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PROTECTING DUE PROCESS AND CIVIC FRIENDSHIP IN THE ADMINISTRATIVE STATE

Thomas P. Huff*

When the grey-eyed goddess Athena seeks to prepare the young boy Telémakhos to join his father Odysseus’s return to Ithaka, she sends him to visit Pyllos, home of Nestor, and to Lakedaimon to meet Menéláos and Helen. There, she quite rightly expects, he can discover directly how the Trojan War came about and thus come to appreciate why his father has been absent through much of his youth. As Homer tells it, Telémakhos enters upon these visits with a certain understandable shyness. “How,” he asks, “can I do it, how approach [them]? I have no practice in elaborate speeches, and for a young man to interrogate an old man seems disrespectful.” But, as Athena knows, the Akhaian traditions ensure that a young man like Telémakhos will be given the fullest opportunity to tell his story. Among other things the atmosphere will be made right—no visitors are ever asked who they are or what they have to say until they have had an opportunity to bathe and eat a full meal, and the host is expected to approach the person and the stories about to be told free of preconceptions or prejudice.

Telémakhos, of course, discovers that these traditions make it possible for him to speak fully, freely, and eloquently about his search for his father and about the situation in Ithaka—more than a hundred suitors for the hand of his mother, Penelope, are eating him out of house and home. He also discovers that his speeches, in turn, evoke in his hosts equally eloquent tales of his father’s honor and of the events of the Trojan War. In the end Telémakhos decides to return to Ithaka to take action, and Nestor, Menéláos, and Helen respond in his support with gifts and advice.¹

In the last ten years the United States Supreme Court has developed a considerable body of law regarding what process is due

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¹ Homer, The Odyssey (R. Fitzgerald, trans. 1963) Bks. I-IV.
in adjudicating claims to various types of government benefits. Unfortunately, as many commentators have noticed, the Court's reasoning has created substantial doctrinal difficulties. The first part of this article reviews several of the opinions that have led to these problems and argues that the Court's current approach to claims to government benefits is unsatisfactory. The second part of the article is considerably more speculative. It attempts, by drawing on the insights of the Telémakhos story, to explain how some of the issues that arise in the adjudication of claims to government benefits are symptomatic of difficulties in the organization of our civic life. What is attempted in Part II is inevitably somewhat general and incomplete, but the issues are now ripe for discussion and require for their understanding examination of the role legislatures and administrative agencies play in determining the quality of our civic life.

PART I: PROTECTING DUE PROCESS IN THE ADMINISTRATIVE STATE

Background

In 1964, Charles Reich's seminal article The New Property helped set the stage for an expansion of the interests that could invoke the requirements of due process. Reich argued that government had emerged in the preceding two decades as "a major source of wealth":

The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth—forms which are held as private property. . . . Increasingly, Americans live on government largess—allocated by government on its own terms, and held by recipients subject to conditions which express the "public interest." Reich aptly described the growing interests of individuals in government largess as a new kind of property. He was particularly

3. Reich, The New Property, 73 Yale L.J. 733 (1964) [hereinafter cited as Reich]. This is noted by Van Alstyne, supra note 2, at 452-55 and L. Tribe, American Constitutional Law 514-15 (1978) [hereinafter cited as Tribe].
4. Reich, supra note 3, at 733.
5. Id., passim.
concerned that constraints be imposed upon the exercise of government discretion in the modification of the interests of individuals in this new property, lest these interests come to resemble those of a feudal tenant—subject to any sort of change in the alleged interest of the landlord state. Consequently, Reich made the following recommendation:

Because it is so hard to confine relevance and discretion, procedure offers a valuable means for restraining arbitrary action. This was recognized in the strong procedural emphasis of the Bill of Rights, and it is being recognized in the increasingly procedural emphasis of administrative law. The law of government largess has developed with little regard for procedure. Reversal of this trend is long overdue.

Prior to the mid-1960s, the Supreme Court had held a quite different view. It found that procedural due process was required whenever government action seemingly conflicted with substantive individual rights protected either by a constitutional guarantee more specific than due process or by "those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors."

During much of this early period an explicit part of the Court's view of due process was that while constitutional rights and common law interests could be protected against direct state action, the state was free to withhold or to condition the privileges it granted, such as employment, upon compliance with restrictions that would have otherwise violated constitutional and common law interests. As Justice Holmes expressed it, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Thus, state-granted privileges were not attended by normal due process protections. By the late 1960s, however, this distinction between rights and privileges was breaking down. Public sector interests had become so pervasive and important that individuals sought procedural protections for these interests comparable to the protections previously accorded

6. Id. at 769-70.
7. Id. at 783.
8. Tribe, supra note 3, at 507 (quoting in part Tumey v. Ohio, 273 U.S. 510, 523 (1927)).
constitutional rights and common law interests.

**Due Process for the New Property: Goldberg v. Kelly**

In the landmark case of *Goldberg v. Kelly*, the Supreme Court acknowledged the changes which had occurred in the relationships between persons and government by requiring that an evidentiary hearing be held before welfare benefits could be terminated. Writing for the Court, Justice Brennan said:

> It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property.

The Court found that the degree of procedural protection afforded the interests of a person in these new property rights must be ascertained “by the extent to which he may be ‘condemned to suffer grievous loss,’ and depends upon whether the recipient’s interest in avoiding that loss outweighs governmental interest in summary adjudication.” Because termination of a statutory entitlement affects important property-like interests, the methods by which termination may be accomplished must satisfy the requirements of constitutional due process. The adequacy of those procedures is determined by balancing the quality of the interest conveyed in the entitlement against the government’s need for efficiency and economy. The more important the interest to the individual, the more elaborate must be the procedural protections. Notwithstanding the nature of the interest, however, the government’s need for efficiency and economy must be considered in ascertaining the precise protections.

**Goldberg's Progeny**

The Court expanded upon and developed this approach in two different types of cases decided subsequent to *Goldberg*. First, the Court treated interests in *liberty* created by statute. In *Morrissey v. Brewer*, the Court considered the process due prior to parole revocation. Chief Justice Burger, writing for the Court, initially stated that “revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a

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13. Id. at 262 n.8.
14. Id. at 263 (quoting in part Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).
15. 408 U.S. 471 (1972).
proceeding does not apply . . . .” He then added that if the individual will be “'condemned to suffer grievous loss',” and if the “interest is one within the contemplation of the ‘liberty or property' language of the Fourteenth Amendment,” then the Court will determine whether the procedural protection afforded meets the demands of the particular situation. Because the Court found revocation of parole to be the loss of an important—though statutorily created—liberty, the Justices held that “[i]ts termination calls for some orderly process, however informal.”

In a second type of case the Court examined procedural requirements for dismissal of public employees. In Board of Regents v. Roth, the Court suggested that interests in government employment could be treated as property interests in a manner analogous to the treatment of public assistance in Goldberg. But because the Court found that Roth had no interest whatever in re-employment—his employment contract being for one year only—he was left without procedural protections.

In the companion case of Perry v. Sindermann, the Court spoke more explicitly of property interests in government employment:

We have made clear in Roth that “property” interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, “property” denotes a broad range of interests that are secured by “existing rules or understandings.”

Sindermann did not have explicit tenure provisions in his employment contract, but it appeared that there might be mutual understandings suggesting a de facto tenure policy. The Court stated that absence of “an explicit contractual provision may not always foreclose the possibility that a teacher has a ‘property’ interest in

16. Id. at 480.
17. Id. at 481 (quoting in part Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951)).
18. Morrissey, 408 U.S. at 481.
19. Id.
20. Id. at 482. The Court held that an informal pretermination hearing must be provided, specifying in some detail when and how that hearing should be conducted.
22. Id. at 571-72, 576-78. It becomes clear in the succeeding employment cases, discussed infra, that certain members of the Court viewed differently property interests in employment. See notes 35 and 38 and accompanying text.
23. Id. at 578-79.
25. Id. at 601 (citations omitted).
re-employment.’” If an implied interest were found, that would not, of course, entitle [the employee] to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his non-retention and challenge their sufficiency.

Consequently, the Court remanded the case for consideration of whether Sindermann had such an implied property interest. The Court did not explicitly find a property interest in government employment either in this case or in Roth; however, both opinions suggested that if such interests were found, constitutional due process protections would be required.

In summary, the reasoning applied in these cases appeared straightforward, if not explicit. The Fifth and Fourteenth Amendments speak of deprivations “of life, liberty or property without due process of law.” Statutorily created interests in welfare and parole and interests in government employment are liberty and property interests. Therefore these interests are entitled to the protections of procedural due process provided in these Amendments.

A Problem Arises: Arnett v. Kennedy

By the mid-1970s, members of the Court began to disagree about the implications of Roth and Sindermann. In Arnett v. Kennedy the Court addressed the claim of a non-probationary civil service employee who had been dismissed under the procedures of the Civil Service Acts. Those procedures provided in part for the removal of non-probationary employees “for such cause as will promote the efficiency of the service.” They required that the employing agency only give written notice of intent to remove and that it send a copy of the charges to the employee to which he or she might respond in writing. Claiming a right to a trial-type hearing, Kennedy had refused to file any response to the charges against him. After notice from his superior of his dismissal, Ken-
nedy filed suit in district court.

In a plurality opinion Justice Rehnquist exposed the source of disagreement. He found that “[w]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of the appellee must take the bitter with the sweet.” In other words, if the Court is going to recognize “property” interests in government employment agreements it also must recognize the procedural limitations explicit in those agreements as provided by statute. According to Rehnquist, Kennedy's interest in his civil service job should not elicit more procedural protection than was provided in the Civil Service Acts as they applied to his position. Interests in government employment may be qualified procedurally in employment contracts at the government's discretion.

Though a majority of the Court disagreed with the Rehnquist plurality on this issue, a problem with “new property” due process was now apparent. The Justices disagreed over precisely how to treat procedurally qualified employment interests. Is the right to procedural due process in employment new property cases conferred exclusively by contract, or do constitutional due process requirements extend to the grant of all legislative entitlements?

33. *Id.* at 136-64 (opinion joined by Burger, C.J. and Stewart, J.).
34. *Id.* at 153-54.
35. Justice Powell, who had not participated in the Roth and Sindermann decisions, was joined by Justice Blackmun, who voted with the majority in Roth and Sindermann, in dissenting on this issue:

The plurality opinion evidently reasons that the nature of appellee's interest in continued federal employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords to appellee no procedural protections against arbitrary or erroneous discharge other than those expressly provided in the statute. The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural protections to which he may lay claim. It seems to me that this approach is incompatible with the principles laid down in Roth and Sindermann. Indeed, it would lead directly to the conclusion that whatever the nature of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

416 U.S. at 166-67 (footnotes omitted). Justice White also dissents from the plurality opinion, employing essentially the same argument that Powell uses. *Id.* at 177-86.
Arnett's Progeny

In Bishop v. Wood, an employment case decided after Arnett, a majority of the Court followed the Rehnquist line of reasoning. Bishop, an employee of the police department of Marion, N.C., had been discharged without a hearing. The Court affirmed the district court's interpretation of the city's personnel ordinance. The trial court had found that the city had provided the petitioner, though officially designated a permanent employee, with little more procedural protection than notice of termination and a statement of reasons for termination. The Court then sustained use of that procedure, despite the fact that the very same ordinance implied that petitioner, as a permanent employee, was subject to dismissal only for certain kinds of cause. As Justice White states in dissent:

The right to his job apparently given by the first two sentences of the ordinance is thus redefined, according to the majority [of the Court], by the procedures provided for in the third sentence and as redefined is infringed only if the procedures are not followed.

This is precisely the reasoning which is embraced by only three and expressly rejected by six Members of this Court in Arnett v. Kennedy.

In cases decided after Arnett, involving interests other than employment, the Court does not use the Rehnquist line of reasoning. During the same term in which Bishop was decided, the Court,

38. Rehnquist, J., Burger, C.J., and Stewart, J. were now joined by Stevens, J. and Powell, J. White, J., joined by Blackmun, J., Brennan, J. and Marshall, J. continued to dissent:

The views now expressed by the majority [in Bishop] are thus squarely contrary to the views expressed by a majority of the Justices in Arnett. As Mr. Justice Powell suggested in Arnett, they are also "incompatible with the principles laid down in Roth and Sindermann." I would not so soon depart from these cases nor from the views expressed by a majority in Arnett. The ordinance plainly grants petitioner a right to his job unless there is cause to fire him. Having granted him such a right it is the Federal Constitution, not state law, which determines the process to be applied in connection with any state decision to deprive him of it.

Id. at 360-61 (footnotes and citations omitted).
39. Id. at 357. The ordinance reads:

Dismissal. A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such notice.

Id. at 355 (emphasis added).
in *Mathews v. Eldridge*,\(^{40}\) addressed the sufficiency of the procedures required by the Social Security Act prior to termination of disability benefits—specifically whether a pretermination hearing was required. The Court could have responded with the entitlement-qualified-by-procedure argument employed in *Bishop*, but instead independently considered the sufficiency of the procedures. Indeed, the Court relied upon the reasoning applied in *Goldberg*—that the importance of the statutory entitlement to its holder must be balanced against the probability for error in the specified procedure and the state’s interests in minimizing its procedural costs:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\(^{41}\)

The Court, sustaining procedures that did not include hearing requirements, distinguished *Goldberg* on the ground that the loss of disability benefits was a far less grievous loss than the loss of basic welfare benefits.\(^{42}\)

The formula provided by the Court in *Mathews* appeared to be an attempt to consolidate the issues and principles developed in *Goldberg*. It appeared inconsistent with the reasoning of the plurality in *Arnett* and that of the majority in *Bishop*. Under the *Mathews* formula, statutory entitlements may be qualified by procedures specified in the act granting the entitlements provided that these procedures balance properly the state’s interests in efficiency against the interests of the entitlement holder in fairness and accuracy. The more important the latter interest the more sophisticated must be the procedural protections. In *Bishop*, to the contrary, the Court treated employment interests as qualified by whatever procedures were specified in the pertinent statues without an independent judicial determination of the appropriateness of the balance struck between state and individual interests. In a

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41. *Id.* at 335.
42. Mashaw argues that the Court does not adequately evaluate the respective interests in *Mathews*, and thus fails even to perform the balancing analysis correctly. Mashaw, *supra* note 2, at 37-46.
later case involving procedural protections afforded when revoking driver's licenses\(^43\) the Court cites with approval the Mathews formula, but neither distinguishes nor overturns Bishop or Arnett. Part of the reason Bishop and Arnett are not distinguished from cases in which the Mathews formula is used is that they cannot be distinguished. As the next three sections will explain, these cases, at bottom, all rest on the same faulty premise.

**New Property Interests in Public Assistance: The Mathews Formula**

Reich noticed fifteen years ago that individual citizens were becoming increasingly dependent upon the government for provision of the economic wherewithal to carry out their lives. They were employed by government or dependent upon government for basic income in the form of welfare or disability benefits, or they conducted important aspects of their economic lives under government licenses and regulation. As a consequence, citizens had become increasingly vulnerable to precisely that kind of disappointment which traditional systems of ownership of private property and private wealth were meant to prevent. After all, private property rights had guarded "the troubled boundary between individual man and the state"\(^44\) by providing individuals with private control over the means necessary to carry out their lives, and due process protections for these rights had assured that the expectations of persons with respect to the exercise of these rights would not be disappointed by arbitrary or capricious state action. Reich's suggestion was that the interests in government largess be treated in a manner analogous to traditional property rights in order that they be afforded comparable, extensive procedural due process protections.

When the Court first adopted Reich's suggestion with respect to interests in public assistance, however, it misfocused the question. Instead of asking in Goldberg whether a property interest had been created and then requiring full procedural protections, the Court sought to balance the extent of the loss to be sustained by the entitlement holder against the burdens upon government of costly and time consuming procedures. Because the loss in Goldberg was great, full protections were indeed provided, but the procedure used by the Court to reach this result was flawed. Interests in public assistance benefits are certainly not traditional com-

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44. Reich, supra note 3, at 733.
mon law property rights, but the role they play in the lives of recipients was recognized by the Court to be analogous to the role private property rights play in the lives of other citizens. Full procedural protections, analogous to those which protect this interest in traditional forms of property, should therefore have been required in order to show a minimum respect for the rights of persons who receive public assistance benefits. To do otherwise would have permitted government to place these persons' lives on a perennially contingent basis not unlike those of manorial tenants.

Thus, in ascertaining procedural protections to be accorded property interests in public assistance designated as property interests, the Court should not have balanced state versus private interest, but rather should have treated these interests as property interests and required that they be accorded full procedural protections. This seems especially compelling in public assistance cases, because the interest-holders generally have relatively little political and economic power.

The point made here rests on the general principle that a state which takes seriously the rights of individual persons, must not balance rights and their procedural protections against the general welfare. If the interests of persons in public assistance are taken to be property rights—rights traditionally taken seriously—then they should be understood as limiting the pursuit of the general welfare.45 This means in part that these rights should be terminated only after full procedural protections have been afforded regardless of the costs to the general welfare.

New Property Interests in Public Employment: Arnett and Bishop

When a government employment opportunity is offered, it is normally offered on a "take it or leave it" basis. The prospective employee is rarely able to negotiate employment terms in the usual sense. Both Kennedy and Bishop had acquired employment positions that were designated permanent. Consequently it is reasonable to assume that their lives had become conditioned upon expectations that they would continue to remain employed. This meant that they would not need to be concerned that their supervisors might take arbitrary or capricious action against them. What is wrong with the plurality opinion in Arnett and the majority opinion in Bishop is the failure to recognize that if these interests in

45. See generally R. DWORKIN, TAKING RIGHTS SERIOUSLY, 184-205 (1977) [hereinafter cited as DWORKIN].
government employment are taken to be property interests they, too, should be accorded full procedural protections.

When government exercises power over the lives of persons, that power ought, by our traditions of limited and determinate government power, be exercised with the utmost care and discretion. Government employment of any type—not just that explicitly designated as permanent—should be recognized as conveying a property interest, and consequently, should be given the full procedural protection typical of such interests. Sindermann had reason to expect his job to continue. The Court properly insisted that if he did, indeed, have an implied contractual interest in continued employment, then he could not be fired without full process. Roth expected to have his contract renewed.46 However, he no doubt recognized that a variety of legitimate reasons could be given for termination of his employment at the completion of his first one-year contract. Due process in his case requires that he have the opportunity to examine and contest those reasons. As Justice Marshall notes in his dissent in Roth, this will not “place an intolerable burden on the machinery of government. [For] it is not burdensome to give reasons when reasons exist . . . . It is only where the government acts improperly that procedural due process is truly burdensome.”47

**Due Process for the New Property**

If government, in granting public assistance or in offering employment, exercises substantial power over the lives of persons, then that power ought to be exercised carefully. At a minimum, new property adjudication should proceed as follows: First, all employment with government should be terminated only for reasons that are clearly explained and after the employee has the opportunity to contest their legitimacy and truth. Second, where public assistance provides substantial financial support, that support should terminate only after reasons have been presented and hearing opportunities have been provided. These rules of adjudication are appropriate because individuals should not have to worry about agents of the state pulling the rug out from under their lives by taking away important sources of income or support. Indeed, part of the appeal of the Court’s use of the “grievous loss” test in Goldberg, and in the Mathews formula, is that it acknowledges, if

46. The Court pejoratively describes this interest as “an abstract concern.” Roth, 408 U.S. at 578.

47. Id. at 591.
only implicitly, the disruption of an interest that is analogous to a property right interest. Due process protects against disruption of such interests by making state action more orderly and consistent and subject to challenge.

What is problematic about the Mathews formula is that it appears to invite a balancing of the government's interests against the individual's in determining what protections there shall be. This contravenes the notion of a property-right claim. Indeed, consideration of "the Government's interest, including . . . fiscal and administrative burdens"\(^48\) is, in the context of these cases, mistaken. If the procedural protections for the new property interests are to be more than something casually determined by an appeal to the "public interest," then these interests must be treated like traditional property rights. To take the lives of individual persons seriously, as the due process ideal has traditionally attempted to do, is to recognize their lives as not always subject to balancing on the scale of public convenience and thus not always a means to the collective ends of society.\(^49\)

But, why should the Court have been attracted by a formula like that used in Mathews or tempted to read the Bishop employment ordinance as it does? The reason is that the Court was unsure that these interests should be treated like property rights. The Mathews formula is the correct sort of formula to use in interpreting a statute when no right-like interest is at stake, just as the Court's reading of the Bishop ordinance is a standard interpretation of an employment contract.

In public assistance cases, use of the Mathews formula raises questions that a legislature or an administrative agency should have considered, viz, whether the procedural requirements necessary for the protection of proposed public assistance entitlements would be too costly. By using the Mathews formula in its decision-making in these cases, the Court is denying precisely what is important, viz, that if the entitlement is a property right, then a balance should not be struck between the individual's interest in retaining the entitlement, and the public's interest in inexpensive adjudication. In the employment cases, the Court similarly assumes that a fair bargain has been struck in the contract of employment, and therefore, that the normal principles of contract interpretation apply. The point in each type of case is that the mere presence of the government as the grantor of the interest requires

\(^{48}\) Mathews, 424 U.S. at 335.

\(^{49}\) See generally, Dworkin, supra note 45, at 184-205.
treatment of the entitlement as a property right, and any attempt by the Court to strike a balance after the fact fails to recognize this crucial factor. The principle of decisionmaking employed must acknowledge that when these interests are established, they create property-like interests that can exceed the procedural protections provided by the legislatures. It is the responsibility of the Court to guarantee that the lives of individual persons are not subject to disruption by such legislative mistakes. The difficulty with use of either the Mathews formula or the standard formulae for employment contracts is that their use begs the important question of whether a property interest is at stake by permitting its value to be discounted in order to achieve a reasonable cost balance with the designated procedural protections.  

If the due process clauses have any meaning for new property interests, they must mean that individuals may order their lives without any fear of arbitrary state action. If government agencies, in implementing legislative programs, are to be prohibited from acting like feudal landlords, then the property interests in employment and public assistance must be fully acknowledged by according them full procedural protections. This, after all, was Reich's point. 

The problem of determining what interests there shall be—by weighing all the costs, including the costs of normal procedural due process protections, against the benefits of the interests, on the scale of the public welfare—is a legislative task. Ensuring that legislatures have not made mistakes, that could be harmful to individuals, in the way those interests are protected is a court task. Part I of this article has been devoted to the second of these issues. Part II will consider a different issue that should be raised and resolved by legislatures when entitlements and employment opportunities are proposed and granted. 

PART II: CIVIC FRIENDSHIP IN THE ADMINISTRATIVE STATE

Introduction

The proposals regarding due process protections for public assistance and public employment made in Part I of this paper may seem unrealistic. Courts, it will be said, are not likely to order elab-

50. This appears to be exactly what occurs in Mathews. The Court discounts the obvious value of disability benefits and thus the grievousness of the loss by hypothesizing that it is possible for a person eligible for disability benefits to have other sources of income because eligibility for such benefits is not based on financial need. See Mathews, 424 U.S. at 340-41.
orotate protections for statutory entitlements, especially in contra-
vention of the expressed wishes of the legislatures. But this need
not be the case. Legislative bodies have and retain the power to
alter or eliminate programs in which employment and assistance
benefits are embedded if they do not like court-ordered procedural
protections. Moreover the courts, in mandating due process, are
not usurping legislative authority. The courts would only be re-
quiring that legislative programs which affect the rights of persons
be administered in an open, orderly, and honest fashion. Court-
ordered protections of the sort envisioned here are no doubt costly,
just as, for example, are the traditional due process protections
found in criminal law, but costs should not be a factor when the
state infringes on the rights of individual persons.

Consideration of the difficult problems raised by the Supreme
Court's attempts to determine what procedural protections should
be afforded claims to government largess also raise deeper ques-
tions about the administrative state. As has been noted, the pri-
mary function of procedural due process, both prior to and after
the mid-1960s, was clear. Procedural protections were recognized
as instrumental to the protection of the substantive rights of indi-
viduals. When, however, protections are sought for claims to gov-
ernment largess, additional new issues arise. Here, state action not
only has a direct effect on the lives of individuals, narrowly con-
ceived, it also has an impact upon the way in which individuals
carry out those parts of their lives that are shared with others. The
latter is an issue which will not fit the due process pattern of
protections.

If fundamental constitutional rights tend to protect individu-
als as individuals from overzealous or arbitrary exercise of state
authority, then legislative programs tend to define both the extent
to which individuals cooperate with one another for mutual benefit
and the character of that cooperation. In liberal states, such as
ours, communal values have not been explicitly promoted as mat-
ters of government policy to the extent that individualistic values
like property, liberty, or equality have. Indeed, when they have
been acknowledged at all, they have been seen as merely the hoped
for result of living in a democratically organized community gov-

51. Tribe, supra note 3, at 501-06.
52. But see note 56 infra.
53. The term “liberal” here means non-orthodox states—states which do not pretend
to oversee the moral or religious development of their citizens, but which do provide an
opportunity for that development in proscriptions on state interference in its citizens’ lives.
The law in a liberal state is said to “rest lightly on men.”
erned by principles of fair play. As indicated in Part I, however, changes in the role which the modern state plays in the lives of persons make the issue of providing proper administrative adjudication particularly important and difficult. But exclusive reliance upon the due process ideal to treat the problems of governmental action in the administrative state may deceive us into thinking that the only important issue in the administration of government largess is the protection of individual interests. This will very likely lead to a failure to take account of important communal values often associated with shared enterprises. The remainder of this article is an attempt to delineate some of these communal values and to suggest very briefly how they might be better protected by legislative and administrative activities.

Communal Values in the Administrative State—A Problem of Size and Sensitivity

When Telémakhos visits Pylos and Lakedaimon, he discovers more than merely information about his father. He also is introduced to his father's friends and to the civic friendship they shared. Telémakhos is treated with the individual respect due him as a member of this community. More importantly, he is also able to see himself as belonging to a community that shares certain values and counts its members as worthy of care and concern. Telémakhos's spirit is renewed, his sense of his own worth is heightened, and his capacity to carry on his own life and his life shared with the Akhaians is revitalized.

In constitutional liberal democracies, two elements have traditionally been recognized as essential to the realization of this kind of civic friendship. First, the basic structure of society must assure individuals that they will be treated with equal respect, i.e., that none are made mere instruments of the general welfare. Institutional, it is fundamental constitutional rights, such as due process and equal protection, to which liberal states have looked in an

55. But see id.
56. Michelman, Formal and Associational Aims in Procedural Due Process, XVIII Nomos 126 (1977), notes that "explanatory procedures of the type broadly connoted by 'due process' [might] serve non-formal (communal, interpersonal) as well as formal (possessive, privatistic) aims." Id. at 128. He appears skeptical, however, in his review of the Roth decision, about whether the Court would be willing to order due process for its "intrinsically valued interchange" without some entitlement to protect. Id. at 148. The view that due process might serve social goals other than the protection of private interests, or in fact does serve them if incidentally, is also discussed in Tribe, supra note 3, at 501-06. See also Summers, Evaluating and Improving Legal Processes—A Plea for Process Values, 60 CORNELL L. REV., passim (1974).
attempt to guarantee this kind of respect. Second, society must in-
sure that shared enterprises are initiated only by democratic legis-
lative processes which, so the traditional view holds, assure that
cooperative programs are beneficial to both individuals themselves
and to their sense of being engaged in a genuinely cooperative
enterprise.°

But the kind of civic friendship of which Telémakhos is the
beneficiary cannot very easily be guaranteed, or even approached,
by democratic processes in the modern welfare state. Indeed, as
our own society has become larger and more complex and legisla-
tive programs have become increasingly important to individuals,
the general social atmosphere, which is supposed to sponsor mu-
tual trust and cooperation, has tended to dissipate.° The concern
for others, as expressed in government assistance programs, has
become harder to articulate clearly.° In some instances so much
attention has been devoted to the success of legislative pro-
grams—to correct decisions with respect to the ends of such pro-
grams—that decent treatment of those who ostensibly benefit from
them has been forgotten. It is not surprising then that citizens gen-
erally mistrust government programs. They doubt their effective-
ness, participate in them only half-heartedly and cynically, and ac-
cept their benefits ungraciously and ungratefully.°

Promoting Civic Friendship

What, then, can be done to promote that genuine trust and
concern necessary to civic friendship? Consider for a moment the
kinds of activities in which communal values are most likely to be
present: A Sunday afternoon game of basketball among neighbors,
a mountain climbing expedition or fishing trip with friends, the op-
eration of an academic department, indeed the running of any sort
of close business or recreational enterprise will do. It is clear, on
even a moment's reflection, that merely participating in such en-

57. This idea is expressed by Rawls, supra note 54, at 523:
When men are secure in the enjoyment of the exercise of their own powers, they
are disposed to appreciate the perfections of others, especially when their several
excellences have an agreed place in a form of life the aims of which all accept.
58. See generally Rosow, Human Dignity in the Public-Sector Workplace, 45 Vital
Speeches 166 (Jan. 1, 1979) (discusses the decline of government employees' morale as a
function of the low state of public confidence in government generally).
59. See generally Lenkowsky, Welfare Reform and the Liberals, 67 Commentary 56
(March, 1979) (discusses the difficulty of defining a liberal view of welfare reform).
60. See generally Lemann, Anti-Social Security, 9 Wash. Monthly 38 (January,
1978) (discusses how government employees avoided being brought in under the Social Se-
curity program).
enterprises when fair rules are present is not enough. To promote a full sense of civic friendship, what also is required is that the activity be conducted in such a way that the talents and interests, indeed the general well-being of each of those who engage in it, are seriously considered by everyone as a very part of the way the activity is conducted. Enterprises which are operated in this way permit each person to find him or herself a constructive part of the activity and a contributor to the effort to make sure that others also have constructive roles to play. Telémakhos does not have to invoke his status as Odysseus's son to receive decent hospitable treatment at the hands of the Akhaians. He merely presents himself as a member of the community and automatically receives such treatment. Because of this, his sense of his worth as a human being is assured, and his sense of his community's concern and support is also guaranteed. He is no longer alone in the world, and the world is no longer as hostile as it had seemed when he was at home amidst his mother's suitors.

If the ideals of civic friendship are to be realized, the basic legislative and administrative programs of a complex, modern society must be conducted differently from the way they are operated now. They must be run so as to promote more fruitful participation by those individuals who must share in government activities. Ordinary citizens must have an opportunity for more extensive participation in the formulation of the principles which govern their shared activities, and fuller participation in, and explanation of, the operation of these activities once conceived, especially as the enterprises affect their particular lives. How this might be achieved in its details obviously cannot be presented here. But some examples of the kind and magnitude of change necessary can be suggested.

Program Formulation:

When programs are formulated, altered, or funded, legislative committees and administrative agencies ought to attempt to understand not only the purpose of the proposed program but also how its administration will affect both the lives of the beneficiaries and of those who administer the benefits. This means that legislative committees and agencies must hear as often from those directly affected by their programs and from those lower level government employees who actually implement these programs as they do from agency heads or administrators. This might mean, in agencies, for example, that administrative staff members, even at the lowest levels, are brought into policy formulating activities.
Program Implementation:

As programs are implemented, government employees ought to be held to the highest standards of civic friendship. They need to understand why programs are designed as they are, what role they are playing in the overall design, and how essential their role is to maintain high standards of individual respect in program implementation. Extensive employee participation in the processes which determine the details of program implementation will undoubtedly help engender such service and should, therefore, be widespread. Systems of reward for imaginative treatment of difficult social situations might also be instituted. Most importantly, though, values of civic friendship such as decency and concern must be acknowledged as essential in the processes of implementation of government programs and not as peripheral to program goals.

Program Adjudication:

Complaints from program recipients and program employees must be treated carefully and efficiently. The requirements of due process as outlined in Part I obviously must be satisfied but, additionally, adjudicative processes must seek sensible compromises and must create, so far as possible, a sense of common interests among disputing parties. This might mean, for example, that citizen advisory committees should be more widely used to settle disputes between government agencies and private citizens.

From the examples offered above, it should be clear that the implications of what is being proposed here are substantial and far reaching. If legislators and administrators were held to high standards in providing for participation and explanation, then cost alone would probably dictate that there be far fewer government programs. But, what programs there were would be required actually to promote, not discourage, civic friendship. Much of the alienation from government now widely experienced reflects both a sense that costly legislative programs are simply irrelevant to peoples’ actual lives and a sense that such programs may very well be disruptive of values of communal goodwill that we, like Telémakhos, need to fulfill our lives.

Conclusion

It is not surprising that legislatures, in creating programs, have not focused on these issues. We have no long-standing traditions that make the bonds of civic friendship an explicit part of our collective government action. This is so partly because collective government action of sufficient size to affect our communal
relations is a relatively new phenomenon—probably less than 40 years old. Moreover, the costs of participation and consultation are very high, and legislatures often seek to achieve results by the least costly route. This discounts the cost to the general welfare of according insufficient attention to the way people see their lives in relation to one another and to government. Obviously, the quality and quantity of participation and explanation must be geared to the civic friendship expected. Ignored, ill-conceived, or improperly oriented processes of participation may be a positive detriment to the realization not only of the goals of an enterprise but also to communal values whose importance is independent of an enterprise's explicit goals. Only when individuals can recognize that the enterprises they share are mutually beneficial can the values of civic friendship be realized.

What is being suggested here is that the issues which have been raised by the administrative due process cases beginning with Goldberg are merely symptomatic of larger difficulties in the operation of our state. Sympathy for the rights of litigants like Roth, Eldridge, and Bishop gains its customary legal expression in concern with whether due process has been afforded. Here there is state action. Here there are individuals allegedly wronged by state action. The plain words of the Fifth and Fourteenth Amendments make due process instrumental to the protection of independently defined individual rights. Our sympathy for these litigants, however, should extend beyond their individual rights. We sense that the decent, civil thing has not been done; they have not told their stories to responsive ears. They have been treated with little sense of community concern. We often forget that along with liberty and equality comes fraternity, and that, without fraternity, rights to liberty and property become grudging limitations upon governmental activities rather than genuine expressions of persons' worth in society.