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February 2009

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

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

Armed with *Olech*, Ms. Engquist challenged her dismissal under a class-of-one theory and won a jury verdict on the issue.³ However, Chief Justice Roberts, writing for the majority in *Engquist*, explained that the class-of-one suit is unavailable to plaintiffs like Ms. Engquist because, in the employment context, "employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify."⁴ By contrast, Chief Justice Roberts reasoned that the fifteen-foot easement standard in *Olech* provided "a clear standard against which departures, even for a single plaintiff, could be readily assessed."⁵ Thus, the narrow holding in *Engquist* was that a "'class-of-one' theory of equal protection has no place in the public employment context."⁶ The impact of the *Engquist* holding,

¹128 S. Ct. 2146 (2008).

² 528 U.S. 562 (2000) (*per curiam*).

³ Engquist asserted other state and federal claims as well, but the only issue decided by the Supreme Court was the viability of the class-of-one Equal Protection claim. 128 S. Ct. at 2149-50.

⁴ 128 S. Ct. at 2154.

⁵ 128 S. Ct. at 2153.

⁶ 128 S. Ct. at 2148-49.

though, likely affects claims other than just public employment cases because there are many areas of “state action ... which by their nature involve discretionary decisionmaking.”⁷ Under the reasoning of *Engquist*, class-of-one claims equal protection claims seem to be excluded when the challenged state action rests on an “array of factors” and lacks the “clear standard” that made the Olechs’ class-of-one claim successful.⁸

Given the potentially far-reaching impact of *Engquist*, we address in this article the question of whether, after the *Engquist* opinion, someone in Ms. Engquist’s position has a substantive constitutional alternative to the class-of-one theory for pursuing claims of wrongful treatment. State law may offer some protection and a federal statutory claim may be available, but we are concerned solely with federal constitutional rights. We think the best alternative arises from the Due Process Clause.

It is well-settled that some state benefits, like building permits, liquor licenses, and certain jobs, are a form of “property” protected by the Due Process Clause. Both the case law and the scholarly commentary in this area focus on whether a given benefit amounts to property and what procedural safeguards must be provided before the state takes the benefit away.⁹ In the wake of *Engquist*, however, we believe another issue will come to the fore —whether the plaintiff may assert a *substantive* due process claim in addition to a procedural due process claim.

⁷ 128 S. Ct. at 2154.

⁸ The process of expanding the *Engquist* principle has already begun in some courts. Compare *SBT Holdings v. Town of Westminster*, 547 F.3d 28, 34-35 (1st Cir. 2008) (upholding a class-of-one complaint post-*Engquist* and without citing the case) with *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2008) (expanding reasoning in *Engquist* which applied to government-employee relationship to this case involving government contractor relationship). Because of this extension of *Engquist*, Plaintiffs would be well-advised to frame their equal protection claims differently if they can, for example, by relying on a “classification” rather than on individualized arbitrary treatment. See, e.g., *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 592 (9th Cir. 2008) (drawing this distinction).

⁹ A recent example of the Court’s “property” jurisprudence is *Town of Castle Rock v. Gonzales*, which found plaintiff had no property interest in enforcement of a restraining order. 545 U.S. 748 (2005). There is also an extensive body of scholarship in the area. See, e.g., Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000); Timothy P. Terrell, “Property,” “Due Process,” and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L. J. 861 (182).

The Court’s most recent case on the procedural requirements of the Due Process Clause is *Wilkinson v. Austin*. 545 U.S. 209 (2005). *Wilkinson* involved a deprivation of liberty rather than property, but the Court does not distinguish between the two in setting the procedural due process requirements. Thus, *Wilkinson* begins its discussion of procedural due process by setting out the basic principles first enunciated in a “property” case, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Wilkinson*, 545 U.S. at 224-25.

Few litigants have framed their Due Process cases in terms of a substantive claim, partly because an equal protection class-of-one claim was available, until taken away by *Engquist*, and partly because the Court has expressed reluctance to expand the scope of substantive due process if an alternative is available.¹⁰ Yet, now that *Engquist* appears to have severely limited the availability of a class-of-one claim, a compelling case can be made for expanding the scope of substantive due process.

Consider the following hypothetical case:

Amy is a tenured professor at a state university. Under state law, as a tenured professor, she may only be fired for “cause.” On these facts, it is settled law that Amy has a state-created property interest in her position. Joe, the school president, informs her that a student has charged her with a violation of the school’s sexual harassment policy. School authorities investigate the charge, and Amy is accorded a hearing before Joe to determine whether she should be dismissed. For the sake of isolating the substantive issue, let us assume that she receives all of the procedural protections demanded by the Due Process Clause.¹¹ At the hearing, Amy undermines the credibility of the accuser, presents witnesses who provide her with an airtight alibi, and in general, makes a compelling case that the accusations are false. Nonetheless, Joe rules that she has violated the policy, revokes her tenure, and fires her. Amy sues Joe and the university, seeking an injunction against dismissal, on the ground that firing her would deprive her of her state-created property without due process of law.

For the sake of isolating the issue whether Amy may assert a substantive claim, we will assume that Joe deliberately fired Amy for reasons of his own, or for no reason at all, but without

¹⁰ See *Graham v. Connor*, 490 U.S. 386, 393-95 (1989) (favoring Fourth Amendment theory). See also *Albright v. Oliver*, 510 U.S. 266, 287 (1994) (Souter, J., concurring in the judgment) (urging “the utmost care whenever we are asked to break new ground in [the] field’ of substantive due process.”). Our argument is not to the contrary. We maintain that, on certain facts, there may be no alternative to the substantive theory. The Court recognizes that, in such circumstances, substantive due process is appropriate. See *County of Sacramento v. Lewis*, 523 U.S. 833, 843-44 (1998) (finding substantive due process analysis was inappropriate if respondent’s claim was covered by the Fourth Amendment, which it was not).

¹¹ In *Coronado v. Valleyview Pub. Sch. Dist. 365-U*, for example, a student was expelled from school for participation in a confrontation between rival gangs in the school cafeteria. 537 F.3d 791 (7th Cir. 2008). In his suit against school officials, he relied on *Goss v. Lopez*, 419 U.S. 565 (1975), which recognized access to public education as a property interest. Though Coronado had no difficulty showing that he had been deprived of that property interest, his motion for a preliminary injunction for violation of his procedural due process rights was denied because he had received notice and a meaningful opportunity to be heard, and due process required no more. *Coronado*, 537 F.3d at 795-97.

“cause,” that is, with insufficient evidence of incompetence, insubordination, criminal misconduct, or other grounds that would justify dismissal.¹² We set aside theories of recovery that rely on specific provisions of the Bill of Rights, such as the First Amendment right of free speech.¹³ Nor are we concerned with substantive due process protection of “liberty”, such as the freedom of intimate association¹⁴ or right to personal security from physical harm caused by conduct that shocks the conscience.¹⁵

We argue that the Due Process Clause affords not only procedural but also substantive protection to Amy’s state-created property interest in keeping her position. While our hypothetical involves government employment, our thesis extends to the whole range of state-created property interests, including, among other things, building permits and liquor licenses. This type of due process claim has received no systematic attention from the Supreme Court and the lower federal courts are divided. The only circuit court case discussing the matter in detail is *McKinney v. Pate*,¹⁶ where the Eleventh Circuit ruled against the substantive theory of recovery. In our view, *McKinney* is wrongly decided, and moreover, the issue urgently requires a thorough airing sooner rather than later. Part I of this article lays the foundation for the argument by briefly describing the Supreme Court’s “state-created” property doctrine. Part II then makes the case for substantive as well as procedural protection for these rights. Finally, Part III discusses the specific substantive constitutional norms that ought to govern state-created property rights.¹⁷

¹² See Merrill, *supra* note 9, at 960 (discussing content of term “cause”).

¹³ The leading Supreme Court cases on public employee free speech rights are *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), which established a balancing test and *Connick v. Myers*, 461 U.S. 138, 150-51 (1983), which emphasized that state’s interest as employer weighs heavily in *Pickering* balance. This basis for recovery has become less available in recent years. See *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that speech that is part of employee’s job is not protected by First Amendment.); *Houskins v. Sheahan* 2008 WL 4977584 (7th Cir., Nov. 25, 2008) (filing internal complaint about being struck by fellow employee was not protected speech).

¹⁴ *E.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down law that criminalized homosexual sodomy); *Flaskamp v. Dearborn Pub. Sch.*, 385 F.3d 935, 941-46 (6th Cir. 2004) (rejecting high school teacher’s argument that denial of tenure because of her relationship with her student violated her Fourteenth Amendment right to intimate association).

¹⁵ See *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (rejecting imposition of liability on police officer for injuring innocent person in course of high-speed chase but indicating that liability would be appropriate if officer’s conduct met “shock the conscience” test).

¹⁶ 20 F.3d 1550 (11th Cir. 1994) (en banc).

¹⁷ See Richard H. Fallon, Jr., *Some confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 324-26 (1993) (suggesting arbitrariness as

I. STATE-CREATED PROPERTY AND THE DUE PROCESS CLAUSE

To persons unfamiliar with the doctrine defining property protected by the U.S. Constitution, there is no apparent similarity between a tenured position at a university, a restraining order, or termination from a job only for cause, on the one hand, and land, chattels, or the intangible interests in financial instruments that constitute property in everyday life and in the common law. Indeed, there was a time when the Supreme Court would have characterized a plaintiff's interest in the enforcement of a tenure policy at a university as a gratuitous benefit from the government or employer, that is, a "privilege," and dismissed the plaintiff's case after a cursory glance at the pleadings.¹⁸ But "property," like other terms drawn from ordinary language to express constitutional values, has become to mean more than land and chattels.

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

Over the past forty years, "property" has become a term of art with a specialized meaning in constitutional litigation.¹⁹ Supreme Court decisions have recognized property rights in jobs,

standard for evaluating conduct of government officials in substantive due process claims).

¹⁸ See William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439-41 (1968) (describing earlier cases in which courts treated variety of government benefits as "privileges" that could be taken away without judicial oversight). Professor Alstyne's report of the "demise" of the distinction was, however, premature. The current regime continues to distinguish between interests that receive constitutional protection and those that do not. See generally Rodney Smolla, *The Reemergence of the Right-Privilege Distinction*, 35 STAN. L. REV. 69 (1982) (arguing privilege doctrine has valid basis in legal norms in procedural due process area).

¹⁹ See, e.g., Henry Paul Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 461 (1977) ("[G]iven the purposes behind the protection of 'property,' the word may fairly be held to embrace new forms of property as they emerge."); Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517, 1532 & n.88 ("[P]roperty is an artifact, a human creation that can be, and has been, modified in accordance with human needs and values").

In the same vein, the "liberty" protected by the Fifth and Fourteenth Amendments "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Lawrence v. Texas*, 539 U.S. 558, 558 (2003). Among other things, "liberty" also embraces the right to personal security and bodily integrity. See *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) ("The liberty preserved from deprivation without due process included the

licenses, and other benefits granted by state and federal statutory law and administrative practice. With the growth of the administrative state in the mid-twentieth century, the danger of government abuse of authority grew ever larger and state-granted benefits became increasingly important to the welfare of individuals. As a result, critics of unbridled state power called for safeguarding liberty by recognizing these benefits as a form of property,²⁰ and the Supreme Court responded.²¹ The leading case, and the starting point for analysis of the current doctrine protecting state-created property, is *Board of Regents v. Roth*.²² David Roth was a college teacher on a one-year contract. After the college informed Roth that his contract would not be renewed, Roth brought a Section 1983 suit, charging that “the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to Due Process of law.”²³ The Supreme Court ruled that Roth had no right to notice or a hearing because he had no property interest in his teaching position that was protected by procedural due process.

The importance of *Roth* lies in the reasons the Court gave for denying Roth’s claim. It rejected the old “right-privilege” distinction and declined to issue a blanket rule against

right ‘generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.’”); *Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2003) (“The “liberty” that the due process clauses secure against deprivation without due process of law includes...the right to bodily integrity”).

“Speech” that qualifies for First Amendment protection includes some but not all of what would be called “speech” in ordinary language, as well as some acts that would not qualify as speech in ordinary language. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1773 (2004) (“That the boundaries of the First Amendment are delineated by the ordinary language meaning of the word ‘speech’ is simply implausible.”). “Seizure,” for purposes of the Fourth Amendment, includes the use of force to subdue a fleeing or recalcitrant suspect. *Graham v. Connor*, 490 U.S. 386, 395 (1989). “Punishment,” for purposes of the Eighth Amendment, covers deliberate indifference to the medical needs of inmates. *Estelle v. Gamble*, 429 U.S. 97 (1976). It also covers deliberate indifference to inmates’ need for protection from other inmates. *Farmer v. Brennan*, 511 U.S. 825 (1994).

²⁰ For the most powerfully argued, and the most influential, critique, see Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964).

²¹ For a description of the evolution of the doctrine, see Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1048-69 (1984).

²² *Roth*, 408 U.S. at 564.

²³ *Id.* at 569. Just to clarify, the Due Process Clause grants procedural rights only to persons whose life, liberty, or property are at stake.

recognizing property rights in benefits obtained from the state.²⁴ Instead, it set forth a test for distinguishing between two types of benefits—those with and without a legitimate claim of entitlement. “To have a property interest in a benefit,” the Court explained, “a person ... must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”²⁵ Whether someone has a legitimate claim of entitlement depends on the law governing access to the benefit:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.²⁶

This test for a legitimate claim of entitlement barred Roth’s claim because the terms of Roth’s contract “made no provision for renewal whatsoever,” and so, they “secured absolutely no

²⁴For a description of pre-*Roth* doctrine, see STEVEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 645 ff. (4th ed. 1999).

²⁵ *Roth*, 408 U.S. at 577. As the Court explained, a legitimate claim of entitlement to a property interest is more than a person having a unilateral expectation of the property interest. *Id.* See also Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CALIF. L. REV. 146, 171-74 (1983) (“[T]he *Roth* definition of ‘property’ is consistent with the historical and usual meaning of the word”); A. C. Pritchard, Note, *Government Promise and Due Process: An Economic Analysis of the New Property*, 77 VA. L. REV. 1053 (1991) (putting forth generally critical economic analysis of Court’s doctrine).

²⁶ *Roth*, 408 U.S. at 577. For example, governments have a choice whether to set up benefit programs in such a way as to create entitlements. See David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633 (2004) (exploring benefits and pitfalls of various approaches).

State law may create “liberty” interests as well, typically with regard to prisoners or others who have lawfully been deprived of personal freedom. Usually this will be done by legislative rules of one kind or another, but other state law directives may also suffice. For an example that is somewhat analogous to the “property” claim in *Castle Rock*, see *Walters v. Grossheim*, 990 F.2d 381, 384 (8th Cir. 1993). When the state nonetheless grants these persons some degree of liberty, they may acquire a state-created liberty interest. See *Sandin v. Connor*, 515 U.S. 472, 484 (1995) (find that state-created liberty interests “will be generally limited to freedom from restraint which ... imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life”). Applying this principle, the Court recently held that Ohio inmates have a state-created liberty interest in avoiding confinement in “supermax” prisons. *Wilkinson v. Austin*, 545 U.S. 209, 222-225 (2005).

interest in re-employment for the next year.”²⁷ Moreover, neither state law nor University rules supported any expectation of renewal. The missing renewal terms and their effect on Roth’s claim shows that the particular circumstances of the employment relationship are critical.

The Court drove this point home in *Perry v. Sinderman*, a case decided the same day as *Roth*. Sinderman, like Roth, was a college teacher whose one-year contract was not renewed. But, unlike Roth, this plaintiff argued that his interest in renewal, “though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration.”²⁸ Specifically, he offered to prove that the college’s practice had been to renew teaching contracts such as his. For the purpose of ruling on the college authorities’ motion for summary judgment, the Court took this factual claim as its premise and held that the plaintiff may, on the basis of “the policies and practices of the institution,”²⁹ establish a legitimate claim of entitlement. Thus, legitimate reliance is governed by an objective test, and “a mere subjective ‘expectancy’ is not protected by procedural due process.”³⁰

B. DEFINING “LEGITIMATE EXPECTATIONS”

Taken together, *Roth* and *Perry* established the principle that, for constitutional purposes, property consists of more than the land, chattels, and intangibles covered by the common law. These cases held that government benefits may, if the law governing them gives rise to legitimate expectations of continuance, amount to “property” within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendments.³¹ The Court’s distinction between *Roth*, where the

²⁷ *Roth*, 408 U.S. at 578.

²⁸ *Perry v. Sinderman*, 408 U.S. 593, 599-600 (1972).

²⁹ *Id.* at 603 (internal quotation marks and citation omitted). In applying *Perry*, courts have held that a property interest can be based on “mutually explicit understandings” between the employee and a supervisor. *See Crull v. Sunderman*, 384 F.3d 453, 464-65 (7th Cir. 2004) (ruling against plaintiff because she failed to “support her assertion of mutually explicit understanding of continued employment by offering statements from someone who could bind the Board”).

³⁰ *Perry*, 408 U.S. at 603. *See, e.g., Nunez v. Sims*, 341 F.3d 385, 391 (5th Cir. 2003) (“[R]egardless of what Nunez’s subjective expectation [of continued employment] was, it would not have been objectively reasonable for her to believe, at the time of entering into the contract, that her entitlement to teach would extend beyond the point that her certification expired by its own terms.”).

³¹ A distinct issue, and one that we do not address at all here, is whether, short of dismissal, some other employment action taken with regard to the plaintiff amounts to a “deprivation” of property. *See, e.g., Barrows v. Wiley*, 478 F.3d 776 (7th Cir. 2007) (finding in circumstances of this case that placing an employee, who steps down from a position, on

circumstances of his employment gave the plaintiff no legitimate expectation of renewal, and *Perry*, where administrative practices created such an expectation, set up a doctrinal framework for determining whether a given government benefit qualifies as property entitled to due process protection. Usually, though not always, the governing law will be state law; hence the characterization of this type of property as a set of “state-created” property interests.³² It is this type of protected constitutional right on which we focus.

Later Supreme Court cases have elaborated these principles and applied them to a variety of claimed property interests. In the employment context, the Court’s case law establishes the basic rule that those government employees who may be fired only for “cause” have a property interest in their positions, which entitles them to due process.³³ Whether the employee has a claim of entitlement is “decided by reference to state law...[and] an examination of the particular statute or ordinance in question.”³⁴

Some Supreme Court cases have taken a narrow view of state-created property. In *Bishop v. Wood*,³⁵ a city ordinance governing the plaintiff-employee’s status authorized his dismissal “if he fails to perform work up to his standard of classification, or if he is negligent, inefficient, or

administrative leave is not a deprivation of property); *Colon-Santiago v. Rosario*, 438 F.3d 101 (1st Cir. 2006) (holding that officers who are removed from politically sensitive positions and returned to career positions when a new political party takes power are not deprived of property).

³² The examination of state law to determine whether a property interest exists is illustrated by *Hampton Company National Surety v. Tunica County*, 543 F.3d 221, 225-26 (5th Cir. 2008) (finding that Mississippi law does not give a company that writes bail bonds a property right to issue those bonds in a particular county). Federal law may create property interests, particularly in cases arising in federal enclaves like the District of Columbia. *See, e.g., Griffith v. Lanier*, 521 F.3d 398, 401-04 (D.C. Cir. 2008) (determining D.C. law did not confer any protected tenure on unpaid volunteer police reserve corps members).

³³ *See, e.g., Gilbert v. Homar*, 520 U.S. 924, 928-29 (1997) (characterizing prior cases as having established proposition that “public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process”); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538-39 (1985) (finding plaintiffs as civil service employees had property rights in continued employment conferred by state statute). More recent examples include: *Phelan v. City of Chicago*, 347 F.3d 679, 681-82 (7th Cir. 2003) and *Harhay v. Town of Ellington Board of Education*, 323 F.3d 206, 212 (2nd Cir. 2003). This principle applies to other contractual relationships as seen in *Omni Behavioral Health v. Miller*, 285 F.3d 646, 652 (8th Cir. 2002).

³⁴ *Bishop v. Wood*, 426 U.S. 341, 344-45 (1976).

³⁵ *Id.*

unfit to perform his duties.”³⁶ The plaintiff, a city employee, challenged his termination claiming the ordinance conferred him permanent classification that, combined with his period of service, gave him a protected property interest under the Due Process Clause.³⁷ In evaluating the plaintiff’s claim, the Supreme Court interpreted the ordinance as making the plaintiff an at-will employee.³⁸ As a result, the plaintiff did not have a property interest in his job as a police officer.³⁹

Bishop is not the only Supreme Court opinion to narrow the view of property; other Supreme Court opinions have also declined to extend constitutional property claims. In *Paul v. Davis*,⁴⁰ the plaintiff argued that a state official defamed him by distributing flyers announcing the plaintiff to be an active shoplifter when in fact the plaintiff’s shoplifting charge was subsequently dismissed.⁴¹ The Court found that the plaintiff did not have a valid constitutional claim because “reputation alone, apart from some more tangible interests such as employment, is [n]either ‘liberty’ [n]or ‘property’ by itself sufficient to invoke the procedural protection of the Due Process Clause.”⁴² The Court distinguished the plaintiff’s claim from *Wisconsin v. Constantineau*, where the plaintiff claimed a stigma to her reputation as a result of a flyer declaring she could not be sold alcohol, because it claimed in *Constantineau*, the posting by the state official “deprived the individual of a right previously held under state law”, that is the right

³⁶ *Id.* at 344.

³⁷ *Id.* at 341.

³⁸ *Id.* at 345. The Supreme Court felt that it did not have an interpretation from a North Carolina state court. So, it relied on the District Court judge, who sat in North Carolina and had practiced law there for many years. *Id.*

³⁹ *Id.* at 345-47. The holding in *Bishop* that at-will employment does not give rise to a property interest has not deterred lower courts from finding otherwise, in circumstances that are hard to distinguish from *Bishop*. See, e.g., *Relford v. Lexington-Fayette Urban County Government*, 390 F.3d 452, 460 (6th Cir. 2004) (finding property interest in job where dismissal was authorized for “inefficiency, misconduct, insubordination, or violation of law involving moral turpitude”). The enduring principle of *Bishop* is still the distinction between employees who have a property interest in their posts and those who hold their positions “at will.” For recent applications of this principle, see *Galloza v. Foy*, 389 F.3d 26, 33-34 (1st Cir. 2004); *Crull v. Sunderman*, 384 F.3d 453, 460 (7th Cir. 2004); *Thomas v. Town of Hammonton*, 351 F.3d 108, 113 (3rd Cir. 2003); *Eddings v. City of Hot Springs*, 323 F.3d 596, 601 (8th Cir. 2003).

⁴⁰ 424 U.S. 693 (1976).

⁴¹ *Id.* at 693.

⁴² *Id.* at 701.

to purchase or obtain alcohol, and there was not a similar deprivation in *Paul v. Davis*.⁴³

More recently, the Court in *Castle Rock v. Gonzales*⁴⁴ denied the plaintiff's claim that she had a property interest in the enforcement by the police of her restraining order against her estranged husband. The Court began by pointing out that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion."⁴⁵ It then found (despite the language of the statute and the order) that "[a] well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes", reasoning that when an arrest is impractical, Colorado's restraining order statute requires only that officers "seek a warrant."⁴⁶ Thus, Ms. Gonzales could not "specify the precise means of enforcement" required by the Colorado restraining-order statute.⁴⁷ The "practical necessity of discretion"⁴⁸ in enforcing her restraining order fatally undermined Ms. Gonzales' claim to an entitlement for "[s]uch indeterminacy is not the hallmark of a duty that is mandatory."⁴⁹

While *Bishop, Davis, and Castle Rock* take a narrow view of property, other Supreme Court cases are more expansive. In *Goss v. Lopez*, the Court declared that state laws guaranteeing access to primary and secondary schooling gave the students a property interest in education.⁵⁰ This holding was in response to a class action filed by Ohio public school students who had been suspended from school, without a hearing, for ten days for misconduct.⁵¹ In finding the students had a protected property interest in their public school education, the Court emphasized that Ohio had chosen to confer this benefit, and as a result, the Ohio public schools could not take away the students' property interests without adhering to the minimum procedures required by the Due

⁴³ *Id.* at 708.

⁴⁴ 545 U.S. 748 (2005).

⁴⁵ This rejection is interesting since the provisions of Colorado law reflected in the restraining order did "truly ma[ke] enforcement of restraining orders *mandatory*." *Castle Rock*, 545 U.S. at 760 (emphasis in original).

⁴⁶ *Id.*

⁴⁷ *Id.* at 763.

⁴⁸ *Id.* at 762.

⁴⁹ *Id.* Writing for the majority in *Castle Rock*, Justice Scalia also suggested in dicta that Ms. Gonzales lacked two additional federal constitutional requirements necessary for her to win a state-created property claim: the benefit must have an "ascertainable monetary value" and it cannot be an indirect and incidental consequence of the enforcement of state law against a third party.

⁵⁰ *Goss v. Lopez*, 419 U.S. 565 (1975).

⁵¹ *Id.* at 573-74.

Process Clause.⁵² Consequently, students have a Due Process right to a hearing before being suspended or expelled.

In another employment case, the Court in *Logan v. Zimmerman Brush Co.*⁵³ held that property embraces an unadjudicated state law cause of action. The property interest at stake in *Logan* was an employee's right to have his appeal of his termination through the Illinois Fair Employment Practice Act heard within one hundred twenty days.⁵⁴ Because the state commission failed to comply with this requirement, it violated the Due Process Clause.⁵⁵ The Court emphasized that the employee's right was not protected merely by the existence of the process but rather by the proper administration of that process.⁵⁶

Finally, in *Atkins v. Parker*,⁵⁷ the Court found that recipients of food stamps had a property interest in their continuance, though the government retained the power to modify or abandon the program.⁵⁸ Specifically, the plaintiffs challenged the notice they had received from the state agency notifying them of changes in federal law that could reduce or eliminate the food stamps they received. The Court, in declaring the notice adequate, distinguished between "procedural fairness of individual eligibility determinations" and "legislatively mandated change in the scope of the entire food-stamp program" and held that in the latter situation the "legislative process provides all the process that is due."⁵⁹ Nonetheless, the Court found food-stamp benefits to be statutory entitlements that are treated as property protected by Due Process Clause.⁶⁰

Lower federal courts, of course, have decided many more "property" cases than the Supreme Court. They have found property interests in liquor licenses,⁶¹ state medical insurance

⁵² *Id.*

⁵³ 445 U.S. 422, 430-32 (1982).

⁵⁴ *Id.*

⁵⁵ *Id.* at 423.

⁵⁶ *Id.*

⁵⁷ 472 U.S. 115, 128 (1985).

⁵⁸ *See Atkins*, 472 U.S. at 129 ("[T]he 1981 entitlement did not include any right to have the program continue indefinitely at the same level, or to phrase it another way, did not include any right to the maintenance of the same level of property entitlement").

⁵⁹ *Atkins*, 472 U.S. at 116.

⁶⁰ *Id.* at 128.

⁶¹ *Wojcik v. City of Romulus*, 257 F.3d 600 (6th Cir. 2001). *See generally* Linda L. Munden, Comment, *Retail Liquor Licenses and Due Process: The Creation of Property Through Regulation*, 32 EMORY L. J. 1199 (1983).

coverage,⁶² business licenses,⁶³ and, where a business began operating before a license was required, “the continued operation of an existing business.”⁶⁴ Even a building permit can be “property,⁶⁵ if under state law it may not be canceled⁶⁶ except for a good reason—a legal norm often expressed by the term “cause.”⁶⁷ They have also held that a “constant, consistent pattern” of decisions by administrative law judges as to appropriate reimbursement rates under Medicare can create a property interest on the part of physicians in the rates the administrative law judges deem appropriate.⁶⁸ A professor may have a property interest not only in his employment but also in his position in the Accounting Department by virtue of provisions in the Faculty Manual guaranteeing his status.⁶⁹ A psychiatrist had a property interest in clinical staff privileges at the Manhattan Psychiatric Clinic, evidently on the basis of provisions in the Clinic’s bylaws and its Policy and Procedure Manual.⁷⁰ An inmate has a property right not to have his institutional account assessed by prison authorities.⁷¹ All in all, the lower court case law has borne out the Supreme Court’s assertion in *Logan* that “the types of interests protected as property are varied and, as often as not, intangible, relating to the whole domain of social and economic fact.”⁷²

⁶² *Hamby v. Neel*, 368 F.3d 549, 557-59 (6th Cir. 2004).

⁶³ *Collins v. Nuzzo*, 244 F.3d 246, 250 (1st Cir. 2001).

⁶⁴ *Women’s Med. Prof’l Corp. v. Baird*, 438 F. 3d 595, 611 (6th Cir. 2006).

⁶⁵ *Woodwind Estates v. Gretkowski*, 205 F.3d 118 (3rd Cir. 2000).

⁶⁶ Lower courts have generally held that *applicants* for benefits, as well as current beneficiaries, may have property interests in them, but the Supreme Court has not addressed the issue. For a recent assessment of the case law, see *Kapps v. Wing*, 404 F.3d 105, 115 (2nd Cir. 2005).

⁶⁷ Courts often use the term “for cause” across the whole range of state-created property interests. Thomas Merrill argues that “because the phrase ‘for cause’ is a term of art with special relevance to employment cases, it may be desirable to express the root idea behind for-cause removal somewhat more broadly.” He suggests “a phrase such as ‘specific condition justifying termination’ rather than ‘for cause.’” Merrill, *supra* note 9, at 960 (2000).

⁶⁸ *Furlong v. Shalala*, 156 F.3d 384 (2nd Cir. 1998).

⁶⁹ *Hulen v. Yates*, 322 F.3d 1229 (10th Cir. 2003).

⁷⁰ *Greenwood v. State Office for Mental Health*, 163 F.3d 119 (2nd Cir. 1998).

⁷¹ *Burns v. Pennsylvania Dept. of Corr.*, 544 F.3d. 279, 291 (3rd Cir. 2008).

⁷² *Logan*, 455 U.S. at 430 (citations and internal quotation marks omitted).

II. SHOULD “STATE-CREATED” PROPERTY RECEIVE SUBSTANTIVE CONSTITUTIONAL PROTECTION?

Most of the due process cases, both in the Supreme Court and lower federal courts, address two issues: whether in a given situation, the plaintiff has a “property” interest, and given that the plaintiff has a “property” interest, what type of *process* the plaintiff is entitled to in a given situation. In light of the Court’s decision in *Engquist*, we think that a third issue may also arise: whether, in a given situation, the state has deprived the plaintiff of a *substantive* right to “property.” Under the approach we propose, a plaintiff would still have to establish that he has a state-created property interest within the framework of federal constitutional standards.⁷³ We argue that the plaintiff who holds state-created property may raise two constitutional claims: (a) that his right to procedural due process was denied and (b) that he was denied substantive due process. In this part of the article, we examine how this substantive due process claim would arise and the potential issues associated with it.

A. THE SUPREME COURT ON SUBSTANTIVE DUE PROCESS

There is no reasoned opinion from the Supreme Court resolving the status of substantive due process in the state-created property context. There is, however, a relatively recent Supreme Court case that could be read as having decided the issue in favor of substantive due process. In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*,⁷⁴ Buckeye sought to build a low-income housing complex. After it had seemingly met the building permit requirements, public opposition to the planned development began to grow. The city council still approved the plan, but the city engineer delayed issuance of the permits pending the voting results of a city referendum that if passed would repeal the ordinance under which the council had approved Buckeye’s building permits. The referendum repealing the ordinance passed.

Buckeye then sued the city and several city officials under Section 1983 charging that it had a state-created property interest in obtaining building permits once it had satisfied the conditions mandated by state law, and that the city and its officials deprived it of that right when they allowed the referendum to go forward rather than issuing the permits. Everyone understood this to be a substantive due process claim, and the Sixth Circuit awarded relief on this ground.⁷⁵

⁷³ See *Olim v. Wakinekona*, 461 U.S. 238, 250 (“Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.”).

⁷⁴ 538 U.S. 188 (2003).

⁷⁵ *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 263 F.3d 627, 641-44 (6th Cir. 2001).

In reversing the Sixth Circuit’s judgment on this issue, the Supreme Court assumed the existence of a state-created property interest,⁷⁶ and then went on to address the merits of the substantive due process issue. Characterizing the circumstances of the case as an executive act case, the Court ruled that, in these circumstances, “the city engineer’s refusal to issue the building permits while the petition was pending in no sense constituted egregious or arbitrary government conduct.”⁷⁷

The implicit premise of this ruling seems to be that a substantive due process theory *would* succeed in the event the city engineer’s refusal had been shown to be sufficiently egregious or arbitrary. The Court did not merely *assume for the sake of argument* that the substantive due process theory was available. A fair reading of the opinion is that the Court simply took it for granted that substantive due process applies to this type of case. That said, it would go too far to assert that *Cuyahoga Falls* unambiguously resolves the issue. For example, the Eleventh Circuit in *McKinney v. Pate* ruled against substantive due process several years before *Cuyahoga Falls*, and it has not changed its position in the wake of the Court’s decision in *Cuyahoga Falls*.

B. *MCKINNEY V. PATE*: THE LEADING CASE AGAINST A SUBSTANTIVE STATE-CREATED PROPERTY RIGHT

Lacking explicit guidance from the Supreme Court,⁷⁸ most lower courts have paid little attention to the substantive dimension of cases like *Amy*’s, and those that have addressed it are divided on whether the holders of state-created property are entitled to substantive constitutional safeguards under the due process clause.⁷⁹ Few litigants frame their Due Process cases in substantive terms, partly because an Equal Protection class-of-one claim was available until *Engquist* took it away and partly because the Court has expressed reluctance to expand the scope

⁷⁶ *Buckeye*, 538 U.S. at 198.

⁷⁷ *Id.*

⁷⁸ *See* *Butler v. Rio Rancho Public Schools Bd. Of Educ.*, 341 F.3d 1197, 1200 n.3 (10th Cir. 2003) (“Court has not decided whether a state created property right like the right to a public education triggers substantive due process guarantees”); *see also* David H. Armistead, *Substantive Due Process Limits on Public Officials’ Power to Terminate State-Created Property Interests*, 29 GA. L. REV. 769, 779 (1995) (discussing lack of guidance from Supreme Court on substantive due process claims).

⁷⁹ *Compare* *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc) (rejecting substantive due process theory) *with* *Herts v. Smith*, 345 F.3d 581, 587 (8th Cir. 2003) (accepting substantive due process theory).

of substantive due process if an alternative is available.⁸⁰ Unfortunately, courts that do recognize substantive due process claims typically do not undertake to defend their position. Perhaps the most extensive treatment of the normative issue is found in *McKinney v. Pate*,⁸¹ a case that rejected the substantive due process theory. Accordingly, a defense of the substantive theory must deal with *McKinney*.

1. *McKinney's Holding*

Millard McKinney had held the position of County Building Official in Osceola County, Florida. He had a property interest in the position because, under state law, he could only be removed for cause. Though his performance evaluations were excellent, the Board of County Commissioners decided to fire him. When he refused to quit, the Board fired him, charging that he “had failed to provide direction to his department and that as a result, the performance of the Building Division staff was deficient.”⁸² One of the commissioners, John Pate, worked for a construction subcontractor, and McKinney asserted that Pate was biased against him “because of McKinney’s strict enforcement of the county’s building codes,”⁸³ that the charges against him were pretextual, and that “the Board therefore fired [him] without reason.”⁸⁴

Sitting en banc, the Eleventh Circuit abandoned several of its own precedents and held that these facts do not “give rise to a substantive due process claim.”⁸⁵ In reaching this decision,

⁸⁰ See *Graham v. Connor*, 490 U.S. 386, 393-95 (1989) (favoring Fourth Amendment theory). See also *Albright v. Oliver*, 510 U.S. 266, 287 (1994) (Souter, J., concurring in the judgment) (urging “the utmost care whenever we are asked to break new ground in [the] field’ of substantive due process.”). Our argument is not to the contrary. We maintain that, on certain facts, there may be no alternative to the substantive theory, and the Court recognizes that, in such circumstances, substantive due process is appropriate. See *County of Sacramento v. Lewis*, 523 U.S. 833, 843-44 (1998) (finding substantive due process analysis was inappropriate if respondent’s claim was covered by the Fourth Amendment, which it was not).

⁸¹ 20 F.3d 1550 (11th Cir. 1994).

⁸² *Id.* at 1555 n. 4.

⁸³ *Id.* at 1554.

⁸⁴ *Id.* at 1555.

⁸⁵ *Id.* at 1553. The narrow holding in *McKinney* is that state-created rights in *employment* are not covered by substantive due process. Later Eleventh Circuit cases have extended the doctrine to other types of state-created property. See *Lewis v. Brown*, 409 F.3d 1271, 1273 (11th Cir. 2005) (“The list of state-created rights is not limited to tort and employment law, and has been held by this Court to include land-use rights like the zoning restrictions at issue here.”). Also, McKinney’s procedural due process claim failed because “McKinney’s state remedy was capable of providing McKinney with all the relief warranted. Even if McKinney’s bias

Chief Judge Tjoflat discussed *Bishop v. Wood*⁸⁶ and *Cleveland Board of Education v. Loudermill*.⁸⁷ He then continued:

Supreme Court precedent demonstrates that an employee with a property right in employment is protected only by the procedural component of the Due Process Clause, not its substantive component. Because employment rights are state-created rights and are not “fundamental” rights created by the Constitution, they do not enjoy substantive due process protection.⁸⁸

But *Bishop* and *Loudermill* do not in any measure support the proposition for which they are cited. Judge Tjoflat correctly describes *Bishop* as a case in which the Court found neither a “property interest protected under the Fourteenth Amendment” nor “a constitutionally protected interest in liberty.”⁸⁹ Since the plaintiff in *Bishop* held neither a property nor a liberty interest in his position, the question of whether state-created property receives substantive constitutional protection did not arise, and the Court did not address it. Similarly, in *Loudermill*, the issue was whether the plaintiff had a property interest in the job⁹⁰ and in the event he did, whether he was accorded procedural due process in connection with his dismissal.⁹¹ Again, substantive due process was not an issue in the case.⁹² Given that the Court did not address substantive due

allegations are true, the presence of a satisfactory state remedy mandates that we find that no procedural due process violation occurred.” McKinney, 20 F.3d at 1564.

⁸⁶ 426 U.S. 341 (1976). *See supra* notes 35 – 39 and accompanying text.

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

⁸⁸ McKinney, 20 F.3d at 1560.

⁸⁹ *Id.* at 1559. In *Bishop*, the plaintiff asserted that the dismissal violated his Fourteenth Amendment liberty because “the reasons given for his discharge were false.” 426 U.S. at 349. Shortly before *Bishop*, the Supreme Court had rejected that reasoning in *Paul v. Davis*, 424 U.S. 693 (1976). Only where the reasons for the dismissal are made public does the plaintiff have a case under *Paul*. In *Bishop*, “the asserted reasons for the City Manager’s decision were communicated orally to the petitioner in private.” *Bishop*, 426 U.S. at 348 & n. 12.

⁹⁰ *Loudermill*, 470 U. S. at 538-41.

⁹¹ *Id.* at 542-48.

⁹² Judge Tjoflat offered two other “distinct and important” reasons for foreclosing

process in either *Bishop* or *Loudermill*, it is difficult to see how the Eleventh Circuit felt its analysis of these cases supported its conclusion that substantive due process was not an available argument for the plaintiff.

2. *Questioning the Eleventh Circuit's Argument*

The core of *McKinney's* reasoning, on which the opinion stands or falls, is that substantive due process does not protect state-created property rights, only rights created by the Constitution. Judge Tjoflat distinguishes between two types of rights protected by the Fourteenth Amendment:

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

substantive due process claims for violations of state-created rights. First, Judge Tjoflat opines that the “second error” in the Eleventh Circuit’s prior law was “that it allows a terminated employee to sue in federal court under Section 1983 before the employee utilizes appropriate, available state remedial procedures.” *McKinney*, 20 F.3d at 1560. For this proposition, Judge Tjoflat cited *Zinermon v. Burch*, 494 U.S. 113 (1990), which holds that certain *procedural* due process claims cannot be brought until the plaintiff has pursued available state remedies. *Zinermon*, 494 U.S. at 130-39. But *Zinermon* quite explicitly distinguishes between substantive and procedural due process, and it reaffirms the settled law that, as to a substantive due process claim, “the constitutional violation actionable under § 1983 is complete when the wrongful action is taken.” *Id.* at 125. Only *after* it is established that no substantive due process claim is available could *Zinermon* be relevant to *McKinney's* or any other case. To argue that *Zinermon* supports the rejection of substantive due process is to reason in a circle.

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

them.⁹³

This discussion then leads Judge Tjoflat to conclude that “areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because ‘substantive due process rights are created only by the Constitution.’”⁹⁴ Judge Tjoflat cites *Bishop* and *Roth* as the employment cases and *Daniels v. Williams* as the tort case supporting this distinction between rights that receive substantive due process protection and those that do not.

Bishop and *Roth* are indeed public employment cases, but neither of them addressed substantive protection for state-created property. *Bishop* held that the plaintiff did not have a “legitimate expectation” of continuance and hence no property right; *Roth* focused on procedural due process and said nothing one way or the other about substantive rights.⁹⁵ *Daniels v. Williams*⁹⁶ is indeed a tort case in which the Court ruled that official negligence could not support a substantive due process claim. But *Daniels* did not foreclose the substantive due process approach for more egregious harms, and the Court in *County of Sacramento v. Lewis*⁹⁷ belied Judge Tjoflat’s taxonomy by authorizing recovery in certain cases.⁹⁸

The *McKinney* court’s inability to find solid precedents is neither surprising nor, standing alone, fatal to its ruling. An argument for a contrary outcome would face the same difficulty. Due to the Supreme Court’s failure to address the substantive due process issue, there are no

⁹³ *McKinney*, 20 F.3d at 1556 (citations and internal quotation marks omitted). For example, in *Flaskamp v. Dearborn Public Schools*, a teacher, fired on account of an affair with a recent graduate, sued to get her job back, claiming a violation of her fundamental right of intimate association. 385 F.3d 935, 938 (6th Cir. 2004). The Sixth Circuit upheld the school board’s decision, ruling that “the board’s action did not ‘directly and substantially’ affect Flaskamp’s right of intimate association and that the board did not act in an unreasonable manner in addressing the issue.” *Id.* at 943.

⁹⁴ *McKinney*, 20 F.3d at 1556 (*quoting* *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring)). Justice Powell indeed makes it clear that he would not extend substantive protection to state-created property rights, but this is not concerning because he wrote for himself alone in a case where the Court was unanimous.

⁹⁵ *See supra* notes 22 – 27 and accompanying text.

⁹⁶ *Daniels v. Williams*, 474 U.S. 327, 331-32 (1986).

⁹⁷ *See County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (finding police officer may be liable to motorist injured in police chase if conduct “shocks the conscience”).

⁹⁸ Relying on an earlier Eleventh Circuit case, Judge Tjoflat asserted that official actions that “shock the conscience” do not give rise to substantive due process claims. *McKinney*, 20 F.3d at 1556 n.7. *County of Sacramento v. Lewis* repudiates Judge Tjoflat’s dictum.

authoritative cases on point. The Court's inattention to the scope of substantive protection for state-created property rights is regrettable, for it raises basic issues regarding "the troubled boundary between individual man and the state."⁹⁹ In a world in which government is "a major source of wealth,"¹⁰⁰ the power of the state is significantly augmented as the scope of constitutional protection of state-created property diminishes. However the question is resolved, it deserves to be aired far more fully than it is in *McKinney*.

III. SUBSTANTIVE RIGHTS IN STATE-CREATED PROPERTY

Now we return to Amy's case. The basic issue raised by Amy's hypothetical is whether Amy, though afforded procedural protection, may nonetheless object to her dismissal on the ground that she holds a substantive right not to be fired unless there is sufficient evidence of "cause." The Supreme Court has not explicitly addressed this issue and commentators have neglected it. The lower courts must occasionally face the problem, but they are divided and the opinions typically do not provide much guidance. We attempt here to resolve the conflict and provide the needed guidance because in the event Amy succeeds, not only will she save her job, but her case will have a broader impact.

A holding in Amy's favor would imply that the state, in undertaking to deprive a person of state-created property, is constrained by some burden of proof, that is, the state must satisfy the "cause" requirement which gave rise to Amy's state-created property right. Such a burden of proof on the state already exists in criminal cases as established by *In re Winship*.¹⁰¹ In the civil context, *Kansas v. Crane*¹⁰² demands "proof of serious difficulty in controlling behavior" in certain civil commitment proceedings that deprive persons of liberty.¹⁰³ As the Court recognized in *Crane*, the right is a substantive norm that the state may not deprive a person of liberty.¹⁰⁴ We argue that state-created property deserves similar protections.

⁹⁹ Reich, *supra* note 20, at 733.

¹⁰⁰ *Id.*

¹⁰¹ See *In re Winship*, 397 U.S. 358, 361-64 (1970) (requiring "proof beyond a reasonable doubt" in criminal cases to protect liberty of defendant and to command respect of community).

¹⁰² 534 U.S. 407, 413 (2002).

¹⁰³ See *Brock v. Seling*, 390 F.3d 1088, 1091 (9th Cir. 2004) (finding that, on facts of this case, state had met its obligation to show "'some' showing of an abnormality that makes it 'difficult if not impossible for the dangerous person to control his dangerous behavior.'").

¹⁰⁴ See *Crane*, 534 U.S. at 409 ("This case concerns the constitutional requirements substantively limiting the civil commitment of a dangerous sexual offender").

Recognizing substantive protection for Amy’s right would expand the circumstances in civil cases which impose a burden of proof on the state and establish conditions, in addition to the procedural requirements, for taking away state-created property rights. We use Amy’s hypothetical to illustrate in broad terms what is at stake in resolving the question of whether the Due Process Clause guarantees state-created property rights substantive as well as procedural protection. If the Due Process Clause provides *only* procedural safeguards, and Amy is afforded those safeguards, she has no constitutional grounds for complaining about the substantive deprivation she suffers when she is fired. If, on the other hand, the Due Process Clause obliges the state to produce some quantum of evidence in support of its claim that there is “cause” for her dismissal, it necessarily follows that Amy’s state-created property right in her job receives substantive protection under the Due Process Clause.

We have kept our hypothetical as simple as possible in order to avoid complications that may distract attention from the central issue of whether courts should erect substantive constitutional bulwarks against the deprivation of state-created property rights.¹⁰⁵ While Amy’s case includes the basic features of a whole range of substantive state-related property cases, other cases often vary from hers along two dimensions. First, the plaintiff may advance a more complex constitutional claim, asserting not merely that the evidence was insufficient (which is our focus), but that the adverse decision was based on animus toward her, or that it was arbitrary, or that it manifested callous indifference to her rights. We will argue that Amy should win in all of these cases. Second, the substantive-safeguards issue relates not only to jobs but arises in connection with the whole range of state-created property, including building permits, zoning variances, and liquor licenses. Thus, under our reasoning, plaintiffs in all of these cases should have access to the substantive theory of recovery that we defend.

A. MAKING THE CASE FOR SUBSTANTIVE PROTECTION

The holding in *McKinney* rests on two premises: that the state law pedigree of this type of property justifies lesser constitutional protection;¹⁰⁶ and that process and substance can properly

¹⁰⁵ Real-world examples of possessor’s of state-created property seeking substantive due process protection include *Herts v. Smith*, 345 F.3d 581 (8th Cir. 2003) and *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994). In *Herts*, a government employee with a property interest in her job claimed that she was discharged arbitrarily; the court ruled that a substantive due process theory was available, but the plaintiff had failed to show sufficiently egregious conduct to support recovery. *Herts*, 345 F.3d at 587-88. In *McKinney*, a building inspector asserted he was fired on account of an official’s animus toward him as shown by this official’s rulings; the Eleventh Circuit completely rejected the substantive due process as a theory of recovery. *McKinney*, 20 F.3d at 1556.

¹⁰⁶ For a somewhat different, or at least less definitive, distinction between “fundamental” property rights, which receive substantive due process protection, and other property rights, which do not, see *Independent Enterprises v. Pittsburgh Water and Sewer Authority*, 101 F.3d

be divorced from one another, with the first receiving constitutional protection, but not the latter. Thus, two challenges exist for plaintiffs like Amy in establishing a valid substantive due process claim for state-created property. First, Amy must show that substantive protection extends not only to fundamental rights conferred by the Constitution but also to state-created property. Second, Amy must show that procedural safeguards are inadequate by themselves to protect the substantive aspect of state-created property. Under scrutiny, both premises of *McKinney* seem problematic and do not bar a substantive due process claim by a plaintiff holding a state-created property interest.

1. “Fundamental” vs. “State-Created” Rights

In distinguishing between “fundamental” rights “created by the constitution” on the one hand, and “state-created” rights on the other, the Eleventh Circuit in *McKinney* necessarily implies a lower status for the latter by virtue of their state-law origin. Degrading state-created rights in this way ignores the core principle, reaffirmed in *Castle Rock*, that the question whether expectations generated by state law give rise to a property interest is ultimately one of federal constitutional law.¹⁰⁷ Calling these “state-created” rights is useful descriptive shorthand, but the moniker misleads by failing to acknowledge the federal constitutional screen they must pass through in order to win protection under the Due Process Clause. For example, the federal requirements may thwart protection for a given interest for lack of monetary value or for the incidental or indirect nature of the protection.¹⁰⁸ Given the federal law overlay, it follows that property interests that satisfy the constitutional norms cannot be distinguished from other forms of property (like fundamental rights) simply because of their state law origins.

By ignoring this federal law component, *McKinney*’s distinction between rights lacks precision. It is not the case that the universe of rights protected by the Fourteenth Amendment can be divided into state-created rights in government benefits, which receive only procedural protection, and rights “created” by the Constitution, which alone are entitled to substantive protection. This distinction simply ignores the largest class of property rights not created by the Constitution — those rights in land, chattels and intangibles that are defined by the common law. For the most part, the existence and scope of common law property rights are governed by state law, yet the Due Process Clause and the Takings Clause protect common law property against

1165, 1179-80 (3rd Cir. 1997). The *Independent Enterprises* opinion does not clarify this distinction at all. In fact, it had already held that the interest for which protection was sought did not qualify as property in the first place. *Id.* at 1178. As a result, the interest at stake did not warrant procedural protection either. *Id.* at 1180.

¹⁰⁷ See *supra* Part I.B.

¹⁰⁸ Justice Scalia evidently thought that they were fatal to the property claim in *Castle Rock*, though it appears he could not muster a majority for that view. See *supra* note 49.

substantive as well as procedural violations.¹⁰⁹

Stated in abstract terms, the property component of the Due Process Clause addresses the constitutional problem created by the tension between the persons in a free society entitled to rely on keeping rights they have acquired¹¹⁰ and the government seeking (for good or bad reasons) to take those interests away. Starting with *Roth*, the guiding principle for property cases has been the Court's understanding that "a purpose of the ancient institution of property is to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."¹¹¹ For hundreds of years, the common law has preserved interests in land, chattels, and intangibles, and the Due Process Clause along with the Takings Clause of the Fifth Amendment safeguard these common law property against legislatures and officials. With the growth of the state in the second half of the twentieth century came the "emergence of government as a major source of wealth,"¹¹² in the form of jobs, contracts, licenses, permits, and the like. In *Roth* and *Sinderman*, the Court responded to the transformation by extending the reach of Fifth and Fourteenth Amendment "property."

Thus, a more accurate account of constitutional rights would drop the distinction drawn by *McKinney*. It would acknowledge that property has several sources. Some of the property and liberty rights deserving procedural and substantive protection under the Due Process Clause originate in state law and practice, while others come from the common law, from the Supreme Court's understanding of "ordered liberty," or, in a more contemporary formulation, from the notion that, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹¹³ What all of these types of

¹⁰⁹ See, e.g., *Simi Investment Co. v. Harris County*, 236 F.3d 240, 248-49 (5th Cir. 2000) (summarizing constitutional methods for protecting against state deprivation of property); *Clark v. City of Draper*, 168 F.3d 1185, 1190 (10th Cir. 1999) (discussing how arbitrary deprivation of an individual's property trigger the substantive component of the Due Process Clause); *South County Sand & Gravel Co. v. Town of South Kingstown*, 160 F.3d 834, 835-36 (1st Cir. 1998) (reiterating rule that plaintiff must plead his claim under specific constitutional provision if one exists and not under more general substantive protection afforded by Fourteenth Amendment).

¹¹⁰ This is the central insight animating Charles A. Reich's *The New Property*, a highly influential pre-*Roth* article that made the case for treating state benefits as property for constitutional purposes. See, e.g., Reich, *supra* note **Error! Bookmark not defined.**, at 733 ("in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality"); *id.* at 764 ("the growth of largess has made it possible for government to 'purchase' the abandonment of constitutional rights"); *id.* at 771 ("property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner").

¹¹¹ *Roth*, 408 U.S. at 564.

¹¹² Reich, *supra* note 20, at 733.

¹¹³ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

property have in common is a determination by the Court that, for one reason or another, they deserve a federal constitutional shield against government.

Now consider the amount of constitutional protection we should accord “state-created” property in particular. What all of these types of property have in common is a determination by the Court that, for one reason or another, they deserve a federal constitutional shield against government. Consequently, “state-created” property exists only when a court determines that state law and practice produce legitimate grounds for reliance on “the security of interests that a person has already acquired in specific benefits.”¹¹⁴ Given such a determination, we do not believe there are plausible grounds for distinguishing “state-created” property from any other kind of property. Thus, the constitutional principle that places curbs on government power to deprive us of common law property and “fundamental” rights applies with equal force to these “state-created” benefits.¹¹⁵ By adopting this approach, a court can recognize substantive due process claims for state-created property interests without contravening or altering Supreme Court precedent.

2. *Favoring Procedural Over Substantive Protection*

Another barrier to substantive protection of state-created property rights is the argument proffered in *McKinney* that the process and substance components of one right operate autonomously, and a state-created right enjoys only protection of its procedural component. The *McKinney* treatment of state-created property concedes that the Fifth and Fourteenth Amendments embrace state-created interests, but then, it limits the reach of the Constitution by recognizing only procedural rights for their protection. As justification for excluding the substantive component of the Due Process Clause, *McKinney* quotes *Collins v. City of Harker Heights*¹¹⁶ for the proposition that

the Court has always been reluctant to expand the notion of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to

¹¹⁴ Roth, 408 U.S. at 576.

¹¹⁵ We are not alone in finding Judge Tjoflat’s reasoning unpersuasive. Long before *McKinney*, others had already rejected the distinction Judge Tjoflat would draw in *McKinney* between “state-created” property and other kinds of property. See Monaghan, *supra* note 19, at 436 (“[G]iven the purposes behind the protection of ‘property,’ the word may fairly be held to embrace new forms of property as they emerge”); Reich, *supra* note 20, at 779 (“Once property is seen not as a natural right but as a construction designed to serve certain functions, then its origin ceases to be decisive in determining how much regulation should be imposed.”).

¹¹⁶ 503 U.S. 115 (1992).

exercise the utmost care whenever we are asked to break new ground in this field.¹¹⁷

A difficulty with *McKinney*'s reliance on this case is that the Supreme Court in *Collins* addressed a different issue altogether from the one presented by *McKinney*. In *Collins*, a city employee complained that city officials showed deliberate indifference to his health by exposing him to dangerous working conditions, and he argued that this amounted to a substantive due process violation. The *Collins* Court did not reject substantive due process in principle but ruled that the alleged misconduct at issue could not “properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.”¹¹⁸ *Collins* was not a case in which the Supreme Court favored procedural over substantive due process. Rather, the issue in *Collins* was whether the plaintiff's claim met the threshold for obtaining *any* degree of constitutional protection, procedural or substantive, and the Court ruled that it did not.¹¹⁹

A different issue is presented in cases like *McKinney* and our hypothetical with Amy. The issue in cases like these is whether an interest that qualifies as state-created property under the Court's criteria — and hence deserving of some constitutional safeguards — should nonetheless be denied *substantive* protection. Put in concrete terms, the issue is whether Amy, having established that she holds a state-created property interest and having received a procedurally flawless due process hearing, has any recourse when she can show that there was too little evidence to support Joe's finding of “cause.” The different type of issue at stake undermines *McKinney*'s reliance on *Collins* for the proposition that the Court disfavors substantive protection.

Besides favoring of procedural protection over substantive protection of state-created property, the Eleventh Circuit also distinguished between challenges to legislation, for which it found substantive due process available, and challenges to executive acts (like Amy's claim), for which it is not.¹²⁰ The distinction drawn by *McKinney* between legislation and executive acts is faulty for at least two reasons. First, it may not be tenable after *County of Sacramento v. Lewis*. In *Lewis*, the Court declared that “due process protection in the substantive sense limits what the government may do in both its legislative and its executive capacities.”¹²¹ This statement appears

¹¹⁷ *McKinney*, 20 F.3d at 1556 (quoting *Collins*, 503 U.S. at 125).

¹¹⁸ *Collins*, 503 U.S. at 128.

¹¹⁹ The holding in the case was that a safe work environment was not part of the “liberty” protected by the Fourteenth Amendment. *Collins*, 503 U.S. at 127-30.

¹²⁰ The distinction between the legislative and executive contexts is explored at length in *Hawkins v. Freeman*, 195 F.3d 732, 738-39 (4th Cir. 1999). See also Fallon, *supra* note 17, at 326-27 (“[A] striking disparity has developed: substantive due process review is harder to obtain, and occurs under less clear standards, in tort actions based on relatively isolated official acts than in challenges to rules and legislation.”).

¹²¹ 523 U.S. at 846. The viability of *McKinney*, therefore, depends on the further

to contradict directly (and thereby eliminate) the distinction drawn in *McKinney*.

Second, *McKinney*'s distinction seems to ignore the constitutional values at stake, and the way those values vary in strength depending on whether legislation or executive action is at issue. Broadly speaking, legislation is typically enacted by a group (for example, a city council or a state legislature) and hence is unlikely to reflect the bad motives of a few decisionmakers. Moreover, legislation will usually affect many people in approximately the same way. For that reason, the democratic process will ordinarily serve as a check on abusive legislation, and judges should and do practice self restraint (verging on self abnegation), except for a small category of "fundamental rights" cases.¹²² By contrast, the executive context is one in which a given decision will often affect only one or a few people, and the decision is made by one or a small number of officials. The potential for abuse is greater in this context, and the case for judicial oversight much stronger.¹²³ Yet, this is the type of case *McKinney* denies the protection of judicial oversight and the substantive due process principle.

B. DO PROCEDURAL SAFEGUARDS SUFFICE?

In our view, the strongest defense of the *McKinney* approach is not to be found in the reasoning of the opinion or in the cases Judge Tjoflat cites. In short, we do not think that *McKinney*'s reasoning holds up under scrutiny. Many courts seem to agree. Only the Eleventh

distinction between "state-created" property rights and other rights, a distinction we address above in Part I.

¹²² Compare *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (relaxing standard for business regulation) with *Roe v. Wade*, 410 U.S. 113 (1973) (finding regulation limiting fundamental rights may be justified only by compelling state interest). While the Court in recent years has moved away from the term "fundamental," it continues to strike down statutes that interfere with "a person's most basic decisions about family and parenthood, as well as bodily integrity." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 849 (1992) (internal citations and quotations omitted). See also *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding state could not interfere with persons' private sexual conduct).

¹²³ See *Armistead*, *supra* note 78, at 783. The Third Circuit also distinguishes between executive and legislative actions; however, unlike the Eleventh Circuit, it does not preclude substantive due process claims arising from executive actions. It allows such claims (thereby providing judicial oversight) and applies the "shock the conscience test." *Stockham Interests, LLC v. Borough of Morrisville*, No. 08-3431 (E.D. Pa. Nov. 12, 2008). By contrast, in evaluating legislative actions, the Third Circuit requires the government to "point to a legitimate state interest rationally related to the ordinance." *Id.* at 8. The starting point for both evaluations is protecting plaintiffs against arbitrary government action. *Id.* at 6.

Circuit in *McKinney* and cases applying *McKinney* defend the “no substantive claim” rule.¹²⁴ Because *McKinney*’s reasoning is infirm, champions of its rule (no substantive claim for state-created property) must look elsewhere for a cogent defense of it. The best justification for the “procedural but not substantive protection” principle lies in the general efficacy of procedural rights as a means of vindicating substantive rights. For example, one might maintain that procedural rights are sufficient, by themselves, to protect the plaintiff’s property interest from the actions of state officers like Joe, who may threaten it.¹²⁵ In Amy’s case, for example, the procedural due process requirement of an impartial decision maker will usually be sufficient to

¹²⁴ We have made an exhaustive search of district and circuit court opinions without finding support for the reasoning in *McKinney*. See also Kenneth Bley, *Use of Civil Rights To Recover Damages in Land Use Cases*, A.L.I. (April 12-14, 2007) (listing only *McKinney* as example of court that “has held that rights created by state law are subject to procedural, but not substantive due process protection against nonlegislative action.”)

Nor do we find any substantial defense of the *McKinney* rule in the scholarly literature. For example, Merrill seems to take it for granted that state-created property is entitled only to procedural protection, without ever addressing the pros and cons or citing any authority for his conclusion. See Merrill, *supra* note 9, at 916-17, 933, 960. See also Erwin Chemerinsky, *Qualified Immunity: § 1983 Litigation in the Public Employment Context*, 21 *TOURO L. REV.* 551, 567 (2005) (citing *McKinney* as example of how government employee substantive due process claims are pro-defendant without defending its reasoning or conclusion).

¹²⁵ For an illustration of this type of argument in a somewhat different context, see *Superintendent v. Hill*, 472 U.S. 445 (1985). The plaintiff in this case was a prisoner who claimed he held a state-created liberty interest in good time credits. These credits were taken away from him and he sued under Section 1983. The Court ruled that procedural due process demanded that the state produce “some evidence” in order to deprive him of good time. It explained that “[r]equiring a modicum of evidence to support a decision to revoke good time credits will help prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens.” *Id.* at 455.

Reasoning similar to this may underlie the holding in *Tun v. Whitticker*, 398 F.3d 899 (7th Cir. 2005). Tun, a high school student, was expelled from school after another student photographed him while he was taking a shower. He sought reinstatement through the school district’s procedures for reviewing decisions of this kind, and, after six weeks, he succeeded. In his Section 1983 suit, he charged that the expulsion violated his substantive due process rights, as there was no evidence of wrongdoing on his part. Unlike *McKinney*, the Seventh Circuit panel recognized the existence of the substantive due process theory but rejected Tun’s claim on the merits, characterizing the school officials’ conduct as an “overreaction.” The court then commented that “the situation does demonstrate the importance of providing procedural due process, which ultimately allowed Tun ... to prevail at the end of the day: his expulsion was set aside, his school records were cleared, and he returned to school.” *Id.* at 904.

prevent her dismissal without a good reason. However, even this argument falls short. A defender of *McKinney* could not ignore the possibility of cases in which a reviewing court would find [a] that Joe was impartial and [b] that Joe had dismissed Amy without a good reason. But, the defender would rationalize that these cases may be rare.¹²⁶ In addition, a defender of

¹²⁶ In *Greenbriar Village, L.L.C. v. Mountain Brook*, the Eleventh Circuit seems to argue that such cases are not even rare but rather do not exist. Instead of asserting that procedural regularity is sufficient to protect substantive rights, the Eleventh Circuit seems to reason that the two are “equivalent”:

[T]he claim that the government acted arbitrarily and irrationally can be easily subsumed and, indeed, is more properly considered a part of a claim that improper procedures were used in the deprivation. Claiming that the interest was deprived arbitrarily or irrationally is equivalent to claiming that no fair, unbiased, and meaningful procedures were used for the deprivation. That type of inquiry falls squarely within what we have defined (and clarified explicitly in *McKinney*) as a procedural due process claim.

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

This is not to say that the two are completely separate. Procedural law and substantive law are related in that the “constitutional purpose” of process “is to protect a substantive interest to which the individual has a legitimate claim of entitlement.” *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983). A coherent argument can be advanced that sound procedural rules provide sufficient safeguards for the substantive rights they are aimed at protecting. That argument is dealt with in Part III.A. Nevertheless, the “equivalence” theory advanced in *Greenbriar Village* fails for a different reason. Contrary to the Eleventh Circuit in *Greenbriar Village*, an implication of the Court’s conceptual distinction between procedural and substantive rights is that the latter cannot “be ... subsumed” (“easily” or otherwise) into “a claim that improper procedures were used in the deprivation.” 345 F.3d at 1263 n.4. Thus, the plaintiff may argue that he suffered *both* a violation of procedural *and* substantive rights and he may win on either, neither, or both claims.

Notice, too, that *Greenbriar Village*’s “equivalence” reasoning does not depend on the

McKinney would have to concede that while there is no procedural claim, a plaintiff charging that a *legislative* decision has deprived him of property without due process has a substantive claim because even courts following *McKinney* allow a substantive claim.¹²⁷ So, contrary to the Eleventh Circuit, substantive claims do exist.¹²⁸

The force of this “procedure suffices” argument also depends on an assessment of the costs and benefits of recognizing substantive claims. One justification of the argument is that authorizing substantive suits would generate costs of one kind or another, and the costs may not be worth the marginal benefit of constructing a body of substantive due process doctrine for vindicating state-created rights. According to *McKinney*, one of those costs is the danger of unbridled substantive due process. Those costs are real. The Supreme Court documented them in *Collins*, and *McKinney* relied on *Collins*. But, that particular argument seems inapposite to cases like *Amy*’s, where the existence of a substantive property right has *already* been established. The plaintiff in *Collins* could not establish a property right at all.

As for other possible costs, the *McKinney* court asserts that substantive due process suits would be “wasteful of judicial resources.”¹²⁹ It is true that this type of litigation, like all litigation, adds to the judicial workload, but that is hardly a reason to single it out for rejection.¹³⁰

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

¹²⁷ *McKinney* explicitly distinguishes legislative acts from administrative or executive acts and preserves the substantive due process theory only for the former. 20 F.3d at 1557 n.9. This distinction obliges courts to distinguish on a case-by-case basis between legislative and executive acts. For a recent example, see *Lewis v. Brown*, 409 F.3d 1271 (11th Cir. 2005).

¹²⁸ *See supra* note 85.

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

¹³⁰ As Justice Harlan noted in a related context, the question here is how the goal of

The Eleventh Circuit also worries that “subjecting local governments to indiscriminate blindsiding by their employees” will “encourage them not to fire anyone for fear of the resulting federal suit.”¹³¹ This concern is not baseless as some substantive suits will be without merit and pose the risk of placing undue burdens on officials called upon to defend them. But, Section 1983 doctrine already has a tool for addressing that problem in the law of official immunity, which protects officers unless they violate “clearly established law.”¹³²

By focusing on the costs of allowing substantive due process claims, *McKinney* simply ignores the affirmative case for substantive due process suits for violations of state-created rights. Section 1983 suits serve two related but distinct purposes — vindication of the plaintiff’s constitutional rights and deterrence of constitutional violations.¹³³ With regard to the former, the

overseeing state officers for constitutional violations would “rank on a scale of social values” compared with other uses of the federal courts. He continued:

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

Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388, 410-11 (1971) (Harlan, J. concurring in judgment). In *Bivens*, the Court allowed a federal suit for damages against federal offices for Fourth Amendment violations, despite the absence of a federal statute authorizing the cause of action. *Id.* at 396-97.

¹³¹ *McKinney*, 20 F.3d at 1564.

¹³² See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (“[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances”); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”). Legislators, judges, and prosecutors are absolutely immune from suits for damages. See S. NAHMOD, ET AL., *CONSTITUTIONAL TORTS* 385-438 (2nd ed. 2004) (discussing when legislators, judges, and prosecutors are absolutely immune). One of the justifications for official immunity is to avoid defining constitutional rights narrowly. See John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 78 (1998) (arguing official immunity provides “breathing space” for constitutional rights that would be lost under strict liability regime).

¹³³ See, e.g., *Memphis Cmty. School Dist. v. Stachura*, 477 U.S. 299, 306-07 (1986) (discussing influence of common law of torts on damages in Section 1983 claims); *Owen v. City*

point is to vindicate the plaintiff's rights by making him whole at the expense of the wrongdoer. The focus is on the case at hand and the demands of corrective justice.¹³⁴ By precluding substantive due process suits, *McKinney* significantly diminishes this goal,¹³⁵ for there will be some situations like Amy's case, in which procedural regularity is insufficient to prevent a substantive wrong. For example, say the plaintiff holds a property right guaranteed by the Fifth and Fourteenth Amendments, and the official has violated that right. The vindication goal of Section 1983 calls for the defendant to make the plaintiff whole. We recognize, of course, that this principle is not absolute¹³⁶ because other goals must be accommodated as well. However, that accommodation is typically and appropriately accomplished through carefully targeted

of Independence, Mo., 445 U.S.622, 651 (1980) (Section 1983 “was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well”); *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978) (“The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law”); *Carey v. Piphus*, 435 U.S. 247, 254-56 (1978) (“To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages”). *See also* *Bivens v. Six Unknown Named Federal Narcotics Agents*, 403 U.S. 388, 397 (1971) (“Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, ... we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment”); *id.* at 407-08 (Harlan, J., concurring in judgment) (“[T]he Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities”); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1787-88 (1991) (“The Constitution thus contemplates a judicial “check” on the political branches not merely to redress particular violations, but to ensure that government generally respects constitutional values”).

¹³⁴ *See* Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 905-06 (2001) (stating that corrective justice demands persons receive back the something belonging to them they were deprived of without their consent).

¹³⁵ It can also be argued that the Court in *Castle Rock* also undermines the goals of Section 1983 when it denied Ms. Gonzales relief despite the seemingly mandatory language of the restraining order statute. *See* Tritia L. Yuen, Comment, *No Relief: Understanding the Supreme Court's Decision In Town of Castle Rock v. Gonzales Through the Rights/Remedies Framework*, 55 AM. U. L. REV. 1843, 1870-72 (2006) (arguing Ms. Gonzales satisfied requirements of Section 1983 set forth in *Blessing v. Freestone* and Court ignored this).

¹³⁶ *See* Fallon, *supra* note 17, at 339-40 (reviewing Court's holding in *Parratt v. Taylor* which “reasoned that the Due Process Clause does not categorically forbid the states to effect deprivations of liberty and property, but only bars deprivations without due process of law”).

doctrines like official immunity,¹³⁷ not through absolute denial of the substantive claim.

Turning to the deterrence purpose of Section 1983, there are good reasons to doubt the efficacy of procedural rules (however elaborate) as reliable safeguards against executive deprivations of state-created property rights.¹³⁸ The key reason is that “[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest in which the individual has a legitimate claim of entitlement.”¹³⁹ Given that the purpose of procedural rights is to protect substantive rights, foreclosing substantive claims seems to defeat that purpose. It is pointless to afford procedural protection to a right whose substance is not worthy of protection by itself.¹⁴⁰

While assuring fair procedures should diminish the number of substantive violations, a clever and determined supervisor or local official can probably find a way to conceal improper motives behind a facade of procedural regularity.¹⁴¹ This potential loophole shows that the accuracy and fairness values that underlie procedural rights are distinct from the values of vindicating legitimate expectations and barring badly motivated conduct that generate substantive rights. We do not rely solely on procedure when the bad motive is racial or gender bias or retaliation for protected speech. There is no more reason to do so when it is personal animus, office politics, bureaucratic obduracy, or incompetence on the part of the decisionmaker.

IV. SUBSTANTIVE CONSTITUTIONAL NORMS FOR STATE-CREATED PROPERTY

¹³⁷ See, e.g., Fallon & Meltzer, *supra* note 133, at 1789 & 1789 n. 316 (stating force of individual remediation depends on nature of constitutional violation); Amanda K. Eaton, Note, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of Hope v. Pelzer on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 662-63 (2004) (discussing policy rationales for qualified immunity for government defendants to find middle ground between under- and over-deterrence).

¹³⁸ See Fallon, *supra* note 17, at 343 (“[T]he assumption that substantive arbitrariness is always traceable to procedural defects is not always valid”).

¹³⁹ *Castle Rock*, 545 U.S. at 771 (Souter, J., concurring) (*quoting* *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983)).

¹⁴⁰ See Thomas C. Grey, *Procedural Fairness and Substantive Rights*, in *DUE PROCESS: NOMOS XVIII* 182, 197 (Ronald Pennock & John Chapman eds. 1977) (“A decision to treat a legislatively created benefit program as subject to the constitutional-moral constraints of due process, while regarding the substance or existence of the program as a matter of legislative grace, would be simply an unjustifiable anomaly”).

¹⁴¹ *Cf. Herts v. Smith*, 345 F.3d 581, 587 (8th Cir. 2003) (recognizing that substantive due process violation may occur even where procedures are flawless).

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

A. LESSONS FROM THE "PERSONAL SECURITY" CASES

The most controversial area of substantive due process doctrine involves challenges to legislation that restricts individual liberty. Attacks on statutes that criminalize abortion or sodomy fall into this category.¹⁴² Another branch concerns isolated acts by officials that directly or indirectly cause physical injury. These cases start from the premise that the Fourteenth Amendment right of "liberty" encompasses not only freedom from restraint but also personal security from harm,¹⁴³ and as a result, anyone who is injured by a government employee has the

¹⁴² *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down state statute prohibiting homosexual sodomy because statute furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual"); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992) (holding that restrictions on abortion would be evaluated under "undue burden" standard).

¹⁴³ *See* *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (discussing liberty interests in context of safety, freedom of movement, and training). The "liberty" interests identified in *Youngberg v. Romeo* are not derived from state law, but from the common law tradition. *See* *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) ("The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'"). *See also* Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 632-33 (1997) (arguing *Ingraham's* holding that Fourteenth Amendment "liberty" included personal security "rests on firmer historical footing than the artificial Fourth and Eighth Amendment rationales").

While liberty interests may also be created by state law as discussed *supra* in note 21, the Court has not had occasion to address the substantive due process limits on state officials in connection with state-created liberty interests. *Cf.* *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 454 (1985) (holding that prison officials' revocation of prisoner's good time credit "does not comport with the minimum requirements of *procedural* due process unless the findings of the prison disciplinary board are supported by some evidence in the record.") (emphasis added; citation and internal quotation marks removed). For a recent application of

beginnings of a substantive due process claim.

Cases dealing with physical harm are not directly relevant to the scope of substantive protection of state-created property. Nonetheless, they deserve attention here, if only because we lack explicit directives from the Supreme Court for the state-created property context.¹⁴⁴ While several differences exist between state-created property and personal security, the two contexts do share a common feature: both involve challenges to a relatively isolated act by a state officer rather than a challenge to a statute. Accordingly, personal security cases provide some guidance as to the general principles of substantive due process that apply when dealing with executive actions like dismissing an employee, cancelling a building permit, and other deprivations of state-created property.

The key feature of the personal security cases for our purpose is that they articulate a normative theory of substantive due process for encounters between individuals and the administrative state. In the personal security cases, the Court identifies the core due process value as a safeguard against arbitrary action or abuse of power. In *Daniels v. Williams*, however, the Court clarified that the liability of the government official cannot be strict, nor is negligence on the part of officials sufficient to support substantive due process liability.¹⁴⁵ Writing for the Court, Justice Rehnquist explained that the point of substantive due process is “to prevent governmental power from being used for purposes of oppression.”¹⁴⁶ Thus, negligence cannot suffice for liability because “[f]ar from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person.”¹⁴⁷ Though *Daniels* did not tell us what kind of showing would make out a good substantive due process claim, it took the critical first step in developing doctrine in the area.

By identifying “abuse of power” as the core substantive due process principle in evaluating executive acts, *Daniels* sets up the main guidepost for resolving substantive due process issues across a range of diverse fact patterns. As an example of application of this principle to cases addressing the amount of time a state official has to deliberate his decision, consider *County of Sacramento v. Lewis*. In that case, the issue was whether a police officer violated the plaintiff’s substantive due process rights when the officer injured the plaintiff in the

Superintendent v. Hill, see *Sira v. Morton*, 380 F.3d 57, 76 (2nd Cir. 2004).

¹⁴⁴ When the “property” at stake is not state-created but rather the kind of interest recognized by the common law, the Takings Clause is generally the governing constitutional provision, and Supreme Court decisions interpreting that clause make up the bulk of the law. See Merrill, *supra* note 9, at 957 (discussing Takings Clause and its interaction with common law property, eminent domain, and just compensation).

¹⁴⁵ 474 U.S. 327 (1986). See also *Davidson v. Cannon*, 474 U.S. 344 (1986).

¹⁴⁶ *Daniels*, 474 U.S. at 331 (internal quotation marks and citation omitted).

¹⁴⁷ *Id.* at 332.

course of chasing a motorcycle at high speed.¹⁴⁸ The Court ruled that “in such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.”¹⁴⁹ The Court distinguished the question of what standard a pretrial detainee must meet in a suit against his jailors for inattention to his medical needs. In that context, the test is “deliberate indifference.”¹⁵⁰

The Court explained why it chose different tests for the two types of cases:

[A]ttention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in one case is less egregious in the other (even assuming it makes sense to speak of indifference as deliberate in the case of sudden pursuit). As the very term “deliberate indifference” implies, the standard is sensibly employed only when actual deliberation is practical, and in the custodial situation of a prison, forethought about an inmate’s welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare.¹⁵¹

By contrast, deciding whether to give chase calls for “fast action” and presents a need to “balance on the one hand the need to stop a suspect” and “on the other, the high speed threat to all those within stopping range.”¹⁵² Because the former circumstance has the luxury of time to deliberate, while the latter does not, the latter situation lacks the harmful purpose that implicates a due process violation.¹⁵³ As a result, what constitutes an “abuse of power” in evaluating isolated executive actions depends at least in part on the time the state actor has to make his decision. When there is the luxury of time, deliberate indifference suffices to constitute an abuse of power whereas situations calling for immediate decisions must shock the conscience before considered an abuse of power.

B. ENFORCING “LEGITIMATE EXPECTATIONS”

¹⁴⁸ 523 U.S. 833, 836 (1998).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 849-50 (*citing* *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)).

¹⁵¹ *Id.* at 851 (internal citations omitted).

¹⁵² *Id.* at 853.

¹⁵³ *Id.* at 853-54.

Lewis, Daniels, and other personal security cases illustrate the general principle that arbitrariness and abuse of power are the keys to establishing a successful substantive due process claim in the “isolated executive action” context. In addition, the Court has been sensitive to differences in the balance of state and individual interests — a balance that depends on the circumstances of a given encounter. That sensitivity is evident in the distinction it draws in *Lewis* between the “deliberate indifference” test for persons confined by the state and the “shock the conscience” requirement for persons injured in high-speed chases.¹⁵⁴ Thus, the state’s interest is stronger when officers must act quickly, and consequently, plaintiffs must meet a higher standard before liability is imposed on the state actor. Conversely, the balance tilts in the individual’s favor when he is confined by the state. In short, the Court has favored a contextual approach rather than attempting to identify a single all-purpose test. In fact, over a decade ago, Richard Fallon noted that “no agreed framework has emerged for identifying when relatively isolated official acts offend substantive due process,”¹⁵⁵ and this remains true today.

Given the variety of circumstances in which individuals have relations with the state, and the diversity of interests on either side of that relationship, the Court’s contextual approach seems wise.¹⁵⁶ For example, the state’s interest is sometimes that of an employer, as in *Roth* and

¹⁵⁴ See *supra* notes 148 – 153 and accompanying text.

¹⁵⁵ Fallon, *supra* note 17, at 324. One group of cases that we will largely ignore deals with challenges to legislation. Ever since the 1930s, the substantive due process standard for challenging legislative acts has been highly deferential. For example, in *Harrah Independent School District v. Martin*, the Court upheld a School District’s rule that teachers must enroll in continuing education programs, stating that “[t]he School Board’s rule is endowed with a presumption of legislative validity, and the burden is on [plaintiff] to show that there is no rational connection between the Board’s action and its conceded interest in providing its students with competent, well-trained teachers.” 440 U.S. at 198.

For other formulations of the test reflecting the Court’s deference to legislative acts, see, for example, *Schenck v. City of Hudson*, 114 F.3d 590, 593 (6th Cir. 1997) (“rationally related to legitimate state ... concerns”); *WMX Technologies v. Gasconade Co.*, 105 F.3d 1195, 1198 (8th Cir. 1997) (“arbitrary, capricious and not rationally related to a legitimate public purpose”); *Tex. Manufactured Hous. Ass’n v. Nederland*, 101 F.3d 1095, 1106 (5th Cir. 1996) (“rational basis”). See *supra* notes 120 – 123 and accompanying text for discussion of the reasons the scrutiny of executive acts should be more searching.

¹⁵⁶ It might also be argued that the Court’s contextual approach allows it serve its own agenda of preventing federal courts from becoming a font of tort law as it fears will happen if it recognizes a wide-range substantive due process claims. One means of doing this is the Court claiming that deference to the decisions of state officials prevents it from recognizing the plaintiff’s due process claim. See Yuen, *supra* note 135, at 1865-66 (“[T]he Court values the well-established tradition of police discretion over the mandatory language within the statute. By limiting recognition of mandatory intent to criminal matters affecting a public end, the Supreme

Sinderman, and it has an interest in efficient delivery of government services. In other cases, the state is a regulator of businesses or of land use. In still others, it is an educator, or a guardian, or a custodian. Another line of cases, illustrated by *Castle Rock v. Gonzales*,¹⁵⁷ involves the state as enforcer of the criminal law. Both the state and individual interests vary among these contexts. In its role as enforcer of criminal law, the police often must act quickly, use force, and make choices as to how to deploy limited resources.¹⁵⁸ In its role as educator, the state may be entitled to deliberately injure someone by suspending a student from school¹⁵⁹ or by inflicting corporal punishment.¹⁶⁰ In contrast, as a custodian of foster children, the state is obliged to look out for the welfare of those in its charge.¹⁶¹ Because of the range of roles the state can assume, no single rule could take account of the manifold constitutional values at stake in devising substantive due process principles for all of these relationships.

Our concern here is with the distinctive features of cases in which the plaintiff holds “state-created” property of some kind, for example, a job, a building permit, or a liquor license. In the typical case, state officials have deliberately interfered in some way with the plaintiff’s state-created property, as Joe did when he fired Amy in our hypothetical.¹⁶² In the employment

Court has severely limited the relief available for private concerns.”). *See also* Joel Hugenberger, Note, *Redefining Property Under the Due Process Clause: Town of Castle Rock v. Gonzales and the Demise of the Positive Law Approach*, 47 B.C. L. Rev. 773, 800 (2006) (questioning Supreme Court’s interpretation of the Colorado restraining order statute as non-mandatory in deference to “long tradition of police discretion” by stating that “[g]iven the narrowness of this interest [Ms. Gonzales’ in her restraining order], it is unlikely that its constitutional recognition would federalize a large swath of state process, as the concurrence suggested, or turn the Fourteenth Amendment into a ‘font of tort law,’ as the majority feared”).

¹⁵⁷ *See supra* notes 44 – 49 and accompanying text.

¹⁵⁸ *See County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (holding high-speed police chases with not intent to harm suspects does not make police liable under Fourteenth Amendment).

¹⁵⁹ *E.g.*, *Butler v. Rancho Rio Public Schools Board of Educ.*, 341 F.3d 1197, 1200-01 (10th Cir. 2003) (upholding School Board’s decision to suspend student because its decision was not arbitrary, irrational, or conscience-shocking).

¹⁶⁰ *Compare Neal v. Fulton County Bd. of Educ.*, 229 F.3d 1069 (11th Cir. 2000) (hitting student in eye is excessive force violates his substantive due process rights) *with Saylor v. Bd. of Educ. of Harlan County, Ky.*, 118 F.3d 507 (6th Cir. 1997) (holding five whacks with a paddle was not constitutional violation).

¹⁶¹ *E.g.*, *Ray v. Foltz*, 370 F.3d 1079, 1083 (11th Cir. 2004) (stating state had duty to ensure safe environment for children for which it has assumed responsibility).

¹⁶² Given the general “abuse of power” principle embodied in *Daniels*, it seems unlikely

context, the state's interest as an employer counsels against constitutional rules that interfere too much with efficient delivery of government services. At the same time, the state itself has created a legitimate expectation that Amy will keep her job absent "cause" for firing her. Thus, the lawmaking task — a task the Supreme Court has not yet squarely addressed — is to balance these competing interests by devising principles for distinguishing between the class of substantive due process cases in which the plaintiff should prevail and those in which the state should win.

In our view, the core value for plaintiffs in cases of this type is the plaintiff's expectation and the state-created property interest that it generates. This expectation gives rise to a *constitutional* right on the plaintiff's part to keep his benefit so long as the expectation of keeping it remains a legitimate one. So, in Amy's situation, unless there is proof of specific *substantive* circumstances for firing her (such as incompetence, insubordination, or budgetary necessity), Joe's dismissal of Amy can fairly be characterized as arbitrary and as an abuse of power under the general principles developed in the personal security cases.¹⁶³ This conclusion is implicit in the Court's ruling in *Perry v. Sinderman* that proof of a property interest "would obligate college officials to grant a hearing at [plaintiff's] request, where he could be informed of the grounds for his nonretention and challenge their sufficiency."¹⁶⁴

If Amy shows during her hearing the insufficiency of Joe's reasons for dismissing her, is fired anyway, and has no further recourse, the Due Process Clause right to a hearing would be quite meaningless. This same reasoning applies across the whole range of situations where individuals hold state-created property under the legitimate expectations rationale. In all of these cases, it is appropriate to define the substantive content of the plaintiff's due process right by the proof the state offers as to why the plaintiff's expectation of keeping the benefit is not legitimate. In identifying this norm, we recognize that many questions remain. Notably, the "legitimate" expectations created by the state in connection with each benefit that creates "property" will need to be determined. Also, our principle that the state must offer proof of a good reason for the deprivation will oblige courts to determine just *how much* proof will be enough. Questions like these cannot be answered in the abstract, but only in the course of litigation.

that a negligent interference with state-created property could give rise to a substantive constitutional claim under the Due Process Clause. In any event, we do not address that issue in our discussion.

¹⁶³ Conversely, officials will prevail on the plaintiff's substantive claim, even if they have plainly deprived him of property, so long as they can establish that there existed good reasons for the deprivation. For example, in *Coronado v. Valleyview Public School District 365-U*, a student was deprived of state-created property when he was expelled from school based on a finding by authorities that he participated in a confrontation between two gangs in the school cafeteria. 537 F.3d 791, 792 (7th Cir. 2008). The litigation centered on whether he received procedural due process, and rightly so, as the school district's rationale was substantively unassailable. *Id.* at 794-95.

¹⁶⁴ 408 U.S. 593, 603 (1972).

C. THE STATE-CREATED PROPERTY CASE LAW

In developing a rationale for substantive protection of state-created property, we have drawn on state-created property principles and on general substantive due process principles. Two Supreme Court decisions — *Regents of the University of Michigan v. Ewing*¹⁶⁵ and *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*¹⁶⁶ — deal more or less directly with substantive due process rights in state-created property. These cases are not particularly useful in building the doctrine because the Court’s treatment of the substantive due process issues in them is terse and fragmentary. Nonetheless, the Court’s rulings in these cases are broadly consistent with the approach we advocate here.

In *Ewing*, a student was dismissed from the University of Michigan for academic failure.¹⁶⁷ He sued the Regents, claiming, among other things,

that he had a property interest in his continuing enrollment. . .and that his dismissal was arbitrary and capricious, violating his ‘substantive due process rights’ guaranteed by the Fourteenth Amendment and entitling him to relief under 42 U.S.C. § 1983.¹⁶⁸

The Court assumed both the existence of a state-created property interest and the availability of a substantive due process theory of recovery without deciding that either existed. It held that

[E]ven if Ewing’s assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action. . .When judges are asked to review the substance of a genuinely academic decision. . .they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.¹⁶⁹

¹⁶⁵ 474 U.S. 214 (1985).

¹⁶⁶ 538 U.S. 188 (2003).

¹⁶⁷ *Ewing*, 474 U.S. at 215.

¹⁶⁸ *Id.* at 217.

¹⁶⁹ *Id.* at 223 & 225. In an earlier case in which a student challenged her dismissal from medical school on substantive as well as procedural due process grounds, the Court had very briefly addressed the substantive due process issue. It assumed the availability of the substantive

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

The most common types of state-created property consist of jobs, building plans, business licenses and other benefits which can only be taken away for "cause." In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, the Supreme Court assumed the existence of a state-created property interest in the issuance of a building permit, which the city took away via a voters' referendum.¹⁷⁰ Writing for a unanimous Court, Justice O'Connor ruled against the plaintiffs and devoted just a few sentences to the substantive due process issue. She pointed out that the city charter provided for a referendum on such projects if enough residents signed a petition calling for one.¹⁷¹ In this case, there had been substantial public opposition to issuance of the permit, which led to a petition for a referendum; as a result, in these circumstances, submitting the building permit to the voters was "eminently rational."¹⁷² No contortions are required to state this ruling in terms appropriate to the state-created property context: The builder, under these facts, simply has no legitimate expectation that he can avoid a referendum and the subsequent revocation of his city-issued building permits.

We do find fault, though, with some of the Court's rhetoric in *Cuyahoga Falls*. Citing *Lewis*, the Court declared that only "egregious or arbitrary government conduct" would offend substantive due process.¹⁷³ If the Court meant to import the "shock the conscience" test from *Lewis*¹⁷⁴ to the state-created property context, then it seems to us that it ignored the differences we have identified between high speed chases and state-created property, or at least failed to

cause of action, assumed that the test governing substantive due process claims of this kind is whether the action was "arbitrary or capricious," and found "that no showing of arbitrariness or capriciousness has been made in this case." *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 (1978). See *Bell v. Ohio State University*, 351 F.3d 240, 251 (6th Cir. 2003) and *Wright v. Chattahoochee Valley Cmty. Coll.*, No. 3:06-CV-1087-WKW (M.D. Ala. Nov. 12, 2008) for recent applications of *Ewing*.

¹⁷⁰ 538 U.S. 188, 198 (2003).

¹⁷¹ *Id.* at 192.

¹⁷² *Id.* at 198-99.

¹⁷³ *Id.* at 198.

¹⁷⁴ See *supra* notes 148 – 153 and accompanying text.

explain why those differences should not matter.¹⁷⁵ Our objection to applying “shock the conscience” to state-created property claims is that legitimate expectations can be disappointed by actions that do not shock the conscience (under a plausible understanding of what shocks the conscience). For example, in *Herts v. Smith*,¹⁷⁶ a teacher was fired despite her property interest in her position. After finding that she received procedural due process, the Eighth Circuit turned to her substantive claim. Citing *Lewis* and other cases, the court said the test for “whether a violation of an individual’s substantive due process rights has occurred” is “whether the officials acted in an arbitrary or capricious manner, or so as to shock the conscience.”¹⁷⁷ It explained that “arbitrary and capricious” means “reasons that are trivial, unrelated to the education program, or wholly unsupported by a basis in fact.”¹⁷⁸

¹⁷⁵ The opinion is unclear on this point. Justice O’Connor avoided any reference to the “shock the conscience” test and invoked *Lewis* only for the proposition that a substantive due process violation occurs when there has been “egregious or arbitrary government conduct.” 538 U.S. at 198-99.

¹⁷⁶ 345 F.3d 581, 587 (8th Cir. 2003). *See also* *Young v. Township of Green Oak*, 471 F.3d 674, 685 (6th Cir. 2006) (“To the extent that a substantive due process claim is available, Young [plaintiff] must demonstrate that the Township’s decision to terminate his employment had no rational basis.”); *Yates v. District of Columbia*, 324 F.3d 724, 725 (D.C. Cir. 2003) (“only the most egregious official conduct rises to the level of a substantive due process violation”) (internal quotation marks and citation omitted); *Simi Inv. Co. v. Harris County, Tex.*, 236 F.3d 240, 249 (5th Cir. 2000) (“cases in which government arbitrarily abuses its power”); *Contreras v. City of Chicago*, 119 F.3d 1286, 1294 (7th Cir. 1997) (“arbitrary and irrational”).

Of course, courts that use this phrase do not always mean the same thing. *See* *Armistead*, *supra* note 78, at 810-14. For example, in *Bituminous Materials, Inc. v. Rice County*, the court ruled that “alleging that a land use planning decisionmaker does not like the plaintiff,” and as a result deprived plaintiff of property, did not survive summary judgment. 126 F.3d 1068, 1071 (8th Cir. 1997). We suspect that other courts would take a different view. Some courts have also required a showing that state remedies are inadequate. *See* *Contreras*, 119 F.3d at 1295. Yet, this approach was explicitly rejected in *Zinermon v. Burch*. 494 U.S. 113, 125 (1989).

¹⁷⁷ *Herts*, 345 F.3d at 587. For similar ways of stating the test, *see* *Tun v. Whitticker*, 398 F.3d 899, 902 (7th Cir. 2005); *Butler v. Rio Rancho Pub. Sch. Bd. of Educ.*, 341 F.3d 1197, 1200 (10th Cir. 2003); *Wash. Teachers Union v. Bd. of Educ.*, 109 F.3d 774, 781 (D.C. Cir. 1997).

¹⁷⁸ *Herts*, 345 F.3d at 587 (citation and internal quotation marks removed). Similar language was also used in *Fowler v. Smith*, a public employee dismissal case. In *Fowler*, the plaintiff had been fired from his job as director of maintenance operations of a public school district. Rejecting his substantive due process argument, the Fifth Circuit said that “[p]ublic officials violate substantive due process rights if they act arbitrarily or capriciously,” and that under this standard the defendants would win if their “action was a rational means of advancing a legitimate government purpose.” 68 F.3d 124, 128 (5th Cir. 1995). The defendants had not met

The holding in *Herts* is fully consistent with our thesis. The plaintiff's legitimate expectations in *Herts*, as in Amy's case, would indeed be disappointed by dismissal based on the kinds of trivial, irrelevant, or unsupported reasons that the Eighth Circuit characterized as arbitrary or capricious.¹⁷⁹ It makes sense to focus on arbitrariness and capriciousness in deciding whether the government has made a sufficient showing of "cause." The point of the cause constraint is that only certain reasons will suffice for dismissing the plaintiff or taking away his building permit or otherwise depriving him of state-created property. If there is little or no evidence that those reasons are present, or strong evidence that some impermissible reason drove the decision, then the plaintiff's legitimate expectations have been disappointed. Moreover, the phrase "arbitrary and capricious" is an apt way to describe the government's conduct.¹⁸⁰ Using that phrase or something like it to identify the standard will focus attention on the key features of a given case.¹⁸¹

The concept of conduct that "shocks the conscience" denotes a more extreme degree of fault on the part of the defendant. According to the Supreme Court, conscience-shocking is triggered by an act that "violates the decencies of civilized conduct,"¹⁸² that is "so brutal and offensive that it did not comport with traditional ideas of fair play and decency,"¹⁸³ and that is

that standards because there was evidence that "Fowler admitted to using a school truck to pull his boat on a weekend trip, kept a pool table in the maintenance building, stored his boat on school property, drove the school vehicle to pool halls, and sent school employees on personal errands." *Id.*

¹⁷⁹ *Herts*, 345 F.3d at 587.

¹⁸⁰ See *Fallon*, *supra* note 17, at 310 & 310 n. 8 (giving content to concept of arbitrariness, Fallon state that "the intuitive idea is not mysterious: government officials must act on public-spirited rather than self-interested or invidious motivations, and there must be a 'rational' or reasonable relationship between government's ends and its means").

¹⁸¹ The application of these principles is illustrated by *Simi Investment Co. v. Harris County*, 236 F.3d 240 (5th Cir. 2000). In upholding a substantive due process challenge to the county's refusal to permit the plaintiff to gain access to a city street adjacent to its property, the court said that it could "discern no rational reason for the County to deny abutting owners access to the street when the City of Houston now has complete jurisdiction over Fannin Street." *Id.* at 251. In support of this, the court said that the "[m]ost troubling" aspect of the case was the district court's finding of "an illegitimate plan to benefit the private interests of Hofheinz-Smith whose properties were financially benefited by the denial of access to the other properties abutting Fannin Street." *Id.* The court concluded that "the evidence demonstrates that the County acted arbitrarily in inventing a park and, thus, acted without a rational basis in depriving Simi of a constitutionally protected property interest." *Id.*

¹⁸² *Lewis*, 523 U.S. at 846 (citation and internal quotation marks omitted).

¹⁸³ *Id.* at 847 (citation and internal quotation marks omitted).

“intended to injure in some way unjustifiable by any governmental interest.”¹⁸⁴ Under the framework we propose, there will be many viable deprivation-of-state-created-property cases in which the reasons offered are trivial, unrelated to the education program or unsupported by the facts, yet the behavior of the official will not necessarily “shock the conscience.”¹⁸⁵ Often the administrator will be shown to have been incompetent or indifferent rather than indecent, offensive, or malicious.¹⁸⁶ Here, again, we find no fault with the *Herts* reasoning, but only with the way a careless lawyer may read the opinion. In this regard, it is worth nothing that the Eighth

¹⁸⁴ *Id.* at 849.

¹⁸⁵ The difficulty of meeting this test is illustrated by *Porter v. Osborn*, 546 F.3d 1131 (9th Cir. 2008). *Porter* involved the death of the plaintiffs’ son, Casey, who had been lying down in his car in a parking area next to a highway at 2:00 a.m. The police were called about his abandoned vehicle, and Osborn responded to the call. When he approached Casey in the dark, Casey sat up and began to drive away slowly. Another officer arrived on the scene, and when Casey failed to respond to their commands, Osborn pepper-sprayed him. Less than a minute later, as Casey tried to drive away rapidly, Osborn shot and killed him. *Id.* at 1133-35. The plaintiffs, the parents of the victim, Casey, alleged that the responding officer had violated their Fourteenth Amendment substantive due process right of familial association with their son, and that the officer’s behavior was so outrageous as to shock the conscience. *Id.* at 1132. The Ninth Circuit held that *Lewis*’s “shock the conscience” standard governed the case even though no high-speed chase was involved and ruled that the test would be met only if plaintiffs could “demonstrate that Osborn acted with a purpose to harm Casey that was unrelated to legitimate law enforcement objectives.” *Id.* at 1137.

¹⁸⁶ The test for arbitrariness in disappointing the plaintiff’s legitimate expectations may be compared to the “deliberate indifference” principle of substantive due process, which is applied to the treatment of persons confined by the state. *See supra* notes 146 – 153 and accompanying text. *See also* Rosalie Berger Levinson, *Reining In Abuses of Executive Power Through Substantive Due Process*, 60 Fl. L. Rev. 519, 541 (2008) (“Outside the emergency context of high-speed chases or prison riots, courts should apply a meaningful deliberate-indifference standard to effectively restrain arbitrary, unreasonable government misconduct.”).

In some circuits, the test for arbitrariness has been compared to “state-created danger” cases. For example in *Hunt v. Sycamore Community School District Board of Education*, a teacher’s aide was assaulted by a special education student with a history of violence. 542 F.3d 529, 532-33 (6th Cir. 2008). The court applied the “deliberate indifference” standard and ruled that this standard would be met only if the “governmental actor chose to act (or failed to act) despite a subjective awareness of substantial risk of serious injury” and “did not act in furtherance of a countervailing governmental purpose that justified taking that risk.” *Id.* at 541. Applying these factors, and stressing that the plaintiff had “voluntarily undertaken public employment involving the kind of risk at issue,” the court found no substantive due process violation. *Id.* at 544-45.

Circuit took care to state its substantive due process test in the disjunctive, by making “shock the conscience” one of two alternatives, rather than the touchstone of liability.

V. CONCLUSION: DOES *ENGQUIST* STAND IN THE WAY?

This article began with a discussion of *Engquist v. Oregon Department of Agriculture*, where the Supreme Court shut the courthouse door to government employees seeking to bring “class-of-one” Equal Protection challenges to actions taken against them, even those who can convince a jury that they were dismissed without a rational basis.¹⁸⁷ Our aim has been to explore an under-appreciated alternative to the class-of-one suit: a substantive due process claim. In proper circumstances, the aggrieved employee may make a substantive claim under the Due Process Clause that arbitrary dismissal violates her state-created property right to keep the post absent “cause” for firing her. Due Process recovery is both broader and narrower than the employee class-of-one theory rejected in *Engquist*. It is narrower in that it is available only to those employees who, under state law, may not be fired without cause. At-will government employees have no recourse under the Due Process Clause.¹⁸⁸ It is broader in that it is available not only to employees, but to anyone holding state-created property, in the form of a building permit, a liquor license, access to public education and so on.

We have examined objections to the Due Process approach, especially those raised by the leading case opposing it, the Eleventh Circuit’s en banc ruling in *McKinney v. Pate*.¹⁸⁹ Those countervailing considerations do not seem sufficiently compelling to overcome the case for allowing Due Process recovery, or so we have argued.¹⁹⁰ Though the Supreme Court has shown some sympathy for the Due Process approach, a fair reading of the cases is that the Court has given the matter little attention. The holding in *Engquist*, however, may provide new ammunition to champions of *McKinney*. Chief Justice Roberts’s opinion certainly manifests some reluctance to permit employees to sue for arbitrary dismissal. Going forward, a pressing question is whether *Engquist* threatens the viability of the substantive due process theory of recovery we have outlined here.

The answer to that question depends on which aspects of *Engquist* the Court chooses to emphasize in future cases. Some of the reasoning in *Engquist* poses problems for substantive due process litigation. The Court puts a lot of weight on the distinction between the government’s relatively weak interest as regulator and its comparatively strong interest in doing as it pleases as

¹⁸⁷ See *supra* notes 1 – 8 and accompanying text.

¹⁸⁸ Bishop, 426 U.S. at 350.

¹⁸⁹ See *supra* Part II.B.

¹⁹⁰ See *supra* Part III.

employer.¹⁹¹ Hence, “government has significantly greater leeway in its dealings with citizen employees than it does when it bears its sovereign power to bear on citizens at large.”¹⁹² Little imagination is required to see how this line of reasoning may be extended to foreclose substantive claims brought by government employees under the Due Process Clause.

Another thread in the Court’s reasoning could extend beyond the employment context and support total abrogation of the substantive due process theory, leaving plaintiffs with nothing more than a procedural due process claim. The underlying reason in *Engquist* for rejecting class-of-one equal protection claims of government employees is that “employment decisions are quite often subjective and individualized,” and “[i]t is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.”¹⁹³ Employment is not the sole occupant of the “subjective and individualized” category, merely the context in which the “principle applies most clearly.”¹⁹⁴ By implication, it may apply to other decisions made by state government officials as well.¹⁹⁵

Grounds are available, however, for limiting the reach of *Engquist*. First, the Court explicitly confined its holding to the Equal Protection Clause class-of-one theory, thereby giving itself a straightforward basis for declining to extend that case to claims under the Due Process Clause and other constitutional provisions.¹⁹⁶ Second, the Court makes clear that, in distinguishing between employment and regulation, it intends to restrict the constitutional rights associated with *at-will* employment. Thus, “recognition of a class-of-one theory of equal protection in the employment context ... is simply contrary to the concept of *at-will* employment. The Constitution does not require repudiating that familiar doctrine.”¹⁹⁷ The substantive due process theory is only available to the plaintiffs who can show that they have state-created

¹⁹¹ See *Engquist*, 128 S. Ct. at 2151 (“The government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.”) (citations and internal quotation marks omitted).

¹⁹² *Engquist*, 128 S. Ct. at 2151.

¹⁹³ *Id.* at 2154.

¹⁹⁴ *Id.* at 2154. Before applying this principle to the case at hand, the Court declares, without specific reference to employment, that “[t]here are some forms of state action ... which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments.” *Id.*

¹⁹⁵ See *supra* notes 6 – 8 and accompanying text.

¹⁹⁶ See *id.* at 2156 (expressing holding limited to elimination of class-of-one theory in public employment context).

¹⁹⁷ *Id.*

property interests in jobs or other benefits and not to at-will employees.¹⁹⁸

There is another reason for cautious optimism that *Engquist* may not be extended to preclude substantive due process claims for deprivations of state-created property. It relates to a weakness in Chief Justice Roberts’s rationale for deferring to government actions that involve discretionary decisionmaking. The Chief Justice explains that “allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.”¹⁹⁹ As an example, he uses the case of a traffic officer who observes many speeders on the highway and who singles out a few of them for tickets. A complaint by a ticketed speeder “does not invoke the fear of improper government classification,” but “rather, challenges the legitimacy of the underlying action itself—the decision to ticket speeders in such circumstances.”²⁰⁰ Allowing a class-of-one action here “would be incompatible with the discretion inherent in the challenged action.”²⁰¹ In dissent, Justice Stevens identifies the flaw in this line of reasoning. It is quite true that the unlucky speeder has no case, but the reason is that the officer does indeed have a rational basis for singling out some speeders: “His inability to arrest every driver in sight provides an adequate justification for making a random choice from a group of equally guilty and equally accessible violators.”²⁰² Here, by contrast, a jury found “that there was no rational basis for either treating Engquist differently from other employees or for the termination of her employment.”²⁰³

The problem here is not with an ill-chosen hypothetical marring a basically sound argument. It is, as Justice Stevens pointed out in dissent, that the majority’s rationale ignores the difference “between an exercise of discretion and an arbitrary decision.”²⁰⁴ Discretion is “the power to choose between two or more courses of action each of which is thought of a permissible,”²⁰⁵ while arbitrary decisions are those “unsupported by any rational basis — not unwise ones.”²⁰⁶ Six Justices nonetheless voted to eliminate class-of-one equal protection claims

¹⁹⁸ For a recent illustration of this distinction, see *Miller v. Clinton county*, 544 F.3d 542, 551-53 (3rd Cir. 2008).

¹⁹⁹ *Engquist*, 128 S. Ct. at 2154.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 2159 (Stevens, J., dissenting). Justice Stevens’ dissent was joined by Justices Souter and Ginsburg.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* (citations and internal quotation marks omitted).

²⁰⁶ *Id.*

in the employment context. But, no member of the majority answered Justice Stevens' objection. Some of the Justices who joined the majority opinion may well harbor doubts about the intellectual sturdiness of the thesis Chief Justice Roberts advances there. Time will tell whether a majority of the Court would endorse similar reasoning to do away with substantive due process claims for deprivations of state-created property.