in particular cases. The terms "life, liberty, and property" are best thought of as referring to all interests the deprivation of which can implicate substantive constitutional values.⁶ The process "due" whenever the deprivation of those interests is at issue is the process that those substantive constitutional values entail.⁷ I reject theories

3. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* 249-82 (1977); M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 1-2 (1982); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 *SUP. CT. REV.* 159.

4. See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Gitlow v. New York*, 268 U.S. 652 (1925). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 567-68 (1978).

5. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

6. See J. ELY, *DEMOCRACY AND DISTRUST* 19 (1980); Alexander & Horton, *Ingraham v. Wright: A Primer for Cruel and Unusual Jurisprudence*, 52 *S. CAL. L. REV.* 1305, 1311-12, 1371-72 (1979) [hereinafter *Primer*]; Monaghan, *Of "Liberty" and "Property,"* 62 *CORNELL L. REV.* 405, 421 (1977); Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 *COLUM. L. REV.* 979, 980 n.12 (1986) [hereinafter *State Law Wrongs*].

7. In its procedural mode at least, the due process clause is not absolutely necessary for accomplishing its constitutional purpose. That purpose could have been achieved directly by the substantive constitutional values themselves. But the Constitution is full of provisions that are, strictly speaking, redundant.

My own favorite theory for the purpose behind the due process clause goes as follows. The framers intended there to be limitations on the content of laws. The first amendment, for example, specifically addresses lawmaking. In order to make sure that governmental extra-legal action would not circumvent the constitutional and natural rights limitations on the content of laws, the framers added the due process clause, which requires that government take no action that threatens constitutional values except as prescribed by law. Thus, the laws must be constitutional, and, through the due process clause, the government must confine its activity to activity under law. See F. STRONG, *SUBSTANTIVE DUE PROCESS OF LAW* 3-18 (1986); Corwin, *The*

of procedural due process that view it as an independent constitutional right serving values distinct and divorced from the constitutional values governing the substance of rules and policies. I take no stand here on whether at least some of those substantive constitutional values also have their textual source in the due process clause (substantive due process), either by incorporation or directly.

I seek to persuade you to accept the substantive nature of procedural due process. The claim is not a novel one. A colleague and I have made it before,⁸ and so have others.⁹ The affirmative case for the claim is that substantive constitutional values are prized because they restrain government's treatment of particular individuals. Their effect on rules is of only derivative importance. In other words, when we apply a substantive test of constitutional validity to a rule, at stake for us are the application of that rule to individuals and the effect of such application on substantive constitutional values. Therefore, a realistic concern with substance entails a concern with the procedures by which rules are applied. A rule and the procedures for its application must be treated as a single package for purposes of applying substantive constitutional values.

The negative case for my claim that procedural due process is derived from substantive constitutional values rests on the proposition that procedure as a free-standing value divorced from all substantive constitutional concerns has little to recommend it. Procedure entails costs, monetary and non-monetary. Procedure can be made more or less elaborate and accurate as a method of fact-finding depending upon the costs we wish to pay. But unless we can attach constitutional significance to the benefits that increasingly costly procedures obtain, we have no gauge for determining when we have the procedures that are constitutionally required. A free-standing constitutional right to procedure would be a loose cannon on the jurisprudential deck. Moreover, because the procedure for applying a rule can always be viewed as part of the substance of the rule itself, a concern for procedure apart from a concern for substance verges on incoherence. Although some theorists argue for an independent right of procedure

Doctrine of Due Process of Law Before the Civil War, 24 HARV. L. REV. 366 (1911); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring); *Mayo v. Wilson*, 1 N.H. 53, 57 (1817).

8. See *Primer*, *supra* note 6, at 1349-88.

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

and attempt to identify some values intrinsic to procedure,¹⁰ I find the significant benefits of procedure to be those associated with substantive constitutional values.

II. A HYPOTHETICAL CASE FOR TESTING THEORIES OF PROCEDURAL DUE PROCESS

Any number of hypothetical cases can illustrate what is at stake in choosing a theory of procedural due process. I shall use facts very similar to those of *Board of Regents v. Roth*,¹¹ modified when necessary to illustrate a point. Suppose a state university employs some of its faculty on one-year appointments, renewable or convertible to a more permanent appointment if both parties agree. The university's general standard for deciding whether to renew such appointments is whether the teacher's classroom teaching, scholarship, and community service are of high quality and superior to that available to the university from its pool of applicants.

I shall describe in the next section the alternative procedures the university might follow in deciding whether to renew a teacher's contract. For now we need to hypothesize three additional things. First, the state is not constitutionally compelled to create or continue a teaching position in a state university. The state could abolish state universities, or reduce their size, and thus eliminate teaching positions, without violating the Constitution. In other words, teaching positions in state universities are constitutionally optional benefits. Second, the hypothesized standard the university employs in making renewal decisions is, *viewed apart from the procedures by which it is implemented*, constitutionally innocuous. Third, and most important for my purposes, other standards that the university might have employed would be substantively unconstitutional, even though the teaching positions are constitutionally optional. For example, a policy of only renewing the contracts of Democrats, Catholics, males, or whites would be unconstitutional. So too would a policy having the effect of favoring Democrats, Catholics, males, or whites with no offsetting benefits. Moreover, and of particular importance, an arbitrary policy such as renewing the contracts of teachers with an odd number of letters in their last names, or with brown eyes, or those selected by a Ouija board or by resumes with two inch margins, would be substantively unconstitutional. However, there might be disagreement over

10. See *infra* notes 56-58 and accompanying text.

11. 408 U.S. 564 (1972).

whether the substantive constitutional defect in such cases of arbitrary policies was one of substantive due process or equal protection.¹²

With this hypothetical case and these assumptions in place, I shall argue that procedure is part and parcel of substantive constitutional guarantees, and that the constitutional mandate of procedure is as extensive in scope as those substantive guarantees.

III. THE AFFIRMATIVE CASE: PROCEDURAL CONSTITUTIONAL GUARANTEES ARE ENTAILED BY AND DERIVED FROM SUBSTANTIVE CONSTITUTIONAL GUARANTEES

Typically, a challenge to government action on constitutional grounds can be characterized either as a challenge to the constitutionality of the rule under which government took its action, or as a challenge to the application of that rule. The former type of challenge — a challenge to the constitutionality of the rule — we normally view as a substantive constitutional challenge. The latter type of challenge — a challenge to the method employed for finding the facts presupposed by applying the rule to the challenger — we normally view as a procedural constitutional challenge. It is clear, however, that with the exception of those special instances in which rules are challenged “on their face,”¹³ constitutional challenges involve a claim that a particular rule’s application to a person is unconstitutional, either because the rule itself is constitutionally defective, or because the process by which it is applied is constitutionally defective. And in order constitutionally to justify applying a rule to a person, one must justify *both* the rule and the rule’s application. The latter justification consists of justifying the procedures by which the facts were found. Failure to make either of these justifications is the failure to justify, in a constitutional sense, the action government has taken.

12. See *Primer*, *supra* note 6, at 1371-82; *State Law Wrongs*, *supra* note 6, at 997 n.111.

Even though the courts are often extremely deferential to other branches’ decisions that are challenged as being unconstitutionally arbitrary, the courts do not say that the Constitution permits those branches to act arbitrarily. There is a constitutional duty not to act arbitrarily, even if the courts indulge a heavy presumption in favor of the non-arbitrariness of government’s acts. Moreover, occasionally that presumption is overcome. See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *United States Dep’t of Agric. v. Murry*, 413 U.S. 508 (1973); *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973). See generally Michelman, *Formal and Associational Aims in Procedural Due Process*, in *DUE PROCESS, NOMOS XVIII* 126, 138-42 (J. Pennock & J. Chapman eds. 1977); *Primer*, *supra* note 6, at 1381-82 n.277; Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 *STAN. L. REV.* 69, 105-20 (1982).

13. See Alexander, *Is There an Overbreadth Doctrine?*, 22 *SAN DIEGO L. REV.* 541 (1985).

What should be obvious, but apparently is not, is that failure to justify the procedure for applying the rule is as much a substantive constitutional defect as failure to justify the rule itself. Whenever we debate the substantive constitutionality of general rules and policies in the abstract, we normally assume those rules will be applied accurately. For example, whenever we debate the constitutionality of a rule that forbids leafletting on the sidewalks or a rule that mandates public aid to all private schools, we usually assume that the procedures by which those rules are applied will select leafletters (and not drunkards) as the targets of sanctions, and all private schools (and not private hospitals) as the targets of aid. In those debates we are concerned about the actual effects those rules will have; and the effects are a product of the procedures by which the rules are applied just as they are a product of the terms of the rules. They may not be as much a product of the procedures as of the terms because most rules directed at the citizenry are substantially self-applied. But the procedures by which rules are officially applied will have a varied impact on the overall effects of those rules. And it is the overall effects — effects that are partially the product of procedures for applying the rules — that either justify or *un*-justify the rules in a substantive constitutional sense.¹⁴

Thus, I propose this: (1) the general rule or policy being applied and the procedure by which it is applied should be viewed as constituting a single package; (2) this rule/procedure package is assessed for substantive constitutionality whenever we assess the constitutionality

14. I am not denying that the *motives* behind government actions are constitutionally relevant. The Supreme Court has treated governmental motives as germane to many constitutional violations. See *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (freedom of speech); *Washington v. Davis*, 426 U.S. 229 (1976) (equal protection); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (establishment of religion). Many commentators have endorsed the focus on motives. See J. ELY, *supra* note 6, at 138-45 (equal protection, freedom of speech); F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 80-86 (1982) (freedom of speech). What I am arguing is that effects are always relevant to constitutionality, even where motive is also relevant. See Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 62 (1981) [hereinafter *Taxonomy*]; Alexander & Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U.L. REV. 1319, 1336-46 (1984). When the effects of a rule are relevant to its constitutionality, the procedure for its application is of constitutional moment. Moreover, procedure is constitutionally relevant to a motive inquiry as well as to an effects inquiry in the sense that certain "procedures" can easily disguise the exercise of forbidden motives and thus may be constitutionally condemned for prophylactic reasons. See also Michelman, *supra* note 12, at 138-39, 161-62 n.46 (noting the relation between procedures and proof of forbidden motives).

of the government's acts; and (3) when the application of a rule is deemed unconstitutional because the procedure is not adequate, the application is *substantively* unconstitutional because of a *procedural* defect.

The hypothetical case illustrates this point. We have hypothesized that the university's policy of renewing the contracts of the most qualified teachers is, in the abstract, a constitutionally permissible policy. In so hypothesizing, we are probably envisioning a procedure for its application that looks something like this: a faculty committee reads the teacher's scholarship or reads experts' reviews of that scholarship, attends the teacher's classes or reads student evaluations of those classes, notes the service activities listed on the teacher's resume, and compares the teacher's resume with resumes of outsiders seeking the position. The committee then reports to some other body, probably the faculty, which ultimately decides whether the teacher's contract will be renewed.

The renewal policy or rule, applied through this or a similar procedure, is a substantively constitutionally permissible rule/procedure package, or so it seems to me. In *Roth*, a similar rule/procedure package was at issue. The Supreme Court correctly held that Roth's non-renewal was constitutionally proper, at least in the absence of proof that the university in fact followed a different policy, such as one of not renewing teachers who criticize the university. I have no quarrel with the decision in *Roth*, although I have a tremendous quarrel with the approach the Court adopted to justify that decision.

Now suppose the permissible rule to "rehire the most qualified teachers" is applied using a different procedure from that described above. Suppose the teacher's scholarship and resume are submitted to the local chapter of the John Birch Society, the Baptist Church, or the Ku Klux Klan for their evaluation of the teacher's qualifications, an evaluation upon which the university would then act. Alternatively, suppose the university decides who is most qualified, and thus hired or rehired, by asking a Ouija board or by measuring the margins of the resumes to see which comes closest to two inches. Given our earlier hypothesis regarding which rules would be substantively unconstitutional, it seems to follow that the rule "hire or rehire the most qualified," *when applied through the procedures described*, produces a substantively unconstitutional rule/procedure package.

I should emphasize that this point holds true even if the legislature has committed the hiring of faculty to the complete discretion of the university. Any exercise of that discretion can be broken into the two components of adopting a hiring policy and applying the policy adopted. The hiring policy must comport with substantive constitutional values, including non-arbitrariness. But those substantive constitutional values

are safe-guarded only if the application-of-policy component of discretion is not procedurally bizarre.

A number of Supreme Court cases illustrate the interdependency of substantive and procedural constitutional rights. Most justices on the Court treated the "irrebuttable presumption" cases of the 1970s as instances of procedural irregularity,¹⁵ but others, on and off the Court, (correctly) viewed those cases as raising substantive constitutional issues instead.¹⁶ (Several cases in this group dealt with the allocation of optional benefits,¹⁷ and one case dealt with an allocation of optional benefits that implicated no substantive constitutional value other than the value of non-arbitrariness.¹⁸) Finally, one recent case involving the arbitrary treatment of an optional benefit, though not an irrebuttable presumption case, divided the Court over whether the unconstitutional arbitrariness was a (procedural) due process violation or a (substantive) equal protection violation.¹⁹

To recap the argument to this point, substantive constitutional values are at stake in the award of benefits that government is under no constitutional obligation to provide. Further, to the extent that substantive constitutional values are at stake in the award of benefits, there is a substantive constitutional concern with the procedures by which adjudicative facts are found. *Whether* procedure is due depends upon whether substantive constitutional values are at stake.²⁰

Two final points provide a necessary predicate to a discussion of alternative views of procedural due process. First, *what* procedure is due depends on the substantive constitutional values at stake and how

15. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *United States Dep't of Agric. v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971).

16. See generally Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893, 917 n.66 (1975).

17. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *United States Dep't of Agric. v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973).

18. *United States Dep't of Agric. v. Murry*, 413 U.S. 508 (1973).

19. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Rodney Smolla reaches a conclusion similar to mine. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 110-11 (1982) (concluding that *Zimmerman* requires some procedure in all cases).

20. Occasionally, when the *federal* government is concerned, an administrator's failure to follow certain procedures in implementing a legislative rule may not violate any constitutional right of individuals but may violate instead the constitutional principles of separation of powers. Thus, even though the procedure would have been constitutionally permissible had it been legislated along with the substantive rule, it may be impermissible solely because it was *not* legislated.

they might be jeopardized by various procedures.²¹ (The government's reasons for providing less procedure than the challenger desires are, of course, part of the calculus for working out the implications and limits of various substantive constitutional rights; and because perfect procedures are impossible, no substantive value can ever be perfectly realized.) Second, *when* procedure is due is a function of those same constitutional values.²² Sometimes the substantive constitutional values at stake permit government to take action detrimental to individuals on the basis of a very preliminary assessment of adjudicative facts, to be followed at some later time by more extensive procedures. At other times, however, the substantive constitutional values at stake demand very formal adjudicative procedures before individuals may be adversely affected. For example, the prior restraint doctrine in first amendment law can usefully be viewed as requiring in most cases trials and perhaps appeals before individuals may be prevented from speaking by the combined threat of punishment and the absence of the usual defense that the speech is constitutionally protected.

IV. THE NEGATIVE CASE: PROCEDURAL CONSTITUTIONAL GUARANTEES ARE NEITHER LESS EXTENSIVE THAN NOR INDEPENDENT OF SUBSTANTIVE CONSTITUTIONAL GUARANTEES

All that I've said to this point may seem obvious to many of you. Indeed, I hope that it *is* obvious. It is a virtue of my theory and a strong sign of its correctness that it is in no way revolutionary but is instead so commonsensical as to be almost trivial. Those of you who feel that way — and I hope there are many — may be asking, "Where's the beef? What's the issue?"

A quick perusal of the Supreme Court's procedural due process decisions of the past fifteen years and the academic commentary spawned by those decisions discloses that, no matter how straightforward and commonsensical my analysis has been, considerable confusion exists over the scope and meaning of the constitutional right to procedure. I am not referring to controversy over what procedures, including their timing, are constitutionally required to protect various interests. The question of what procedures are constitutionally required in a particular context can be quite difficult and controversial, and

21. See, e.g., *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (freedom of speech and appellate review of fact finding); *Addington v. Texas*, 441 U.S. 418 (1979) (burden of proof for civil commitment); *In re Winship*, 397 U.S. 358 (1970) (burden of proof for criminal conviction).

22. See Alexander, *supra* note 16, at 922-30; *Primer*, *supra* note 6, at 1358.

my analysis leaves that type of difficulty basically intact. My analysis settles a different current controversy: whether *any* procedural protections are constitutionally mandated in particular cases where government takes action directed at specific individuals. My analysis makes this an easy question to answer. If substantive constitutional rights are at stake, then some procedures are always constitutionally required. Why then have so many courts and commentators found this controversy so difficult to resolve?

I suppose the current confusion over the constitutional protection of procedure comes from two sources. One source is the old right/privilege distinction and “the greater power includes the lesser” form of analysis that seems so plausible in the realm of “privileges.” The other source of confusion is the erroneous equation of a constitutional right to procedure with a constitutional right to a trial-type hearing. These two sources of confusion have produced two commonly held but erroneous conclusions about procedural guarantees: (1) those guarantees are less extensive than substantive constitutional guarantees; and (2) those guarantees are independent of substantive constitutional guarantees.

A. *The Right/Privilege Distinction and “The Greater Power Includes the Lesser” Analysis*

There are certain benefits that the Constitution forbids governments to eliminate without adequate justification. There are other benefits that the Constitution permits governments to eliminate at its option. The former category of benefits includes freedom of speech, freedom of religion, privacy, and, to some extent, private property. The latter category includes, for example, welfare and public employment. The ultimate normative principles that would justify a scheme under which some benefits are viewed as constitutionally non-optional and others are viewed as constitutionally optional are quite difficult to determine. I will not attempt to justify the constitutionally non-optional/optional scheme other than to note that it is a tenet of doctrinal orthodoxy.²³ It goes by the term more familiar to lawyers: the “right/privilege” distinction.

The non-optional/optional or right/privilege distinction has historically played havoc with constitutional doctrine. It continues to do so today, primarily because to some, a greater power totally to eliminate privileges necessarily entails a lesser one to condition the privileges

23. See *Taxonomy*, *supra* note 14, at 16-39.

as the government sees fit.²⁴ To others, “the greater power includes the lesser” approach would thoroughly gut the equal protection clause and the equal protection mode of freedom of speech, freedom of religion, and other substantive constitutional rights.²⁵ These opponents of “the greater power includes the lesser” approach contend that government may not give welfare only to Republicans or Baptists, even if it might otherwise choose to give welfare to no one at all. The proponents of that approach, on the other hand, demand to know “why not?”

For my purposes, suffice it to note that the current doctrinal orthodoxy indicates that optional benefits may *not* be conditioned any way the government would like, but that the reasons why they may not be so conditioned are murky. Sometimes it is clear that making an individual relatively worse off with respect to an optional benefit actually makes the individual absolutely worse off with respect to a non-optional benefit.²⁶ Allowing only Democrats to put up billboards may penalize Republicans more than if no one were permitted to construct billboards. But beyond such cases, it is still not clear why the greater power does not include the lesser, though it is clear that in many instances it does not.²⁷

Almost all of the modern conceptual difficulties with procedural due process arise when the benefit at stake is constitutionally optional that is, where the government could legislatively abolish the benefit at its pleasure.²⁸ The difficulties that the right/privilege muddle has spawned for other areas of constitutional law surface in procedural due process when one asks the obvious question: “How can there be a constitutional right to a procedure for determining whether one gets a benefit when there is no constitutional right to the benefit itself?” Some, employing “the greater power includes the lesser” mode of analysis, conclude from the right/privilege distinction that if a benefit is a privilege, it cannot be the object of a constitutional right to procedure.²⁹ As the argument goes, if the government may constitu-

24. See *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892).

25. See generally Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984).

26. See *Taxonomy*, *supra* note 14, at 35-39.

27. See Kreimer, *supra* note 25, at 1304-14.

28. See *Primer*, *supra* note 6, at 1378-84.

29. See Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85; Grey, *supra* note 9; Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CALIF. L. REV. 146 (1983); Smolla, *supra* note 19, at 90-94.

tionally at its whim eliminate the benefit entirely, it makes no sense to attach a constitutional duty to provide procedures when particular individuals are denied the benefit.

Here is my reply to this analysis. First, my position is totally consistent with the orthodox division of benefits into constitutional rights and mere privileges, or as I call them, constitutionally non-optional and optional benefits. Second, "the greater power includes the lesser" mode of analysis has been rejected where substantive constitutional rights are concerned. The equal protection clause and the equal protection mode of the constitutional rights regarding speech, religion, lifestyle, and so forth, are substantive constitutional constraints on the award of "privileges." Although it is difficult to work out the normative theory that justifies both the status of a benefit as optional *and* places constraints on its allocation once it is awarded,³⁰ it is beyond cavil that within the current framework of constitutional doctrine, substantive constitutional constraints on the allocation of optional benefits are deeply entrenched.

If one accepts that there are substantive constitutional constraints in the background of every award or denial of optional benefits, can one nevertheless hold that there are no procedural constitutional constraints operating? The answer is yes only if the substance of a government rule and the procedure implementing it are not a package. But I tried to demonstrate earlier that substance and procedure *are* a package for purposes of substantive constitutional values. If I succeeded, then it must be true that procedural constitutional constraints are entailed by substantive constitutional constraints.

The right/privilege distinction has negative implications for a constitutional right to procedure only where it has negative implications for substantive constitutional constraints. That is, only where government has plenary discretion in a substantive sense in determining how an optional benefit shall be allocated will government be completely free to choose its procedures for determining the facts upon which application of its allocation policy depends. Because it is well-established that government never has such substantive plenary discretion as a matter of constitutional doctrine, government never is completely free constitutionally to choose its fact-finding procedures.

Put differently, because I tie the constitutional protection of procedure to the constitutional protection of substantive values, I concede that had constitutional doctrine developed differently, so that Justice

30. See *Taxonomy*, *supra* note 14, at 35-39; Kreimer, *supra* note 25, at 1326-51.

Holmes' "greater power includes the lesser" view of privileges prevailed,³¹ there would be no constitutional protection of procedure with respect to privileges. Since Holmes' view has been thoroughly rejected, however, constitutional constraints on the fact-finding procedures used in allocating privileges must be recognized.

I want to make one final point about the role of the right/privilege distinction in arguments about procedural due process. Chief Justice Rehnquist³² and Judge Frank Easterbrook³³ take the following, modified Holmesian position. First, if a benefit is a privilege, by definition it follows that potential recipients have no constitutional right to the benefit. Second, if a "sweet" benefit is allocated by means of a "bitter" procedure, government has bestowed a "bittersweet" package of benefit and procedure. Characterizing the benefit as separable from and unqualified by the procedures chosen for its allocation would elevate form over substance. Third, if benefits may be "arbitrarily" eliminated or reduced by government, which is what is meant by calling them privileges, then their allocation by means of arbitrary procedures is constitutionally permissible. There is no constitutional protection against arbitrary allocation of privileges.

Rehnquist and Easterbrook conclude from this three step analysis that courts have no business second-guessing the procedures government provides for the allocation of privileges. Both the Supreme Court and I reject this conclusion. The Court's disagreement occurs at the second step of the analysis.³⁴ I think the Court is wrong on this point and Rehnquist and Easterbrook are correct.³⁵

My disagreement with Rehnquist and Easterbrook occurs at the third step. There are specific substantive constitutional values such as those regarding speech and religion that place limits on the kinds of benefit-procedure packages the government bestows in the realm of privileges. But there is also a general substantive constitutional value that proscribes arbitrariness in the substance of rules and there-

31. When serving on the Supreme Court of Massachusetts, Justice Holmes upheld the dismissal of a policeman for engaging in political activities, writing: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517, 220 (1892).

32. See, e.g., *Arnett v. Kennedy*, 416 U.S. 134 (1974).

33. Easterbrook, *supra* note 29.

34. See *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 1492-93 (1985).

35. See *supra* notes 13-19 and accompanying text; Grey, *supra* note 9, at 202; Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433 (1987).

fore in the procedures by which they are allocated. As I have indicated, a complete constitutional theory would explain how a benefit can be a privilege, subject to complete elimination "arbitrarily," and yet still be limited to non-arbitrary distributions.³⁶ I do not have such a theory of constitutional arbitrariness. But I believe that such a theory does underlie the constitutional scheme,³⁷ that non-arbitrariness is a substantive constitutional value, and that, like all substantive constitutional values, the value of non-arbitrariness places limits on the government's choice of the procedures for allocating privileges.³⁸

B. *The Futile Search for an Independent Constitutional Right to Procedure*

Many courts, including most prominently the Supreme Court, and several commentators take the position that procedural due process is the Constitution's independent guarantee of certain procedures for applying rules and policies, and it rests not on the Constitution's substantive values, but on its own bottom. I obviously reject this position. An "independent" procedural due process does not fit well analytically within the overall constitutional structure. Moreover, I believe that the language of the due process clause, while it evinces a concern with process, does so in conjunction with a concern for substantive values that it also evinces. Indeed, I believe that "life, liberty, and property" are words, not of limitation, but of inclusion, and that they comprehend all benefits affected by substantive constitutional values.³⁹

36. See *Taxonomy*, *supra* note 14, at 35-39.

37. See Mashaw, *supra* note 35, at 435-38; Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383 (1977).

38. Professor Mashaw's contribution to this symposium may be viewed as a particular fleshing out of the meaning of "unconstitutionally arbitrary." That is, the pursuit of ends or the use of means that offend privacy, participation, or intelligibility are inconsistent with the meaning of citizenship in a liberal democracy. Mashaw, *supra* note 35, at 440, 442.

Professors Peter Simon and Thomas Grey both come close to endorsing this strong right/privilege position with respect to at least some privileges. Grey, *supra* note 9; Simon, *supra* note 29. They both agree with me that procedures are constitutionally mandated for the sake of substantive constitutional values. Simon, however, appears to believe that some substantive decisions can be arbitrary without violating the Constitution. On this point, Grey sides with me, but underestimates, I believe, the implications a non-substantive-arbitrariness position has for requiring procedure.

39. See *supra* note 7 and accompanying text.

I believe the motivation to posit a substance-independent procedural due process stems from two sources in addition to any motivation that the Constitution's language provides. First, if one erroneously believes that substantive constitutional rights carry no implications for the procedures through which rules and policies are applied in specific cases, and if one believes correctly that the Constitution is concerned with those kinds of procedures, then one is motivated to posit an independent constitutional right to procedure and locate that right quite naturally in the due process clause. Second, if one equates a constitutional right to procedure with a constitutional right to a trial-type hearing — and if one notes correctly that substantive constitutional rights, while they do entail certain procedures for applying rules and policies, often do not entail trial-type hearings — then one will conclude that the constitutional right to procedure must be independent of substantive constitutional rights.

I hope my analysis to this point exposes the error of the belief that substantive constitutional rights carry no procedural implications. I want to focus here on the second source of the motivation to posit a substance-independent constitutional right to procedure, the belief that procedural due process means trial-type hearings.

First, although the Constitution may demand fair and reasonably accurate procedures whenever applying general rules or policies to specific individuals carries implications for substantive constitutional values, the Constitution does not demand trial-type hearings in all such cases. The grading of a bar applicant's answers on the state's bar examination could violate several substantive constitutional rights, depending on what kind of grading procedure is used. But it is ridiculous to suggest that the Constitution demands a trial-type hearing on the scoring of the answers, or even notice to the bar applicant and an opportunity to be heard.⁴⁰ Countless governmental decisions, from deciding that someone is guilty of a crime to awarding Sarah a *B* on a math quiz, apply rules and policies to specific persons and thus rest on findings of "adjudicative facts" about specific persons, items, or events that are the traditional concern of procedural due process.⁴¹ All these decisions can be made in ways that violate substantive rights.

40. See *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985); *Board of Curators v. Horowitz*, 435 U.S. 78 (1978); *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975); K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (2d ed., 1979), § 12.12.

41. See *Londoner v. City & County of Denver*, 210 U.S. 373 (1908); K. Davis, *supra* note 40, §§ 12.1-4; *Primer*, *supra* note 6, at 1353-62.

But while some surely merit hearings, or even elaborate trials in the case of adjudicating criminal guilt, others surely do not.

Second, the equation of procedural due process with trial-type hearings, while it has some precedential support, is not inexorably required by a fair reading of the cases. There *are* hoary precedents that deem notice and the opportunity to be heard to be the minima of due process.⁴² But equally hoary precedents consider non-hearing adjudicative-fact-finding procedures, such as mere inspection of the item that is the subject of the dispute, as satisfying the requirements of due process. Determinations of whether a vessel is seaworthy, whether the answers on an examination are correct, or whether a student's clinical work is acceptable are adjudicative in nature, but the case law indicates that such determinations need not be made through a trial-type hearing to satisfy procedural due process.⁴³ It takes little, if any, reworking of the precedents to conclude that procedural due process is not synonymous with trial-type hearings or, what amounts to the same thing, that "notice" and an "opportunity to be heard" are elastic concepts that can include reading one's resume, viewing one's teaching, or inspecting one's ship.⁴⁴

The mistaken equation of due process with trial-type hearings, especially when conjoined with "the greater power includes the lesser" view of the right/privilege distinction, has led Supreme Court justices and academic commentators alike on a futile search for a substance-independent constitutional right to procedure. The "independent" theories of procedural due process come in the following forms. First, there are "independent" theories that are essentially competitors with my substantive theory of procedural due process. These theories face a twofold burden: they must show that my linking of substance and procedure is mistaken, and they must show that their own version of procedural due process is correct. Second, there are "independent" theories of procedural due process that are best regarded, not as alternatives to my theory, but as supplements to it. Thus, procedural due process includes not only those procedures entailed by substantive constitutional rights, but also those procedures demanded by certain constitutional values that are implicated only by adjudicative procedures. The twofold difficulty faced by these theories is showing that

42. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Londoner v. City & County of Denver*, 210 U.S. 373 (1908).

43. See cases and authorities cited *supra* note 40.

44. See generally *Primer*, *supra* note 6, at 1353-62.

their favorite values are indeed in the Constitution, and explaining why those values have no substantive constitutional implications.

Those independent theories of procedural due process that compete with mine argue that only when the government converts an optional benefit from a mere privilege into "property" or "liberty" does the due process clause require certain procedures. The majority in *Roth* took this position, and it still represents the Supreme Court's general approach to procedural due process. Several academic commentators also take this position.

The problem this position faces is developing a theory to account for when and why a mere privilege is transformed into "liberty" or "property" protected by constitutionally-mandated procedures. The Court's opinions have done nothing but spawn confusion. And while academic supporters of this approach are clearer than the Court, they are ultimately unconvincing. Timothy Terrell⁴⁵ and Stephen Williams⁴⁶ urge that government's monopolistic position with respect to the benefit or its adequate substitutes should determine whether procedures are constitutionally required. But unless their argument is ultimately premised on substantive constitutional values, they are vulnerable to the rejoinder, "Why worry about the procedures for allocating the benefit when the rules that define eligibility are of no constitutional concern?" In other words, the fact that an individual must deal with the government to obtain a certain type of benefit may be a good reason for concluding that *substantive* constitutional values limit the government's discretion both in defining eligibility for the benefit and in choosing procedures for determining who is eligible. Government monopoly is not a good argument for a concern *only* with adjudicative procedures.

Just as important, government monopoly is not a good argument for a total lack of concern with the adjudicative procedures by which other, non-monopolized optional benefits are allocated. Terrell, in his contribution to this symposium, argues for a waiver theory to support the position that no procedures are constitutionally required when non-monopolized privileges are allocated.⁴⁷ But waiver begs the ques-

45. Terrell, *Causes of Action as Property: Logan v. Zimmerman Brush Co. and the "Government-as-Monopolist" Theory of the Due Process Clause*, 31 EMORY L.J. 491 (1982); Terrell, "Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L.J. 861 (1982).

46. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEG. STUD. 3 (1983).

47. Terrell, *Liberty and Responsibility in the Land of "New Property": Exploring the Limits of Procedural Due Process*, 39 U. FLA. L. REV. 351 (1987).

tion of what constitutional rights regarding procedure define the baseline from which waivers are or are not made.

Edward Rubin takes the position that due process applies whenever government decides to allocate a benefit according to specific rules rather than through administrative discretion,⁴⁸ a position that probably represents what the Court believes but has been unable to articulate. Rubin posits "fair and accurate application of rules" as the value that the due process clause constitutionalizes. But he fails to convince me that such a value makes sense divorced from a concern with the substantive fairness of the rules themselves. Either admitting the link between the concern with substance and the concern with procedure reduces Rubin's (and the Court's) position to mine,⁴⁹ or it leaves an unjustified chasm separating the allocation of benefits according to *rules* from the allocation of benefits according to *administrative discretion*. Substantive values and their procedural implications apply, however, to *both* forms of allocation.

It is unclear why justices on the Court, Rubin, and others⁵⁰ have been led to conclude that the distinction between legislative rules and administrative discretion is significant in the context of procedural due process. The commitment of an issue to administrative discretion essentially puts the administrator into a role that combines both legislating standards and applying them. Substantive constitutional standards apply to such a role, including the application aspect of the role. If anything, because the administrator is playing two roles, and some of the checks and balances of tri-partite government are absent, more procedure rather than less is warranted.⁵¹

It seems to me that the legislative rule/administrative discretion dichotomy is principally a separation of powers concern, not an individual rights concern, though individuals, of course, have standing to invoke separation of powers issues.⁵² Separation of powers is not, nor could it be, procedural due process. Procedural due process applies to state and local governments, but no federal constitutional concern,

48. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044 (1984).

49. There are indications that Rubin's position is close to mine. See *id.* at 1107 & n.303. But Rubin maintains that he rejects my linkage of procedural rights to substantive constitutional values. Letter from Edward Rubin to Larry Alexander (March 11, 1985).

50. See Ackerman, *The Conclusive Presumption Shuffle*, 125 U. PA. L. REV. 761, 765-67 (1977).

51. See Mashaw, *supra* note 35, at 1-8.

52. See *INS v. Chadha*, 462 U.S. 919 (1983); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

except perhaps the non-justiciable Guaranty Clause,⁵³ governs *ultra vires* state and local administrative action.⁵⁴ From the standpoint of procedural due process, the administrative procedures for applying rules of eligibility for benefits must be treated as legislatively authorized, as part of the rules of eligibility themselves. Chief Justice Rehnquist is correct on this point.⁵⁵ His error lies not in the assumption that rules and their procedure are a package, but in his assumption that when optional benefits are at stake, the package may be as arbitrary as the legislature wishes.

Rubin recognizes that procedural due process and separation of powers are separate constitutional concerns. The due process clause governs all unfair or inaccurate procedures for adjudications under legislative rules, even if the adjudicative procedures are legislatively blessed. If, however, Rubin admits that the legislature could prescribe, as part of its substantive rule, each of the steps the rule-applier follows and each of the factual inferences made, then one can legitimately ask what constitutional values, besides separation of powers, the rule-applier violates when acting without that legislative mandate. On the other hand, if Rubin denies that the legislature may constitutionally authorize those procedures as part of its substantive rule, then it must be because the legislation is *substantively* unconstitutional. That is so because *the legislature is not adjudicating under rules, but is legislating a rather complex rule* instead.

It therefore appears that Rubin argues for the same position I defend. Both types of procedural defects that he discusses, arbitrary procedures and arbitrary departures from non-arbitrary procedures, are unconstitutional if, and only if, they cannot constitutionally be legislatively prescribed as part of the substantive rules that are applied through them. And that type of unconstitutionality — unconstitutionality in legislation — is a product of substantive constitutional values.

The independent theories of procedural due process that supplement rather than contradict my substantive theory usually posit some value, such as “dignity”⁵⁶ or “association,”⁵⁷ that they claim is both a

53. U.S. CONST. art. IV, § 4. See *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

54. See *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937).

55. See *Arnett v. Kennedy*, 416 U.S. 134, 152-54 (1974).

56. See Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981); Pincoffs, *Due Process, Fraternity, and a Kantian Injunction*, in DUE PROCESS, NOMOS XVIII 172, 175-79 (J. Pennock & J. Chapman eds. 1977); Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978).

57. See Michelman, *supra* note 12.

constitutional value and one particularly served by adjudicative procedures like trial-type hearings. The “procedural” due process clause’s unique constitutional contribution is to foster values like dignity by demanding trial-type hearings in at least some cases where such hearings are more procedure than substantive constitutional rights themselves require.

I am not sure what this type of theory entails. For example, it is perfectly consistent with my argument to posit dignity as a *substantive* constitutional value that, like other substantive values, has implications for procedures as well as for rules and policies. On the other hand, if “dignity” is a purely “procedural” value, I have considerable difficulty comprehending it.⁵⁸ Is the hypothetical college teacher’s dignity offended by having the decision to renew the contract depend on comparing the teacher’s published articles, student evaluations, and resume to those of other candidates for the position? Is it offended when all other constitutional values are satisfied by that procedure, and the only complaint is that the procedure is not a “hearing”? Is it offended more than the dignity of those applicants who were evaluated solely upon resumes? The substantive constitutional values at stake in an adjudicative decision can be looked to in order to determine the constitutional weight of more accurate procedures. Such weight can then be compared with the costs of more accurate procedures, costs that are not merely monetary and often can be themselves translated into substantive constitutional values. An independent right to more procedure than that calculus warrants, a right based on “dignitary values,” seems to be a constitutional wildcard indeterminate in scope and potentially perverse in effect, especially if the ordinary procedural calculus is correctly employed.

My criticisms of “dignitary” theories of procedural due process do not extend to the dignitary theory presented by Jerry Mashaw in this symposium.⁵⁹ Mashaw and I agree that the current Supreme Court’s approach to procedural due process is wrongheaded for the reasons articulated by Chief Justice Rehnquist to the effect that substance and procedure are a (sometimes “bittersweet”) package. Mashaw and I also agree that “life, liberty, and property” are terms of inclusion

58. I also have difficulty with the position that dignity and other similar values are substantive values that are implicated by substantive legislative rules and policies but are only constitutionalized to the extent that they bear on adjudicative procedures. Why would the framers care about adjudicative procedures that offend dignity but not substantive rules and policies that do so?

59. Mashaw, *supra* note 35, at 439-43.

and refer to all interests the deprivation of which implicates substantive constitutional values. Mashaw's dignitary value is definitely a substantive constitutional value; that is, a value having implications for the constitutionality of the substance of rules as well as for the procedures by which they are to be applied. Indeed, Mashaw's dignitary value represents his version of how to flesh out the general substantive value of non-arbitrariness that I read into the Constitution. Finally, Mashaw's dignitary value does not require hearings in all cases, a result I also endorse. In short, I view Mashaw's dignitary theory to be a more particular version of my own theory. It is a substantive theory of procedural due process having none of the difficulties of theories that speak only to the procedures by which rules are applied and not to their content.

My tentative conclusion is that substantive constitutional rights are not only the source of procedural constitutional rights, but also the limits of those rights. I am not convinced that there is any substance-independent constitutional right to procedure.⁶⁰

V. CONCLUSION

I have done little in this paper beyond linking procedural constitutional rights to substantive ones. I have shown that procedures for finding the adjudicative facts upon which the application of rules and policies depends are subject to constitutional constraints in all cases, the right/privilege distinction notwithstanding. I have also shown that the constitutional constraints, while demanding more in the way of procedure than many believe, do not demand trial-type hearings in every case. On the other hand, I have not explained the right/privilege distinction, or why the allocation of privileges implicates substantive constitutional rights, "the greater power includes the lesser" argument notwithstanding. Nor have I shown what process is due or when in particular situations that process is due, but only that those questions are answered by resort to substantive constitutional values. In short, I have not shown what one will find in exploring the mysteries of procedural due process, but only where one should look.⁶¹

60. See also *Primer*, *supra* note 6, at 1378-79 n.264 (raising question whether procedural protections imply substantive protections).

61. It is interesting to speculate whether the tie between substantive and procedural constitutional rights is less than obvious today because law schools have severed substantive courses from the courses that deal with their procedural framework.

