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ADMINISTRATIVE DUE PROCESS:
THE QUEST FOR A DIGNITARY THEORY†

JERRY L. MASHAW*  

If you are a man who leads,  
Listen calmly to the speech of one who pleads;  
Don't stop him from purging his body  
Of that which he planned to tell.  
A man in distress wants to pour out his heart  
More than that his case be won.  
About him who stops a plea  
One says: "Why does he reject it?"  
Not all one pleads for can be granted,  
But a good hearing soothes the heart.  

The Instruction of Ptahhotep  
(Egyptian, 6th Dynasty, 2300-2150 B.C.)

As the due process promises of Goldberg v. Kelly2 were revealed to contain conditions that rendered those promises nonnegotiable in a variety of contexts,3 legal scholars attempted to change the shape and direction of the analysis used in defining administrative due process.4 Commentators

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1 I ANCIENT EGYPTIAN LITERATURE 61, 68 (M. Lichtheim ed. & trans. 1973). I would like to thank Professor John Leubsdorf of the Boston University School of Law for supplying this citation. 
3 Paul v. Davis, 424 U.S. 693 (1976) (hearing or other procedures not required before state withdraws or alters status not initially recognized by state law); Mathews v. Eldridge, 424 U.S. 319 (1976) (hearing not required before termination of Social Security disability payments); Board of Regents v. Roth, 408 U.S. 564 (1972) (hearing not required before nonrenewal of nontenured state teacher's employment contract). 
demanded a more "responsive approach to procedural protection," 5 discussed "the limits of interest balancing," 6 attempted to patch up the "cracks in the new property," 7 and described "associational aims" in processes of public decisionmaking. 8 Indeed, quite apart from constitutional analysis of the due process clause, Richard Stewart described the modern contours of administrative law—as defined both by statute and by judicial decree—as motivated by an "interest representation model" of administration that seeks to involve in the process of decisionmaking all of the persons or groups affected by any administrative action. 9 More generally still, Robert Summers made a "plea for process values" with respect to all public decisional processes. 10 The unifying thread in this literature 11 is the perception that the effects of process on participants, not just the rationality of substantive results, must be considered in judging the legitimacy of public decisionmaking.

I propose to label approaches that reflect this perception "dignitary theories" of due process. All such approaches attempt to develop an analysis of administrative due process questions that focuses on the degree to which decisional processes preserve and enhance human dignity and self-respect. Although the writers who make up this emerging school sometimes refer to values "intrinsic" to or "inherent" in the processes themselves, 12 it seems reasonable to interpret their concern instead as a concern for values inherent in or intrinsic to our common humanity—values such as autonomy, self-respect, or equality that might be nurtured or suppressed depending on the form that governmental decisionmaking takes.

In this essay, I want to make several arguments concerning the search for an adequate dignitary theory of administrative due process. First, I want to suggest why such a theory is attractive. But second, I shall elaborate reasons for believing that any such theory must, if grounded in the liberal democratic

6 Note, Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing, 88 Harv. L. Rev. 1510 (1975).
12 E.g., L. Tribe, American Constitutional Law 502 (1978) (citing Michelman, supra note 8); Saphire, supra note 5, at 120-21.
tradition of American constitutionalism, be either prudential—and therefore problematic and unstable—or extremely modest in its procedural demands. At least as some have defined it, the quest appears quixotic. Nevertheless, I will suggest, primarily by example, that a modest and prudential definition of dignitary process demands might be significant, particularly in its influence on the dominant “positivist” approach to procedural protections. Finally, there is a glimpse of the phantom theory that seems to sustain the emerging quest for a nonpositivist, nonutilitarian, robust, and satisfying set of constitutionally justiciable process rights—a theory that I cannot here either name or describe.

What my argument comes to is this: a dignitary approach to administrative due process has merit. Indeed, a reorientation of procedural evaluation in dignitary terms may have important consequences. The value of the dignitary perspective is not, however, that it would supplant a positive, instrumentalist, and utilitarian conception of process, and the procedural rights which that conception implies, with a new vision of “participatory” governance that would entail extensive new process claims. Instead, a dignitary theory of due process—defensible in terms of what I call “the liberal tradition”—reinforces the view that process concerns are intimately connected to substantive rights, views participation as potentially “bad” as well as “good,” and makes modest “absolute” demands on processes of public decisionmaking. If we require more, we require a reformulation of the philosophical foundations of American constitutionalism.

I. THE APPEAL OF DIGNITARY THEORY

A. Intuitive Plausibility

At an intuitive level, a dignitary approach is obviously appealing. We all feel that process matters to us irrespective of result. This intuition, may, of course, be a delusion. We may be so accustomed to rationalizing demands for improvement in our personal prospects on the purportedly neutral terms of process fairness that we can no longer distinguish between outcome-oriented motives and process-oriented arguments. Thibaut and Walker’s experimental work,13 which tends to demonstrate that (at least under certain circumstances) people seek to maximize their personal involvement in decisional processes and that they gauge the fairness of processes by the degree of that participation,14 may, after all, merely demonstrate that we generally regard control or the opportunity for personal strategic behavior as the best protection for our substantive concerns.15

15 I do not mean to imply that the studies by Thibaut, Walker, et al., fail to
Yet, there seems to be something to the intuition that process itself matters. We do distinguish between losing and being treated unfairly. And, however fuzzy our articulation of the process characteristics that yield a sense of unfairness, it is commonplace for us to describe process affronts as somehow related to disrespect for our individuality, to our not being taken seriously as persons.16

Imagine, for example, being excluded from voting. Disenfranchisement in a general election carries with it a loss of political power so minute that cold calculation should convince us that our personal franchise is in practical, political terms valueless.17 Yet something—the affront to our self-image as citizens, the sense of unfairness from exclusion—has led some of us to pursue this “valueless” privilege to participate in political decisionmaking through every available court.18 Involvement in the process of political decisionmaking, via the exercise of a right to voter participation, seems to be valued for its own sake. The same may well be true for other processes.19

B. Avoiding the Positivist Trap

The appeal of a dignitary approach goes beyond simple intuition. Analysis in terms of dignitary values holds out a prospect for avoiding the “positivist trap” that plagues contemporary due process decisions.20

The trap has two jaws. It may spring shut either on the threshold question of the legal characterization of the interest “held” by the complaining party (i.e., is it a “life,” “liberty,” or “property” interest?),21 or later, when the
distinguish between perceptions of means (process) and ends (outcomes). I do not, however, believe that they have been able to isolate perceptions of process that relate necessarily to some dimension of process other than its potential to provide a favorable outcome via either personal participation or the participation of an advocate committed to the claimant’s cause. Indeed, their account of what is at work in a favorable or unfavorable perception of processes seems rather muddled. See Walker, Lind & Thibaut, supra note 13, at 1415-20.

16 As Justice Brennan, writing for himself and Justices White and Marshall, put it in Paul v. Davis, “I have always thought that one of this Court’s most important roles is to [protect] the legitimate expectations of every person to innate human dignity and sense of worth.” 424 U.S. 693, 734-35 (1976) (Brennan, J., dissenting). For similar sentiments, see the cases collected in Saphire, supra note 5, at 121-24.


19 Examples of other types of process exclusions are developed in Summers, supra note 10, at 1-30.

20 See generally Michelman, supra note 8; Van Alstyne, supra note 7.

21 See Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (“[T]o determine whether due process requirements apply in the first place, we must look . . . to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment’s protection of liberty and property.”) (citation omitted); Webster v. Redmond, 599 F.2d 793, 801-02 (7th Cir. 1979), cert. denied, 444 U.S.
court comes to assess the "value" of that interest vis-à-vis governmental interests in efficiency, efficacy, or the like. The trap at the threshold of due process adjudication might be articulated in terms of an imaginary dialogue in a federal district court:

Court: What is your claim?

Citizen (former public school teacher): I was fired from my teaching job without a hearing. I am here to claim my due process rights.

Court: What is your interest in this claim?

Citizen (puzzled): Well, isn't that obvious? I want a chance to defend myself, and I want my job back.

Court: Wait, you misunderstood me. I want to know what interest you have that qualifies under the due process clause as an interest in "life," "liberty," or "property."

Citizen: Well, it's my life, isn't it? And, if I can't teach where I want to, I have lost my liberty. It is even possible, I guess, to say that I have lost property—my income—but that way of talking seems a little funny to me.

Court: Where does it say that you have a "liberty" to teach in your former school?

Citizen: Eh?

Court: Well, surely there is no general liberty to teach in your school. People can't walk in off the street and take up teaching anytime they want. What gives you that "liberty"?

1039 (1980) ("'T]here can be no claim of a denial of due process, either substantive or procedural, absent deprivation of either a liberty or property right.' ") (quoting Eichman v. Indiana St. Univ. Bd. of Trustees, 597 F.2d 1104 (7th Cir. 1979)). "Life" interests are rarely found or discussed. Cf. 2 K. Davis, Administrative Law Treatise 348 (2d ed. 1979) (arguing that " 'Life' never has its source in [positive] law"). See generally Monaghan, Of "Liberty" and "Property," 62 Cornell L. Rev. 405 (1977).

22 The Supreme Court has identified the following three factors as relevant in the balancing test that determines what process a claimant is due:

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 requirements [sought by the claimant] would entail.


23 This dialogue was suggested by the facts of Board of Regents v. Roth, 408 U.S. 319, 335 (1976).
Citizen: Oh, I get it. The School Board hired me to teach there.

Court: O.K. So your "liberty" interest—or maybe we had better call it a "property" interest—is based on a contract with the School Board. What does the contract say?

Citizen: Well, it doesn't really say anything much. I have a letter that says that I was appointed at such and such a salary. But that's about it.

Court: Did the notice of appointment say anything about removal?

Citizen: No. But I assumed, if it came to that, there would be some fair way of going about it—not just dismissal with no hearing.

Court: But surely you don't think you can force a hearing on the Board just because you assumed there would be one? You wouldn't think that the Board could require you to clean the school's restrooms just because they had assumed when you were hired that you wouldn't mind adding that to your duties?

Citizen: Well, no, but . . . .

Court: Now, I don't mean to say that you don't have a property interest here in retaining your job until dismissed after a fair hearing. It may be that such an interest is "implied" in the contract of employment.

Citizen (warily): You say "implied" like it has some special meaning. How do we find out whether hearings are "implied" by my contract?

Court: Well, there are several places to look. The School Board may have rules or regulations that say something about dismissal. There may be general statutes or common-law principles in your state that provide an interest in hearings before dismissal from public employment. Indeed, if you could establish that hearings were the practice of the School Board in such cases, or that it led teachers generally to believe that there would be hearings associated with dismissals, I might find that you had a sufficiently reasonable expectation of a hearing that it was an implicit part of your property interest in your teaching contract.

Citizen: O.K. I will see what I can find.

(Later, dejectedly) Well, I am afraid I couldn't find much. The rules just say that "teachers' appointments are for a stated term or during adequate performance." I am not even sure what that means. The only mention of a process relating to dismissal is a voting rule for the Board that requires a majority vote for personnel actions made on the recommendation of a school principal and a two-thirds majority for all such actions in other cases. So far as I can tell there have never been any hearings—at least there aren't any records. The general statutes are silent and the courts have never really decided the question. In all candor, though, I have to tell you that there is a lot of stuff in some
judicial opinions about the "presumption" that employment contracts are terminable "at will."

Court: Well, I am not too surprised. State law is often like that. But, as you seem to suspect, this report eliminates your due process claim. You don't have a "legal interest" to assert.

Citizen: I rather thought you might say that. I'll go away now, but before I go, could I ask a question?

Court: Sure.

Citizen: Why is it that, although I came in here to assert a federal constitutional right, all we have talked about are contracts, state statutes, School Board regulations and state common law?

Court: Because that's where we find the interests that the due process clause talks about, in the existing positive law of some jurisdiction. You don't expect us to just make these interests up, do you?

Citizen: No, I guess not. But I didn't expect the School Board to get to make them up either. In fact, if they had agreed by contract or regulation to give me a hearing, I don't see why I would need constitutional protection in the first place.

Court: Next case.

The positivist trap need not, of course, have sprung shut on our citizen-school teacher at the threshold of his claim. Back with his report on the state of the positive law in his jurisdiction, a more sympathetic response was possible:

Court: I see. Well, the School Board's rules certainly suggest something more than tenure at will. They seem to contemplate either a fixed term or tenure during good behavior. And the latter standard must presume some good faith method of determining the adequacy of the teacher's performance. Otherwise "adequate performance" would be the functional equivalent of "at will." I think you have demonstrated a sufficient property interest to justify a claim that due process demands some reasonable procedure for ascertaining the facts concerning the grounds for dismissal. Let's go forward with an inquiry into what process was, indeed, due here.

But the steel spring of positivist logic remains cocked. The satisfaction of positivism's threshold test does not preclude positivism's application to the case later on, when it comes time to elaborate the specific requirements of due process. Let us return to the courtroom.

Citizen: Great. When do I get my hearing? Who issues the subpoenas for my witnesses? Will the Board get a stenographer, or should I bring my tape recorder? What . . . .
Court: Not so fast. We haven't decided what kind of hearing is necessary here. Besides, the City Attorney is waving something at me.

City Attorney: That's right, your honor. I have an affidavit here that states that the dismissal in question was by majority vote of the Board on the basis of a recommendation of the teacher's principal. This case should be dismissed.

Court: Well, I am glad to hear that the Board followed its own rules. But what does that have to do with the plaintiff's due process claim?

City Attorney: That's perfectly straightforward, your honor. The plaintiff's interest is one based on the implied promise of the Board's rules. But, surely he can't read some but not all of the rules. And, the rules provide a procedure—recommendation of the principal plus a majority vote of the Board. If the plaintiff expected more, that expectation had no basis in the rules or the general law of this state. It was a simple, subjective expectation (indeed, I might call it a hope or a wish), and we already know that that cannot provide the basis for imposing additional procedures on the Board. The plaintiff has had the process that was due.

Court: There is a certain logic to your position. But how does this fit into the Mathews v. Eldridge balancing test?24

City Attorney: Perfectly. The first question in that test is the importance of the claimant's interest. Now as we know, that can't mean the importance the claimant attaches to it. Otherwise we are back to subjective measures—every person would be able to define his or her own process. The question is what importance or value can be reasonably assigned to the interest asserted.

Now it's obvious that the value of an interest includes not only its substantive definition, but also the prospect that any particular person can claim or defend it. In short, the value of an interest is precisely its substantive value to the holder discounted by the probability of its retention. And, of course, the probability of retention is determined by the security of expectations provided by the process for allocating the substantive interest.

In this case, if you allow the plaintiff more process than the rules specify, you are creating that process for the protection of an interest that is nowhere specified in the positive law. The process set out in the rules both determines the real value of the plaintiff's interest in his employment contract and protects it to the full extent that procedural protection is due.

Court: I am still troubled. What role is there for the due process clause in all this?

City Attorney: In a case like this, only to stand behind the rules and

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ensure uniform application—no cooking up of special procedures for particular cases. If there were no procedure specified at all, then you might have to supply some via due process.

Citizen: But this is an outrage. Surely the court doesn’t sit here to enforce the School Board’s crummy rules?

City Attorney: I understand that you are angry. But the law doesn’t operate on your sense of outrage. The question is what was a reasonable expectation concerning security of tenure under the positive law in existence. The answer to that question defines your interest. And, it hardly seems outrageous to treat your interest precisely as the rules say it will be treated. Maybe you, and other teachers, should have greater security in your jobs. But surely that is a substantive policy issue for legislative judgment.

Besides, the rules give you greater interests, both substantively and procedurally, than the general law of this jurisdiction concerning employment contracts. Your definition of your interest of necessity relies exclusively on the Board’s rules. As Justice Rehnquist says, you have to take the bitter with the sweet.\textsuperscript{25}

Court (to Citizen): I am afraid he’s right. I can’t go around making up new values or interests and then new procedures to protect them. That’s not my role.

Good luck in your job search.

Citizen: I think you’ve done it again—read the due process clause right out of the Constitution.

Court: Next case.

The positivist trap does not catch all cases one way or another. Many dance nimbly around the yawning steel maw without touching;\textsuperscript{26} others actuate the trigger mechanism for some Justices and not others.\textsuperscript{27} Some Justices even claim that positivism has no attraction for them and, perhaps, no place in constitutional adjudication.\textsuperscript{28}


\textsuperscript{26} Most due process cases provide opportunities for falling into one or the other of the positivist traps. For cases in which the traps are somehow wholly avoided, see Parham v. J.R., 442 U.S. 584 (1979); Dixon v. Love, 431 U.S. 105 (1977).

\textsuperscript{27} Compare Paul v. Davis, 424 U.S. 693, 710-12 (1976) (majority opinion by Rehnquist, J., joined by Burger, C.J., and Stewart, Blackmun, and Powell, JJ.) (reputational interest not a "liberty" or "property" interest protected by the due process clause) with id. at 720-34 (dissenting opinion by Brennan, J., joined by Marshall and White, JJ.) (reputational interest may be a "liberty" interest, and may implicate "property" interests, protected by the due process clause).

\textsuperscript{28} The remarkable twists and turns of individual Justices in procedural due process cases are worthy of a study in themselves. Perhaps the following will suffice to set the
But, the judicial dilemma that gives the trap its lure remains. Without a connection to positive law, the Justices must confront the freedom to assign values to the interests demanding due process protection. And although that essentially "natural law" posture—an attempt to derive principles from axioms concerning the intrinsic nature of man or the inherent qualities of liberal democracy—is sometimes feasible, even hospitable,\textsuperscript{29} a positivist judicial retreat is often prudent.\textsuperscript{30} The question is how to prevent retreat from becoming rout.

Herein lies one attraction of a dignitary theory of procedural due process. A dignitary theory may avoid the positivist starting point. Such a theory can quite appropriately view the question of the process claimant's substantive interest as irrelevant to the question of his or her process rights. The issue is instead whether the challenged process sustains or diminishes individual dignity. The statutory or common-law characterization of the claimant's interest, or its relative value as represented by the general pattern of positive norms, is evidence of the existence and strength of dignitary values. But these sources can hardly be definitive. The search from the dignitary perspective is for constitutional fundamentals, not legislative contingencies.

There is, of course, an element of finesse here: the difficult problem of delineating an appropriate judicial role in the determination of substantive values is avoided by simply asserting that judicial definition of constitutionally significant dignitary concerns is the core function of due process adjudication. It remains to be seen whether dignitary theory can develop a persuasive case for that role. Persuasiveness will no doubt turn both on the degree to which the values asserted to be dignitary values can be seen to be at the

tone: In \textit{Bishop v. Wood}, 426 U.S. 341 (1976), Justice White begins a dissent for himself and Justices Brennan, Marshall and Blackmun by saying, "I dissent because the decision of the majority rests upon a proposition [the positivist trap] which was squarely addressed and in my view correctly rejected by six Members of this Court in \textit{Arnett v. Kennedy} . . . ." Id. at 355 (White, J., dissenting). That statement implicitly criticizes Justice Powell, who—although he was caught with the majority in \textit{Bishop}—rejected the lure of the trap in \textit{Arnett v. Kennedy}, 416 U.S. 134, 166-67 (1974) (Powell, J., concurring in part and concurring in the result in part).

Justice White and his \textit{Bishop} companions should not, however, wax too self-righteous. A look at \textit{New Motor Vehicle Bd. v. Orrin W. Fox Co.}, 439 U.S. 96 (1978), reveals Justice White to have joined in a majority opinion written by Justice Brennan that is so wedded to the positivist view that it cannot distinguish a procedural from a substantive issue. See 439 U.S. at 106-08. And Justice Blackmun concurs in the classic \textit{Bishop v. Wood} majority's style: "the abstract expectation of a new franchise does not qualify as a property interest." 439 U.S. at 113 (Blackmun, J., concurring). Meanwhile, Justice Stevens, who wrote the majority opinion in \textit{Bishop}, was the sole dissenter in \textit{Fox}, on grounds that necessarily give independent normative force to the words of the due process clause. See 439 U.S. at 114 (Stevens, J., dissenting).

\textsuperscript{29} See Kadish, \textit{Methodology and Criteria in Due Process Adjudication—A Survey and Criticism}, 66 \textit{Yale L.J.} 319, 334-63 (1957).

\textsuperscript{30} See Mashaw, \textit{supra} note 4, at 49.
core of traditional conceptions of liberal democracy, and on the degree to which effectuation of those values through constitutional adjudication challenges contrary legislative judgments concerning legal process characteristics. For as we shall see, the appropriateness of any judicial revision of legislative judgments is a serious question in versions of liberal constitutionalism that permit more than a minimal state.  

C. A Broadened Perspective

Closely connected with the desire to avoid positivist snares is a desire to broaden the range of due process inquiry. The dominant due process analysis is instrumentalist as well as positivist. It takes the basic Benthamite approach to legal procedure, viewing it as the means (or instrument) for realizing the commands of the substantive law. The goodness of a procedure is thus determined by assessing its capacity for accurate factfinding and appropriate application of substantive legal norms to the facts as found. Claims to process protections become mediate or instrumentalist claims to facilitating structures for the protection of substantive rights.

31 Suffice it to say that I find unpersuasive the escapes from positivist traps suggested by Michelman, supra note 8, and by Tushnet, The Newer Property: A Suggestion for the Revival of Substantive Due Process, 1975 Sup. Ct. Rev. 261, 277-86. The former first suggests an allocation of roles between legislature and court—substantive rights definition for the legislature, procedural rights definition for the courts—which is premised on a supposed presupposition in the Supreme Court’s “implicit positivism” that holds that substantive rights can only perform their office by setting bounds on zones of autonomy if procedures exist for their effective implementation that are not themselves subject to legislative manipulation. Michelman, supra note 8, at 134. The Supreme Court (some Justices) may, indeed, (sometimes) hold this view, but it is hardly a coherent positivist position. Nor does it explain what underlies the presupposition limiting the legislature’s “legitimate province.” Michelman’s later suggestion that fake or quasi-entitlements are sometimes found when the Court wants to require procedures in cases in which actual positive entitlements cannot be claimed, id. at 145-48, may again be a way of describing the dominant jurisprudence, but it similarly avoids the critical question: “What justifies an assertion of judicial power to constitutionalize administrative procedure?” (As further reading will reveal, I nevertheless think Michelman’s analysis leads in a generally appropriate direction.)

Tushnet faces the problem squarely, recognizing that the issue is one of defining constitutional liberties. But the methodology he suggests is so wide-ranging—he calls it the “criteria of social importance”—that it belies his earlier claim to embrace substantive due process without Lochnerian excess. Tushnet, supra, at 277-80. (For my own attempt at the same game, see Mashaw, Constitutional Deregulation: Notes Toward a Public, Public Law, 54 Tul. L. Rev. 849 (1980)).


33 See Mathews, 424 U.S. at 343-47; Mashaw, supra note 4, at 39-45.
There is no obvious reason, however, why people should be more concerned with protecting their process rights in regard to existing substantive entitlements, than with protecting their participation in the processes by which substantive entitlements are defined. Yet, the Supreme Court has ostentatiously denied that it is concerned, when interpreting the due process clause, with judging the appropriateness of the processes of legislative or quasi-legislative lawmaking, save as they approach the adjudicative mode.

As contemporary administrative activity—particularly administrative regulation—moves increasingly toward the use of generally applicable rules, a due process jurisprudence oriented to the protection of rights through adjudication, rather than toward the ways in which rights are created by quasi-legislative processes, appears impoverished. If the Court is to have anything constitutionally significant to say about the shape of modern administrative processes, a positivist-instrumentalist approach, focused on accurate application of existing legal rules, will not suffice. The image of the modern administrative state generating increasing numbers of inevitably arbitrary general rules, unconstrained by any operationally relevant constitutional theory of democratic individualism, is unsettling. It is certainly enough to motivate a search for some alternative perspective on administrative due process.

D. A Promise of Constitutional Coherence

Yet, the problem of the sense of injustice that may emerge from the application of uniform rules to arguably diverse individuals has not always elicited the response that constitutional due process is unconcerned with general rules. Indeed, this sense of injustice and concern with general rulemaking is at the base of a seemingly eclectic series of due process cases that enunciate the so-called “irrebuttable presumption” doctrine. These cases occurred in two flurries, emerging and disappearing, some might say,

34 See generally Cooper, Goldberg's Forgotten Footnote: Is There a Due Process Right to a Hearing Prior to the Termination of Welfare Benefits When the Only Issue Raised is a Question of Law?, 64 MINN. L. REV. 1107 (1980); Comment, Due Process Rights of Participation in Administrative Rulemaking, 63 CALIF. L. REV. 886 (1975).
like a recurrent plague of locusts—for the irrebuttable presumption doctrine has a voracious appetite for statutes.\textsuperscript{38} It states, in its boldest form, that statutes (or administrative rules) may employ no proxy categories; that every statutory classification equating some objective characteristic of persons with some goal of public policy must be universally appropriate. If there are real-world exceptions that would, under the challenged statutory scheme, be treated like the rule, the statute establishes an illicit, irrebuttable presumption—a violation of due process of law.\textsuperscript{39} That violation is remediable only by the provision of opportunities for individualized judgments concerning the fit between specific persons or occasions and the goals of public policy.\textsuperscript{40}

There are two obvious problems with the irrebuttable presumption approach. First, it contradicts a massive jurisprudence affirming the expediency and desirability of substituting transparent general rules for individualized adjudication.\textsuperscript{41} Second, if left long at large, the doctrine would gnaw its way through most of the United States Code, not to mention state statutes, municipal ordinances, and the regulations of most administrative agencies. Attractive largely because of its apparent value neutrality, the principle has no obvious limits. It is a formalistic principle; empty no doubt, but on its way to becoming full.

To have limits, the irrebuttable presumption doctrine must have content, and a dignitary approach may point the way. The notion that the doctrine represents is after all not a trivial concern: legislative or administrative generalizations that ignore personal and situational differences, that tend to stamp out individuality, may be harmful indeed. The question, of course, is, "How much of this kind of assault on individual personality is bearable?" The formalistic irrebuttable presumption doctrine implicitly answers "none," and thereby, signals the practical necessity for its periodic return to dormancy. A dignitary theory that sought to articulate, defend, and effectuate a process-oriented conception of procedural due process might discover, in its quest for the core conditions of individual dignity, principles also applicable to rule-making processes that could properly limit individual demands for particularized official responsiveness.\textsuperscript{42}

\textsuperscript{38} See Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534, 1548-49 (1974).

\textsuperscript{39} Vlandis v. Kline, 412 U.S. 441, 446-54 (1973); Note, supra note 38, at 1534.

\textsuperscript{40} That is the strict view. In at least one "irrebuttable presumption" case, however, the Court allowed that a more limited presumption than the one at bar might have been permissible, even without providing for individualized determinations. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647 n.13 (1974).


\textsuperscript{42} For other attempts to deal with this issue, see Mashaw, Conflict and Compromise Among Ideals of Administrative Justice, 1981 Duke L.J. 181; Tribe, Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?, 92 Harv. L. Rev. 864 (1979); Tribe, Structural Due Process, 10 Harv. C.R.-C.L. L. Rev. 269 (1975) [hereinafter cited as Structural Due Process].
A dignitary approach may promote a new constitutional coherence in another way. There is a sense in which only a dignitary theory promises to make procedural due process judgments consistent, both with the individualist presuppositions of the Bill of Rights, and with the modern substantive due process jurisprudence that has emerged from a combination of Bill of Rights texts with fourteenth amendment due process.\textsuperscript{43} The fifth amendment's due process clause is, after all, in the original Bill of Rights—a set of protections concerned preeminently with the liberal ideal of individual freedom from majoritarian excess. An approach to procedural due process questions that is positivist in its starting points, instrumentalist in its basic inquiry, and “interest balancing” or utilitarian in its evaluative technique wrenches the due process clause from its constitutional context. The possibility that positive law will be oppressive—that the perception of the general good, or the “public interest,” will overwhelm individual rights—describes the need for the Bill of Rights protections. General utility cannot be the measure of those protections as well. Yet that is precisely what the dominant constitutional theory maintains as it weighs the benefits of increased accuracy against the costs of procedural formality.\textsuperscript{44}

A dignitary perspective thus holds out the prospect of returning procedural due process to the family of individualistic concerns that are represented by constitutional values such as privacy, free expression and religious freedom. It would also connect up the methodology of procedural due process—a search for fundamental dignitary values—with the value matrix that finds substantive due process expression in the fourteenth amendment’s incorporation doctrine.\textsuperscript{45} It would, in sum, reconcile procedural due process analysis with the spirit of the Constitution.

II. THE CHALLENGE OF A DIGNITARY PERSPECTIVE

That dignitary approaches to due process analysis have intuitive appeal, respond to contemporary concerns about a burgeoning administrative state, and tantalize us with the prospect of a nonpositivist, yet coherent and satisfying, constitutional theory may propel our inquiry; but it still leaves us far short of an account of what such a theory would propose, how it can be justified, and how it would work itself out in an evolving due process jurisprudence. Indeed, dignitary theorizing may fail at any of these points: (1) It may not be possible to elaborate a plausible set of “process values.” (2) If elaborated, these values may fail of satisfactory justification. (3) Even if given a principled and coherent justification, the set of “validated” process values may yet fail us in application. On the one hand, a dignitary approach might go too far: a robust value matrix might demand more of

\textsuperscript{43} See generally Mashaw, supra note 31; Tushnet, supra note 31.

\textsuperscript{44} See generally Note, supra note 6.

\textsuperscript{45} See generally Henkin, “Selective Incorporation” in the Fourteenth Amendment, 73 Yale L.J. 74 (1963).
administrative government than a world of scarce resources cares to admit, but not generate any internal principles of self-limitation. On the other hand, a dignitary approach might not go far enough: the set of plausible and justifiable values that can be forced into the mold of an adjudicable constitutional complaint might appear anemic in comparison with the issues that an elaborate due process jurisprudence confronts. Here again, dignitary theory would have proved inadequate to the task. In this section, therefore, I shall attempt to elaborate and justify a set of plausible "process values." In Section III, I shall discuss their application.

A. Intuitive Statement

There are more calls\(^4^6\) for the abandonment of "positivist," "utilitarian," or "instrumentalist" perspectives and the construction of a dignitary constitutional theory (or for the elaboration of dignitary values) than there are taxonomies,\(^4^7\) much less extended defenses, of the process concerns that would inform such a due process jurisprudence. Yet, whether considering the literature, or viewing the question as opening up wholly virgin territory, the generation of a plausible group of dignitary-value candidates seems within our grasp. We can initially derive our proposed values intuitively, for they are rooted in common characteristics of liberal constitutionalism. A brief exploration of the prime candidates reveals, however, the need to pursue these intuitions in greater depth. The values that fit our intuitions are vague at the margins and potentially contradictory at the core. They only begin to adumbrate a usable constitutional theory. My candidates for a taxonomy of dignitary values follows.

1. Equality

The demand that the techniques for making collective decisions not imply that one person's or group's contribution (facts, interpretation, policy argument, etc.) is entitled to greater respect than another's merely because of the identity of the person or group is so ubiquitous and intuitively plausible that no extended defenses of equality's candidacy seems appropriate. Yet, equality is a notoriously slippery concept, and its procedural implications are puzzling.

First, the idea of equal respect and equal voice is strongly associated with majority rule: May's theorem demonstrates that if all persons are permitted to participate in all decisions under conditions that ensure that no one's identity or preferred outcomes have special status and that each person has an equal chance to cast the decisive vote, then only majority rule

\(^4^6\) E.g., Michelman, supra note 8; Saphire, supra note 5; Summers, supra note 10; Van Alstyne, supra note 7; Note, supra note 6.

\(^4^7\) Summers and Saphire provide extended and overlapping taxonomies. Saphire, supra note 5, at 114-25; Summers, supra note 10, at 20-27. Michelman limits his candidates to "revelation" and "participation." Michelman, supra note 8, at 127.
can emerge as the decision rule.\textsuperscript{48} Any decision of the type we are discussing, imposing procedures contrary to those arrived at in the majoritarian political process, accordingly carries some anti-egalitarian stigma, even if it is premised on egalitarian concerns. The notion of equal respect cannot, therefore, carry us in a straightforward deductive fashion toward constitutional due process rules applicable to nonvoting contexts. The development of such rules must proceed prudentially from a concern with majoritarian tyranny.\textsuperscript{49}

Second, building decisional processes that protect equality in a prudential fashion is quite difficult. Formal and substantive equality often compete. The ability of both sides in a conventional adversary dispute to question a witness seems essential to formal equality. Yet, such questioning may so increase the costs of litigation to certain parties—rape victims or malpractice defendants, for example—that they appear substantively disadvantaged. Weighted voting rules (constitutional amendments),\textsuperscript{50} special proof requirements (beyond a reasonable doubt),\textsuperscript{51} presumptions (workmen’s compensation coverage),\textsuperscript{52} or one-sided appeal structures (criminal trials, public benefits decisions),\textsuperscript{53} may have at their base some notion of redressing substantive inequality.

Indeed, the simple dynamics of processes may subtly advantage or disadvantage certain types of claims or claimants. Oral adjudicatory process, for example, may be a more powerful technique for exposing weaknesses, gaps, or uncertainties concerning a proposed decision than for portraying the general scientific or common sense notions that would support it. Yet, the even-handed, formal elimination of orality, or of cross-examination, or of


\textsuperscript{49} See generally B. Ackerman, Social Justice in the Liberal State 301-13 (1980).

\textsuperscript{50} The United States Constitution requires that constitutional amendments be ratified by three-fourths of the states, rather than a simple majority. U.S. CONST. art. V.

\textsuperscript{51} The due process clause requires that no person be convicted of a criminal offense unless every fact necessary to constitute the crime charged is proved beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970).

\textsuperscript{52} Some workmen’s compensation statutes establish presumptions that employees’ claims fall within their provisions. 1 A. Larson, The Law of Workmen’s Compensation § 10.33, at 3-120 (1978).

\textsuperscript{53} At least under federal law, the one-sided criminal appeal structure may be crumbling somewhat: the current trend appears to allow government appeals whenever the Constitution permits. See United States v. Wilson, 420 U.S. 332, 337 (1975); 18 U.S.C. § 3731 (1976).

For an example in the public benefits arena, see the Social Security Act § 205(g), 42 U.S.C.A. § 405(g) (Supp. 1981).
the plodding, serial presentation of evidence normally associated with adjudication, may reverse substantive inequalities, rather than redress an imbalance.

Finally, we should note both the extended domain and the potentially limited power of process equality. The domain of equality concerns reaches well beyond majority voting and adversary adjudication. Even in investigatory adjudicative processes formally involving only one party (for example, public assistance claims), we would be concerned that each person affected by a decision have equal effort (formal? substantive?) devoted to the accumulation of evidence and consideration of its import. For to do otherwise is to deny that one person’s claim to the same subject matter is as valuable as another’s. We may similarly be concerned about equal access to representative legislators, or to the legislative process, notwithstanding the admitted connection of the legislative process to majoritarian voting processes.

Within this extensive domain, however, equality may be a thin protection. If we provided everyone confronting any administrative decision with the process made available to K in The Trial, equality would be maintained, but the protection afforded individual self-respect would be modest indeed.

2. Predictability, Transparency, and Rationality

It seems obvious, building on the last remark, that predictability, transparency, and rationality are a family of related process values that can make a worthwhile contribution to any process participant’s sense of self-respect. The hallmark of a decisional process that can be described as “Kafkaesque” is the participants’ befuddlement. They know only that they seem to be involved in an important decision concerning their lives. But they have no idea what is relevant to the decision, who will make it, and, in the extreme case, what precisely the decision is about. Perhaps the only thing that becomes clear in such a process is that if and when a decision is made, the participants will not be given any understandable reasons for it.

“Kafkaesque” procedures take away the participants’ ability to engage in rational planning about their situation, to make informed choices among options. The process implicitly defines the participants as objects, subject to infinite manipulation by “the system.” To avoid contributing to this sense of alienation, terror, and ultimately, self-hatred, a decisional process must give participants adequate notice of the issues to be decided, of the evidence that is relevant to those issues, and of how the decisional process itself works. In the end, there must also be some guarantee, usually by articulation of the basis for the decision, that the issues, evidence, and processes were in fact meaningful to the outcome. This reason giving is necessary, both to redeem

56 When I refer to the “participants” in a decision-making process, I do not mean the decisionmaker, only the subjects of the decision and, perhaps, other contributors to the process.
57 Robert Summers has reached a similar conclusion in a discussion that appears
prior promises of rationality, and to provide guidance for the individual’s future planning. In its latter aspect reason-giving confirms the participant, even in the face of substantive disappointment, as engaging in an ongoing process of rational and self-regarding action.

Although these general remarks concerning this group of dignitary demands may appear to raise few problems, we should be clear about some of the questions that remain. Although random and unstructured processes obviously limit the purposiveness of participation and inhibit rational planning concerning other affected aspects of a participant’s life, we sometimes prefer them to rigidly structured decisional rules. They emphasize the “human”—meaning perhaps the emotional, eclectic, and intuitive—aspects of our personality. Opportunities to be engaged in predictable ways in purposive activity do not always increase our sense of self-worth. Certain familiar and apparently rational legal processes—e.g., juries and hospital “God” committees—not only fail to give reasons, but are valued because they do not. 57

A conflict may lurk somewhere between two aspects of our individuality: rationality and freedom. And this conflict might be redescribed as a conflict between different notions of rationality: “rationality” as an intuitive process in which goals, means of achieving them, and states of the world constantly interact, each thereby reshaping our perceptions of the others; or a paradigm of means-ends “rationality” in which goals, at least, are fixed, coherent, and unambiguous. A demand that a process be “rational” thus does not define the process ultimately desired. It leaves open the question, “Rational in what way?” 58

3. Participation

“Participation” is an obvious candidate for our set of dignitary process values. One constantly confronts the claim that the dignity and self-respect to draw on, without expressly mentioning, dignitary values. See Summers, supra note 10, at 26-27.


58 Moreover, we must beware of demanding the impossible in the name of the rational. Kenneth Arrow’s general possibility theorem, when applied to administrative decisionmaking, indicates that under certain circumstances “rationality” in any sense may be unattainable. Suppose we chartered an administrative agency to regulate by license, permit, or order some potentially harmful behavior. Suppose further that we gave the agency a series of “values” to “consider” in arriving at its judgments, and required it to render reasoned judgments in the “public interest.” Arrow’s theorem introduces into this familiar scenario the unfamiliar notion that if a small set of conditions is used to define what “consideration” and “the public interest” entail—conditions so minimal that they can be expected to produce universal assent—then the agency will be unable to produce consistent decisions, and its attempts at reason-giving will reveal it to be confused, devious, or both. See generally Spitzer, Multicriteria Choice Preferences: An Application of Public Choice Theory to Bakke, The FCC and the Courts, 88 YALE L.J. 717 (1979); Spitzer, Radio Formats by Administrative Choice, 47 U. CHI. L. REV. 647 (1980).
of the individual can be protected only through processes of government in which there is "meaningful participation" by affected interests.\textsuperscript{59} Indeed, in my statement of process "equality," I often described such equality as equality of "participation," and I described processes as predictable, transparent, or rational "for their participants."

The basis for a connection between participation and self-respect may, however, be variously explained. As our positivist-trap dialogue suggested, it has become traditional in the due process jurisprudence to make the connection only in circumstances in which the individual is attempting to defend some previously recognized "right."\textsuperscript{60} That is arguably a dignitary approach, but with a substantive entitlements trigger.\textsuperscript{61} Yet, others would assert that participation is equally important in proceedings that function to develop the content of rights, rather than merely to enforce rights previously specified.\textsuperscript{62} The latter claim—and it seems a persuasive one—may be said to be that our self-respect is called into question not only when our rights are dealt with in proceedings to which we are not admitted, but also when we are excluded from a process of social decisionmaking in which the set of rights we all hold are defined or elaborated.

This point is extended by those who argue that the true relationship between participation and self-respect is that participation increases self-respect to the degree that participation gives the participant control over the process of decisionmaking.\textsuperscript{63} And loss of control, it is argued, is particularly damaging to self-respect precisely in those circumstances in which rights are amorphous and decisionmaking depends importantly on "contextualizing" the events or norms that appear to be relevant to the issue to be decided. It is in these situations that we are especially conscious of the need to explain and justify our actions and in which the loss of the opportunity to do so denies our self-worth. Indeed, the argument is pressed further still to urge the necessity of employing broad principles and contextualizing processes if we are to avoid inducing perceptions of injustice and loss of individual status.\textsuperscript{64}

Now, obviously, in this form the participatory demand has very important implications for the structure of substantive entitlements, although unlike more extreme positivist positions it does not condition participation on the assertion or defense of a well-specified substantive right. If this is the direction in which a dignitary approach pushes the conceptualization of


\textsuperscript{60} See notes 21-28 and accompanying text supra.

\textsuperscript{61} Michelman, supra note 8, at 129-30. In fact, as we shall see, entitlements triggers might well protect dignitary concerns, provided that the entitlements conception is appropriately robust. See section III B 2 infra.

\textsuperscript{62} E.g., Comment, supra note 34, at 898 & n.47.

\textsuperscript{63} Such "control" theorists often do not, however, necessarily link control and self-respect. See note 15 supra.

\textsuperscript{64} See Thibaut & Walker, supra note 11, at 553-54; Structural Due Process, supra note 42, at 303-06.
process, then there are equally obvious difficulties in structuring constitutional adjudication of process rights around such a notion. The demands for participation begin to look like a demand that the administrative state be dismantled, and that all decisions instead be made by some combination of popular referendum, adversary adjudication, and negotiation to consensus.

The demand for participation might, indeed, be more modest if separated entirely from an entitlements conception, whether substantive entitlements are viewed as rule-bound and static or principled and emergent. Such treatment of the participatory demand characterizes what Frank Michelman describes as “nonformal” processes, which evidence a human and moral concern. In his view, processes might pursue associational aims of which participation, having a “part in the decision,” is one. Yet, although he describes this fraternal or communal ideal in ways that are intuitively plausible and attractive, Michelman despairs of converting ideals into rights:

[A]n official whose explanations and interchanges have been requisitioned by someone who assertedly owns those elements of his behavior just will not be engaging in the kinds of acts which carry the interpersonal meanings that (possibly) we yearn for. If such a thing as a right to nonformalistic due process is conceivable, it must be a right of a sort of which we (or I) do not now have an adequate idea, a right existing outside the formalistic-positivist framework, a claim or drive or value having a mandatory quality, yes, but not ultimately dependent upon judicial coercion . . . .

In short, to rethink participatory process rights in terms that make them meaningful at the level of self-definition or in terms of the desire for community may be, necessarily, to render them nonjusticiable.

4. Privacy

The intuition that privacy matters, that processes that protect privacy are better than those that do not, is reinforced by the few specific process protections embodied in the American Constitution—the protections against self-incrimination and unreasonable searches. In attempts to provide a coherent framework for other more substantive constitutional protections—protections surrounding procreative choices and the marital relationship

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65 Cf. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980) (arguing that traditional liberalism, hostile to the exercise of power by entities intermediate between state and individual, has led to an undue diminishment of the legal power granted cities).
66 Michelman, supra note 8, at 127-28.
67 Id.
68 Id. at 149-50.
69 U.S. CONST. amend. V.
70 Id. amend. IV.
the Supreme Court has identified these specific process constraints with the more general notion of protecting privacy. Privacy, perhaps more than any of our other candidates, has the jurisprudential advantage of some explicit instances of implementation.

But privacy raises rather different process concerns than the values previously canvassed in our intuitive taxonomy. Rationality and participation seem to demand additions to public decision processes—additions that will communicate and include, that will permit interchange, self-revelation, perhaps mutual understanding. And, although strictly speaking equality of citizens with respect to public decisions may imply only majority rule, egalitarian-concerns carry in our constitutional vernacular connotations of inclusion that make equality claims devices for demanding more extensive access to existing processes.

Privacy, on the other hand, is at base a demand to be let alone, to be respected as an autonomous being with legitimate claims to separateness. Moreover, if process rights are of the usual Hohfeldian sort—that is, they imply a duty—then surely privacy will sometimes conflict with participation, rationality, even equality. If my demand on you is for participation or revelation, then your duty is certainly inconsistent with maintaining your “right” to privacy. Indeed, I may well seek simultaneously to join you in a process of collective decisionmaking, yet to shield through privacy claims information that you deem highly pertinent to the correct resolution of our dispute. Many common rules of procedure and evidence seem to have this double aspect. What conception of personhood can mediate this clash among dignitary values?

5. Residual Categories

Intuitive statement of variations on the process implications of human dignity could go on. But I sense that we are nearing the point at which new data
characterizations of the theme can be reduced rather easily to one or a combination of prior value categories. Thus, while I am attracted by additional formulations, such as “humaneness,” “individualization,” or “appropriate symbolism,” I am suspicious that they are largely proxies for combinations of values already declared. This is not, of course, to argue that further attempts at intuitive statement are useless. Combination is not mere repetition. It may provoke a synthesis of value attributes that would otherwise remain obscure. I might, after all, have been satisfied to leave the intuitive statement at the level of a demand for autonomy and fraternity, or somewhat less abstractly for rights to self-legislation, comprehension, and self-definition. Thus, further thought in this area might be fruitful.

Yet, for now, it seems sensible to view the exercise in intuitive taxonomy as at an end. If it has convinced the reader that something **prima facie** plausible can be said for a dignitary approach, its purpose has been served. Whether you are quite satisfied with the list or with the precise formulation of or nomenclature for the values posited, the values can nevertheless serve as landmarks, hopefully sufficient, to prevent our inquiries into justification and implementation from becoming aimless wanderings among either abstract philosophical, or particular procedural, systems.

B. Theoretical Defense

But there are obviously some problems with our intuitions. The values enunciated do not have very definite shapes; they are sometimes internally contradictory, and they may be competitive. These features make them appear, at least superficially, to be poor candidates for constitutional implementation through the due process clause. Are the values merely to be asserted as desirable and attractive, eclectically developed in contingent contexts, and balanced against each other (and perhaps other values) in a continuously intuitive fashion? If so, then they are likely to be as fragile as the dignitary protections already provided incidentally by the dominant Benthamite approach. And one really cannot hope to constitutionalize values through intuitive assertion.

Some theoretical defense must be offered for translating moderately plausible intuitive claims into constitutional rights. Such a theory should define the core of our dignitary concerns, connect that core in a coherent fashion to a broader constitutional tradition, and point the way toward the means for practical implementation of dignitary values in the structuring of due process requirements. Can such a theory be devised? I think it can. Indeed, there are several paths toward theoretical justification. None of the paths is, the reader should be warned, simultaneously nonpositivist, noninstrumentalist and nonutilitarian. Nor do they finally converge. Yet they traverse a common theoretical terrain and have points of tangency. They can lead us

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forward in our quest for a dignitary theory, while helping us to rethink and redescribe our proposed destination.

The moral and political theories that we might most appropriately employ to refine, reject, or support our intuitive taxonomy of process values are a family of theories that I will call "the liberal tradition." This tradition has at its core the notion that individuals are the basic unit of moral and political value. It is particularly in this tradition that limiting government by providing individual rights makes sense; and it is, of course, this intellectual tradition that has been most influential both at the formation and in the history of the American republic.

But "liberalish" theories are not all alike. We may exclude Platonic idealism and Marxist materialism, as essentially nonliberal and therefore inappropriate to the American constitutional tradition, without getting very far toward an understanding of what that tradition entails. Indeed, on closer examination the intellectual tradition that might be called "liberal" has several major strands or streams, no one of which has an exclusive claim to our attention. Each is an attempt to render a coherent account of individual rights, and each may to that degree inform our understanding of a dignitary perspective or process. Each has both eighteenth century roots and modern spokesmen, and each may, therefore, seek to inform a process of constitutional adjudication that is oriented neither wholly to tradition nor wholly to contemporary concerns.

1. The Liberal Tradition

A description of the liberal tradition that is a sufficiently short compass to meet our present needs, yet in a form that avoids presenting merely a cartoon, is no easy matter. Liberal ideas have emerged in social and political contexts from which they can be extracted only with substantial loss of meaning. To describe the logic of liberalism is in some sense to falsify it.

Nevertheless, let me characterize the basic liberal moves as falling into three ancestral categories—Lockean, Benthamite, and Kantian. We shall discuss the first two very briefly, merely to demonstrate the possibility of arriving at dignitary process values from these positions. But since the first

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78 "Liberalism is the belief in and the commitment to a set of methods and policies that have as their common aim greater freedom for individual men." Smith, Liberalism, in 9 International Encyclopedia of the Social Sciences 276, 276 (1968).

79 Thus, it hardly needs saying that both the Bill of Rights of the United States Constitution and the declaration of the natural rights of man in the Declaration of Independence embody such liberal notions.

80 And religious and juridical ones as well, see generally R. Tuck, Natural Rights Theories (1979).

maintains little attraction for the modern liberal imagination and the second has already been defined as the enemy by those seeking to extend the conception of process values, we need not tarry long. The Kantian tradition will receive more extended treatment, both because of its intuitive connection with a dignitary approach to process and because John Rawls’ Kantian political theory has had a powerful influence on contemporary legal thought.

(a) Locke and the Entitlements Conception. That some variation of Locke’s ideas, at least as embodied in a general Whig conception of governance, influenced the structure of constitutionalism in America seems beyond cavil. But there is imbedded in Lockean political theory a deep contradiction between individual proprietorship over life, liberty, and property and majoritarianism—a contradiction that is resolvable in two ways.

The first is to choose majoritarianism, a choice that we have previously noted is strongly connected to the dignitary ideal of equal respect. But this move also entails a commitment to positivism and to just those revelatory and associational processes generated by majoritarian governance.

The alternative approach emphasizes entitlement. In this view, as Robert Nozick has recently reinterpreted it, persons and property emerge with “rights” attached. Given that such rights have a possessive character and are attached to particular individuals, society has no claim on individually held property or liberty. To Nozick, taxation is theft. He, therefore, views even a minimal or guardian state only as an undesirable but inevitable response to individual insecurity. In his view, the state has no positive (redistributive) functions, because such functions would necessarily invade the rights of individuals. Its only role is to protect individual liberty and acquisitions.

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82 Robert Nozick’s recent work, e.g., R. Nozick, Anarchy, State, and Utopia (1974), may be the first serious attempt to defend a Lockean natural rights view of property since the turn of this century.

83 See Mashaw, supra note 4, at 47-49; Saphire, supra note 5, at 148-51; Note, supra note 6, at 1523-27.


86 Not counting the way Locke seems to have resolved it—that is, to so restrict membership in political society and so limit the view of rational self-interest that majority rule becomes the device, and only the device, by which the general scheme, as well as property and its accumulation, is protected. See C. B. MacPherson, supra note 81, at 251-62.

87 See notes 48-49 and accompanying text supra.

88 R. Nozick, supra note 82, at 10-25.

89 See id. at 169-70.

90 See id. at 10-25, 118.

91 See id. at 149-275. Nozick does not consider the provision of protective services for some constituents by others—the baseline requirement of his minimal state—necessarily to be redistributive. Id. at 114-15.
In this radical libertarian perspective it seems logical to presume that procedures for dispute resolution would be easily classified as either legitimate or illegitimate. Legitimate procedures would include only those that could be seen to produce no errors (and therefore invaded no one's substantive rights) or that had been agreed to by a process of free negotiation among the affected parties. Both types of legitimate process protect autonomy. The former emphasizes rationality, the latter participation. Here are dignitary processes in a robust form. Yet, because either type of legitimate procedure is often unavailable or extremely expensive, the practical difficulties of a radical libertarian conception of process seem overwhelming.

Nozick tells a metaphorical tale concerning the growth of a minimal state (including machinery for dispute resolution) that attempts to avoid the necessity (and obvious impracticability) of individual consent to all procedural arrangements by invoking the “invisible hand” of “voluntary” association. But in this metaphor voluntariness breaks down, if not everywhere, at critical points. At the very least Nozick’s explanation of state sovereignty, the final unification of competing “protective agencies,” is a pure power play based on social necessity.

But the convinced libertarian cannot readily relinquish his insistence on consent in the face of social necessity. Once the necessities of social order are admitted, there is no obvious theoretical stopping point when trading off the claims of individual liberty against the demands of social necessity; thereafter, argument is merely about the facts. And given the reinterpretation of liberalism in this century to emphasize the social preconditions for meaningful exercise of individual rights, if the libertarian wishes to retain a natural entitlements posture, he had better hold fast to the demand for individual consent to processes that can coercively rearrange rights. Otherwise he moves rapidly back toward a positivist conception of substantive entitlements and procedural rights. This is the land of Charles Reich’s “New Property,” a land that William Van Alstyne has shown to be heavily mined with positivist traps.

Even were we to accept the Nozickian vision of substantive entitlements, it is clear that dignitary processes in his system are merely the means for protecting substantive rights. Processes do not exist for their own sakes, to protect their own unique values. This particular brand of instrumentalism, thus, makes a robust set of dignitary process rights hinge on acceptance of the natural rights theory that leads to the minimal state. And I am doubtful that the right to participation in markets is what those in quest of dignitary rights in public processes of governance have in mind.

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92 Id. at 106.
93 See id. at 101-02.
94 Id. at 118-19.
95 See id. at 108-10. Nozick describes this event as the inevitable development of a “de facto monopoly.” Id. at 109.
96 See, e.g., J. DEWEY, LIBERALISM AND SOCIAL ACTION (1935).
98 Van Alstyne, supra note 7, at 452-70.
(b) Bentham, Mill, and Utility. It is tempting to exclude utilitarianism as inconsistent with the individualist starting point of dignitary or liberal theory. The utilitarian, after all, asks not, "What right do individuals have?" but, "What maximizes social welfare?" In some sense utilitarianism is the antithesis of an individual rights perspective. But, on reflection, the temptation to ignore utility-maximizing approaches should be rejected. Utilitarians can be as concerned with the "happiness" induced by accurate results as they are with benefits that flow from utility-maximizing approaches.

That accounting is, after all, one in which each individual counts as one: my happiness is as important as yours, and vice versa. There is in the utilitarian social welfare calculus strict equality of persons (indeed, so far as one can tell, all sentient beings). Moreover, the calculation is in no sense meant to suggest that society itself has an organic existence. By "social welfare" the utilitarian means only the sum of individuals' welfare. Finally, as a matter of intellectual history, it seems inappropriate to exclude the author of On Liberty from the liberal tradition, on the ground that he also wrote Utilitarianism.

The question, then, is what the utilitarian has to say about individual rights. Or perhaps more aptly, to what extent can a utilitarian approach yield a justification for individual rights? Within the general framework, there seem to be three basic methods of approaching this problem. One is Mill's method in On Liberty. The idea is to separate the individual and the social. Within the sphere of individual thought and action, that is, thought and action having no substantial consequences for other persons, calculations of social welfare have no place. The individual is free to pursue his own desires, however misinformed or repugnant. Only when he acts in society by taking action affecting its members is he subject to constraint on the basis of calculations of social welfare.

There are, of course, well-known objections to this move. The principal one is the indeterminateness of the line between "individual" and "social" action. Another is the absence of any justification, other than social welfare, for drawing such a line. Note, however, that this approach does

99 The use of Bentham is figurative. Although he is now more familiar to us, the eighteenth century roots of utilitarianism in American constitutionalism lead more directly to others. See generally G. WILLS, INVENTING AMERICA (1978); see also B. BAILYN, supra note 85; G. WOOD, supra note 85.


102 "The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute." J.S. MILL, supra note 100, at 13.

103 See K. BRITTON, JOHN STUART MILL 102-06 (2d ed. 1969).

104 Mill's notion of the inviolable private sphere, it has been argued, stems not from social welfare calculations but from natural law theories. R. ANSCHUTZ, THE PHILOSOPHY OF J.S. MILL 8-29 (3d ed. 1969). Because I am more interested here in
yield at least a dignitary process restraint—some notion of individual privacy that is beyond social invasion because it is necessary to social welfare. The problem, of course, is that the “right” is so fragile that it might as well be called an “interest”—which may later be balanced against others.

A more satisfying move toward generating protected individual rights is made by the so-called “Rule Utilitarians.” Their basic argument is that certain individual rights or protections so often maximize social welfare that they should have the status of rules. The use of these rules, rather than de novo social welfare calculations when making decisions, is believed to enhance overall welfare because the rules are likely to be wrong less often than an unguided and contingent attempt to maximize social welfare. The rules, of course, establish only prima facie rights. They may be overridden by a convincing demonstration in particular cases that social welfare demands an exception. Nevertheless, even prima facie rights, rights that merely prevail when the social welfare calculation is uncertain, may be quite robust in the face of pervasive uncertainty.

What sorts of rights should have the status of rules in a utilitarian moral universe? Here, of course, there can be much disagreement, but surely the rules must be few in number. Otherwise the basic features of utilitarianism would be lost. Moreover, rules should be developed only when exceptions are thought to be rare and the conduct proscribed (or required) relates directly and powerfully to the core notions of pleasure and pain.

A common example of a utilitarian rule might be a prohibition against slavery. Although they are often attacked by nonutilitarians with the claim that their moral stance permits even such abominations as slavery, modern utilitarians have given a persuasive argument for rule utilitarianism in this context. R.M. Hare, for example, in a recent article, admits that he can hypothesize a situation in which slavery would do more good than would the abolition of slavery. But he further argues that, try as he might, he cannot construct a believable scenario for such an outcome. Moreover, because

utilitarianism as a coherent body of thought than with peculiar wrinkles in the thought of John Stuart Mill, this complication may be ignored.

105 This is not to say that rule utilitarianism is a better moral theory. For a recent discussion of the difficulties with rule utilitarian approaches, see D. Regan, Utilitarianism and Cooperation 83-93 (1980).

106 See generally Harrod, Utilitarianism Revised, in 45 Mind 137 (new ser. 1936).

107 Rule utilitarianism has thus been severely criticized as undermining the central notion of utilitarianism—that one must always act to maximize human happiness. E.g., Smart, Extreme and Restricted Utilitarianism, in Theories of Ethics 171 (P. Foot ed. 1967); Stout, “But Suppose Everyone Did the Same,” 32 Australasian J. Phil. 1 (1954) (offering a defense to this criticism).

108 Hare, What is Wrong With Slavery?, 8 Phil. & Pub. Aff. 103 (1979).

109 Id. at 109-17.

110 Id. at 118-21. Hare notes certain aspects of human nature—such as the tendency of human beings to exploit those over whom they have absolute power—which
the condition of slavery produces a reign of terror—the slave (having no legal rights) lives in constant fear of pain from the master's caprice, neglect, or vengefulness—a clear prohibition on slave status seems to Hare consistent with a well-considered utilitarian position.\textsuperscript{111}

The utilitarian might take a similar view of wholly arbitrary procedures. At the limit, the state bureaucracy that combines general power with absolute discretion becomes as the master to the slave. A reign of terror ensues. The citizen lives in constant fear of pain, and any movement toward predictability and transparency will produce substantial social welfare gains. The Kafkaesque, total bureaucracy should clearly be proscribed.

But as one moves away from the limiting case, toward the types of procedural issues normally confronted in American legal life, the place of utilitarian rules becomes highly problematic. Bureaucracies as we know them have limited jurisdictions, discernible (although sometimes vague and conflicting) substantive policies, and relatively standardized procedures. Uncertainty is not terror, and the possibilities for contingent justification of limited discretion abound.

Here lies the domain of the third and dominant utilitarian methodology, an unfettered social welfare calculation, with all the well-known difficulties inherent in that intellectual exercise.\textsuperscript{112} A calculation of costs and benefits particularly concerned with the impact of process directly on the happiness of affected persons, would, for example, remain concerned with the potentially greater happiness to be had from allocating public resources to a multitude of worthwhile ends other than procedural reform. This methodology yields \textit{a priori} no support for any particular process or process value. It can say only that, \textit{ceteris paribus}, processes should produce pleasure rather than pain, or perhaps more likely, should cause as little pain as possible. It is precisely the thinness of this "ruleless" protection that some contemporary dignitary theorists find objectionable.

\textit{(c) Kant and Rawls.} Thus far liberal theory has seemed to point the way toward an anemic and fragile set of process rights—majority rule, privacy, and nonarbitrariness. Revelatory and participatory process values have emerged only as instrumental to the maintenance of substantive entitlements in a minimal state, or from general considerations of social welfare. In addition to their other weaknesses, neither of these latter approaches seem to have defined man as a political actor in a fully satisfactory fashion. The entitlements approach subsumed politics in the market and implied that

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liberty and human dignity are defined in economic terms. Utilitarianism subsumed the right in the good. Even when it converted the pleasure principle into a moral duty, it somehow fell short of demanding that we recognize the moral integrity of others in addition to their right to pursue their own happiness.

The Kantian strand of the liberal tradition might be more satisfactory. Kant’s approach is *a priori* and categorical; it seeks to reveal the moral imperatives imbedded in the structure of normative rationality, and thus does not create illusory interests that can easily be balanced away. Moreover, the well-known second formulation of the basic Kantian moral command compellingly characterizes the core value of liberal thought, that each person be treated as an end, never merely as a means. Can this ideal provide a basis for a dignitary approach to due process?

Edmund Pincoffs has suggested as much in a *Nomos* volume on Due Process. He applies what he calls a “Kantian injunction” to the issue in *Board of Regents v. Roth*—whether a nonrenewed teacher on an expired term contract is entitled, by virtue of the due process clause, to some kind of...

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113 *Cf.* Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980) (criticizing contemporary “economic analysis of law” theorists for implying that social wealth is a social value—*i.e.*, a thing worth having for its own sake).

114 See, *e.g.*, B. ACKERMAN, *supra* note 49, at 100-03, 342-45.

115 A few words may be in order here concerning Kant’s categorical imperative, and the formulae Kant derived from it. In his attempt to explicate the groundwork of morality, Kant formulated a basic moral command—*i.e.*, a categorical imperative. Against this command the morality of all subjective, individual principles of action (in Kant’s terminology, maxims) could be judged. Reasoning that only those maxims are moral which a rational being could conceive as being valid bases of action for all other rational beings, Kant stated his categorical imperative as follows: “Act only according to that maxim by which you can at the same time will that it should become a universal law.” *I. KANT, FOUNDATION OF THE METAPHYSICS OF MORALS* 39 (L. Beck trans. 1959) (1st ed. Riga 1785). In order to focus the categorical imperative’s application, Kant proceeded to reformulate it four ways: (1) “Act as though the maxim of your action were by your will to become a universal law of nature.” *Id.* (2) “Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.” *Id.* at 47. (3) Act in accord with “the idea of the will of every rational being as a will giving universal law... [E]verything must be done from the maxim of [the] will as one which could have as its object only itself considered as giving universal laws.” *Id.* at 50. (4) “Act as if [you], by [your] maxim, [are] at all times a legislative member in the universal realm of ends... [A]ct as if your maxim should serve at the same time as the universal law of all rational beings.” *Id.* at 57 (on the “realm of ends,” *see* note 120 and accompanying text *infra*). The reader should note that each of these formulations is really a restatement of the basic imperative, and its equivalent in meaning, if not in focus.


117 408 U.S. 564 (1972).
explanation or hearing concerning his failure to have his contract renewed. Listen as Pincoffs proceeds:

[I]f there are no very persuasive arguments why Roth should not be given reasons, are there any arguments why he should—or are we to leave it that it is just intuitively obvious that he is morally (even if not legally) entitled to reasons? Are we to say that of course he should be given reasons—and a chance to contest them—out of simple decency? Or that in an ideal community he would be given reasons? Or that to refuse to give him reasons and an opportunity to contest them would be unthinkable? None of these remarks would be very helpful. None of them gives reasons for the giving of reasons; all seem like ways of avoiding the kind of account which must be given to those who are impressed with the need for official efficiency, for getting on with whatever the task may be.

Somewhat to my own surprise, I find that I am driven, in my analysis of the moral rights and duties that obtain between Roth and his president to the second formulation of the Kantian categorical imperative; the formulation that commands us never to treat anyone—including ourselves—as a mere means. Think of the Kantian command as being justified and at the same time clarified by the examination of a number of varying paradigms of treating persons as mere means to some end. One paradigm that might be offered is precisely the case in hand. If the president is assessed—and assesses himself—solely on grounds of his efficiency in attaining the complex end of an adequate educational opportunity for those who are qualified to take advantage of it, then he regards himself as a mere means, and at the same time regards Roth and his colleagues as mere means to the attainment of educational opportunity. . . . [I]f Roth is not informed of his fault, he is treated as a mere means; he is eliminated, like a faulty machine part, from an organization that will henceforth, supposedly, function better without him, and in that [sic] no further thought is given to Roth's interest in correcting his own performance.

But [Roth's] being owed reasons is but a small distance—if it is any distance—from his being owed a hearing in which he can examine, and challenge, what is said by the president—in which he can participate in the decision that concerns himself.

. . . .

It is not necessary, then, to suppose that there is value in sheer participation. Participation may be instrumentally valuable, but instrumental to the achievement of a moral purpose that is itself impossible to describe in instrumental terms, the purpose of treating a man not as a mere means but as an end in himself. This is not to say that there is no intrinsic value in participation. I would prefer to say that there may be, but that the moral value of participation turns on its relation to a moral end. This relationship of instrumentality is not the same kind as that between the president's raising money and educational opportunity for all. We might say that participation is an instrument by which the
valuation of persons as ends in themselves is expressed. It is as if the Kantian principle were determinable in any number of ways, but participation is one of the ways in which it may become determinate. It does not follow that mere participation is of value (though it may have value), but rather follows that participation is morally valuable to the degree that it makes determinate the moral principle that we should never treat a man as a mere means.\textsuperscript{118}

Now it is this type of reasoning from first principles of "human dignity" or "moral integrity" that seems most likely to generate cognizable claims of right within a dignitary theory of due process. As Pincoffs' analysis demonstrates, extensive procedural demands may be justified by an argument which includes consideration of prudential concerns for other social goals. The direct application of the Kantian categorical imperative, in which dignity may be said to consist in being treated as an end in oneself rather than as instrumental to the ends of others, may thus yield a robust set of procedural rights. Presumably, Roth may demand, as at least a Kantian moral right, a process designed to preserve and enhance his particular goals in life.

The attempt to apply Kantian injunctions in the Pincoffsian fashion leads, however, to an apparent contradiction. If frustrating Roth's process claims by balancing them against resource constraints, and hence implicitly against the claims or purposes of others, is a failure to treat Roth as an end in himself, then Roth seems entitled legitimately to demand any process that he deems necessary to the pursuit of his purposes in life. But what is to be said to Roth's colleagues who object to spending their time pursuing Roth's purposes? Are they not being used as mere means? May they not wield the categorical imperative to demand privacy from Roth's incessant pursuit of participatory governance? Where is the principle of limitation that would adjust competing claims or ends?

The problem lies, I believe, in the use that Pincoffs makes of the second formulation of the categorical imperative. The injunction to treat persons always as ends in themselves is derived from the "universalization" requirement of Kant's categorical imperative.\textsuperscript{119} And like the basic imperative, the second formulation must be read as related to an objective or universal realm of "ends" or "moral persons."\textsuperscript{120} So construed, the injunction relates not to frustrating any person's goals or purposes in life, but to

\textsuperscript{118} Pincoffs, supra note 116, at 175-79.

\textsuperscript{119} See note 115 supra.

\textsuperscript{120} [A]II rational beings stand under the law that each of them should treat himself and all others never merely as means but in every case also as an end in himself. Thus there arises a systematic union of rational beings through common objective laws. This is a realm which may be called a realm of ends (certainly only an ideal), because what these laws have in view is just the relation of these beings to each other as ends and means.

I. \textit{Kant}, supra note 115, at 52. Kant adverts to the realm of ends expressly in his fourth formulation of the categorical imperative. See note 115 supra.
frustrating the person’s exercise and development of a “good will.” ¹²¹ Each person is thus an end-in-himself because each person participates in, or strives for, objective moral goodness. The injunction to respect that participation or striving can—indeed should—be limited by some notion of which actions or claims relate to the dignity of a rational being. ¹²² Other claims are not “universal.”

But if we have thus in theory rescued Kant from the incessant and competitive claims of the self-realizing ego, we have not thereby specified a determinate perspective on process claims. And, indeed, the rescue operation seems doomed. For when we put the question, “What is the good will against which actions and claims are to be measured?,” we get two equally unhelpful answers. In the last part of the Foundations of the Metaphysics of Morals, ¹²³ and in the second Critique, ¹²⁴ we seem to be told that the kingdom of ends—the reality of the moral self rather than its historically contingent appearance—lies always beyond our vision. ¹²⁵ It is a conceptual ideal necessary to explain the possibility of our notions of moral worth and our striving for goodness, but it is not available for comparison with the phenomenal world. The first answer thus says that our quest is inevitable, but impossible.

The second answer comes from Kant’s famous examples, the applications of the categorical imperative. But this answer is unsatisfactory, because these examples are famous nonsequiturs. For Kant, the requirement of universalization of moral maxims excludes suicide, ¹²⁶ and all lying, ¹²⁷ while it requires charity. ¹²⁸ In one essay he even purports to derive rules of etiquette at dinner parties from the categorical imperative. ¹²⁹ But to Kant’s readers these “obvious” applications have always been troublesome. ¹³⁰

¹²¹ Morality . . . consists in the relation of every action to that [individual, personal] legislation through which alone a realm of ends is possible. This legislation, however, must be found in every rational being. It must be able to arise from his will, whose principle then is to take no action according to any maxim which would be inconsistent with its being a universal law . . . .

¹²² See id. at 50-52, 60-64.

¹²³ Id.


¹²⁵ See id. at 124-26; I. KANT, supra note 115, at 69-72.


¹²⁷ Id. at 40.

¹²⁸ Id. at 41.


¹³⁰ See, e.g., C.D. BROOD, FIVE TYPES OF ETHICAL THEORY 129-31 (1934) (arguing that Kant’s examples do not illustrate his categorical imperative). For sympathetic attempts to interpret Kant’s moral thought and to explain the relationship between its abstract principles and its concrete examples of moral duty, see, for
They seem merely to dress up the conventional morality of eighteenth century Konigsberg in philosophic costume.

In order to rescue Kant from the criticism that, in application, the categorical imperative owes virtually everything to place, time, and person, and almost nothing to objective theory, the first answer must be embraced. The categorical imperative was not meant to be directly applicable to the phenomenal world as a means for generating rules of conduct or moral claims. Rather, it provides an ideal toward which the rules of the phenomenal world can strive.

From this perspective the wisdom and subtlety of John Rawls’ approach to rendering Kant more determinate in his *A Theory of Justice* is thrown into sharp relief. The original position might be viewed as an approach to the kingdom of ends; the veil of ignorance as a technique for protecting the universal or good will from the clash of contingent purposes that punctuate the phenomenal world. The choices of the disembodied, rational wills posited by Rawls are universal by definition, and the pursuit of the principles of justice by a rational placeholder, who does not know where he will end up in the social scheme, necessarily treats all rational beings as ends in themselves.

Rawls is, of course, more than incidentally committed to the satisfaction of Kant’s imperative. To treat anyone as a mere means is to deny the importance of his ends in life and, at the same time, to undermine his basis for self-respect. And in *A Theory of Justice* the idea of self-respect plays a critical dual role. It is the intuitive bedrock upon which many of Rawls’ psychological assumptions about acceptable bargains will be based, and it is also a test of the moral legitimacy and relative desirability of the principles and institutions that emerge from the process of contracting.

As is by now generally familiar, from the original position of self-interested neutrality Rawls generates two basic principles of justice. The first is a

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131 J. Rawls, supra note 84.
132 The “original position” is a hypothetical situation that Rawls posits. It forms an initial status quo from which a group of rational and mutually disinterested people reach a set of agreements that provide the basis of a just society. All persons in the original position enjoy fundamental equality. *Id.* at 11-22, 118-92. See generally Dworkin, *The Original Position*, in *Reading Rawls* 16 (N. Daniels ed. 1975).
133 The veil of ignorance is a condition Rawls imposes upon the participants in the original position: none of them knows anything about him or herself, such as social status or natural abilities, that could differentiate him or herself from the other participants. J. Rawls, supra note 84, at 12, 136-42.
134 Rawls argues as much. *Id.* at 18-19.
135 See *id.* at 251-57; Rawls, *Kantian Constructivism in Moral Theory*, 77 J. Phil. 515 (1980).
136 See generally J. Rawls, supra note 84, at 178-79, 440-46.
principle of strict equality with respect to basic liberties. The extent of this set of liberties is unclear, but it includes for Rawls at least universal suffrage with majority rule; freedom of conscience (moral and religious), speech, and assembly; and freedom from arbitrary arrest as defined by the rule of law. Restrictions on these basic liberties are permissible only in the interest of increasing the amount of liberty experienced by all. Thus, an expanded set of universal and preferred rights might, for example, be put beyond the reach of majority rule. But, Rawls obviously views this set of rights as indeterminate. Any number of constitutional regimes might satisfy the equal liberty principle. The important feature is equality. Rawls sees no sufficient reason for any contractor to forego equal liberty; for, in his view, this strict equality is so related to self-respect that (barring extreme circumstances) no one would forego equal liberty for social or economic advancement.

The second principle relates to problems of economic and social position. Here Rawls rejects strict equality on the grounds that the self-interested, but temporarily ignorant, contractor need not forego the possibilities for material advancement that inequality could provide for every person, even the worst off. All he need do is ensure that should he end up as the worst off, he would nonetheless be better off than under a regime of strict equality. This insight leads to Rawls' second principle of justice, which requires (a) that inequalities be attached to positions and offices available to all under conditions of fair equality of opportunity and (b) that advances in the position of better-off persons be limited by the requirement that the position of the worst-off be maximized.

This principle might, like the first principle, be satisfied by a large number of constitutional and legislative arrangements. Certain approaches to social arrangements, however, would be proscribed. Slavery and other "arbitrary" classifications relating to personal legal status would be illegitimate, as would simple attempts to maximize total or average utility. Rawls further believes that the operation of this second principle, by reducing extremes of social and economic position and reinforcing bonds of social fraternity, supports the priority of the first principle. Liberty becomes more desirable as basic economic needs are assured, and more closely associated with self-respect as extremes of wealth and position are eliminated.
This rather straightforward statement of Rawls' two principles of justice, of course, provides little of the subtlety, insight, or interconnectedness of his arguments. I am here only concerned, however, with those aspects of Rawls' theory that could give a firmer foundation to intuitive notions of dignitary process rights.

We may begin by tentatively excluding consideration of the second principle; for if process rights are merely fungible parts of what Rawls calls "primary goods"—all those things it is rational to desire because they are instrumental in achieving particular goals in life\textsuperscript{147}—then they can form no part of a constitutionally preferred set of rights.\textsuperscript{148} Constitutional preference implies that these rights not be overridden by majority vote, and Rawls' system permits no trades of basic liberties—majority rule included—for other, lesser primary goods.\textsuperscript{149} Basic liberties are by definition things that we want no matter what other things we also have or desire.\textsuperscript{150} Hence, unless process rights beyond majority rule can be given a place in the set of basic liberties that might be adopted, they cannot be allowed to restrict the basic liberty of majority rule.

That due process claims should be considered "liberties" rather than mere "goods" is not surprising. We are accustomed to thinking of Bill of Rights protections in "liberty" terms. But the conception of process rights as "Rawlsian liberties" is not generally straightforward or unambiguous, nor does it lead easily to the priority of those rights as constitutional protections.

The clearest notion of process rights in Rawls' theory applies to legislative processes. He argues—at least some of the time—that equal participation—one-person-one-vote, majority rule, offices open to all—is essential to the notion of equal liberty.\textsuperscript{151} However, when Rawls moves beyond voting rules to concern himself with the application of legal rules, he connects that function directly to the rule of law.\textsuperscript{152} Such a conception primarily provides support not for "process values" in adjudication, but, in Rawls' own words, for a system "reasonably designed to ascertain the truth."\textsuperscript{153} The rule of law, for Rawls as for Locke, is not itself a concept of liberty, but rather a means of implementing such liberties as are available.\textsuperscript{154} The notion is both limited and instrumental: unless the law is reasonably clear concerning the

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\textsuperscript{147} Id. at 62.
\textsuperscript{149} Although Rawls includes liberties among his "social primary goods," J. Rawls, \textit{supra} note 84, at 62, he later establishes, by what he calls "the priority of liberty," that "liberty can be restricted only for the sake of liberty itself." \textit{Id.} at 244.
\textsuperscript{150} See \textit{id.} at 542-43.
\textsuperscript{151} \textit{Compare id.} at 221-28 with \textit{id.} at 247.
\textsuperscript{152} \textit{Id.} at 58-60, 238-39.
\textsuperscript{153} \textit{Id.} at 239.
\textsuperscript{154} See \textit{id.} at 239-40.
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citizens' rights and duties, and administered through a rational process reasonably designed to produce accurate (and therefore regular and consistent) applications, there can be no secure expectations with respect to equality of access to the basic liberties.\footnote{See id. at 235-43.}

This is not to suggest that Rawls' views of due process are necessarily inconsistent with the notion of process values. The values most closely connected with the rule of law—predictability, transparency, and rationality—can be instrumental \textit{both} to correct results and to the support of self-respect. Indeed, one might argue that because the Rawlsian conception of justice is at base directed toward the preservation of the primary value of self-respect,\footnote{See id. at 440.} the pursuit of correct results in the well-ordered or just society may be indistinguishable from the pursuit of dignitary values. Yet, Rawls clearly does not conceive of a good adjudicatory process as independently or directly supporting citizens' sense of self-worth. Regularity of application is enough for a theory concerned primarily with the justice of substantive claims.

We must also beware of making more of the demand for "dignified" or "self-respecting" adjudicatory process on the basis of Rawls' theory than Rawls himself makes. It cannot blandly be asserted that a thinker who gives the primacy Rawls does to self-respect would surely applaud its pursuit through judicial elaboration of a broad due process clause. \textit{A Theory of Justice} is much too intricately balanced for such facile claims; Rawls is also concerned with institutions, and he clearly views judicial review as a move away from equality of political participation. In at least some of his discussions of liberty, the counter-majoritarian difficulty is a stark reality.\footnote{See, e.g., id. at 228-29.} He admits that bills of rights and judicial review might be developed in ways that maintain equal liberty,\footnote{See id. at 224.} but there is no strong belief here for the inclusion of process rights in constitutional arrangements—beyond the dictates of equal political liberty and the rule of law.

Perhaps the strongest case for constitutionalizing process values in pursuit of self-respect that comports with Rawls' theory is this: in a less than well-ordered state, in which legislation proceeds from bargaining rather than from a rational attempt to implement the two principles of justice, a process of rational constitutional adjudication \textit{might} legitimately restrain or supplement majoritarian institutions. And as a part of the judicial activity tending to promote the ultimate achievement of the just state, the court \textit{may} find it beneficial, even necessary, to impose process restraints on administrative decisionmaking. Moreover, it \textit{might} be beneficial in such a situation to construct process requirements in ways that not only promote attention to the rational ends of administrative decisionmaking, but that also support a
sense of self-respect that is otherwise inadequately promoted by the existing organization of society.

We might, proceeding in this prudential way, construct, for example, a basis for reasoning. At least in the Kantian-Rawlsian perfectionist version of liberalism, human dignity and self-respect are rational constructions. Kant emphasizes the dual role of reason in moral action: reason is the will's tutor as well as its handmaiden, both the means by which the good will is formed and the means for constructing good actions in daily life. As with Rawls, one can at least say that Kant would view as immoral institutional arrangements that interfered with either function of rationality. Pincoffs' analysis is thus on firmer ground when he hinges Roth's need for information on his need to be able to regulate his own future behavior. Processes that are wholly uninformative, yet potentially meaningful, constrain individuals in their endeavor to act as free and rational beings. And, at some level of opacity or seeming arbitrariness, combined with substantial state involvement in our lives, such processes would tend to undermine the bases for individual self-respect.

A fundamental demand for rational processes of social decisionmaking is thus a fair implication from Kantian moral theory. But the individual's right to know the reasons for official action need not imply an extensive right to processes that would require the public agency to behave rationally. That the agency or official is mistaken or foolish in some—even many—cases may thwart our desires, but it need not impair our capacity to understand what has happened and to take whatever moral instruction is appropriate to the occasion. For a process to be "rational" in this sense is only for it to be comprehensible—a much thinner sense of rationality than the Benthamite accuracy-seeking process that dignitary theorists have found inadequate.

2. The Liberal Consensus

Some interesting implications arise from this modest foray through classical and contemporary liberal thought. It seems clear that we were correct to be concerned about intuitive claims as to process. If we view those claims to personal autonomy, to "doing what one wants," then we must (if we are to be coherent) make liberalism's classic move (from Locke to Mill to Nozick) to separate the private from the public sphere. Dignitary claims then take on the character of substantive restraints on state power. Acceptable characteristics of processes mediating interpersonal or intergroup conflict would be either consensual (in the private sphere) or, when the processes are designed to further public purposes, subject to restraints regarding reasonable accuracy and public encroachment on protected zones of pri-

159 I. KANT, supra note 115, at 10-11, 29.

160 This idea is captured in Rawls' theory by the notion of "reflective equilibrium." See, e.g., J. RAWLS, supra note 84, at 20, 48-51.

161 See note 118 and accompanying text supra.
vacy. It appears that claims to participation in public processes must, on the other hand, take the form of utilitarian-instrumentalist arguments or claims to equal respect. And no matter which form the claims take, mainstream liberal thought gives them only a limited determinate content: (a) equally weighted voting under conditions of majority rule; (b) equal application of legal rules; and (c) the avoidance of incomprehensibility.

This is not, of course, to say that ideals like "participation in public process" or "opportunities for revelation" have no contribution to make in realizing the ultimate liberal value of individual self-respect. It is merely to say that they do not seem to be a part of the core conditions for realizing liberal values. Participation and revelation contain contradictions, or raise counterarguments, which suggest that they can be pursued only in a prudential fashion—by weighing them against other values. They cannot be asserted as virtually absolute constitutional rights, to be respected on pain of transforming the body politic into a nonliberal regime.

Those in quest of a richer set of dignitary process requirements will have to move beyond the basic tenets of liberalism, or construct a complex prudential argument that connects additional protections to the concepts of majority rule, rationality, and privacy. Both of these approaches are to some degree feasible, and we can provide at least a sketch of how the prudential argument might proceed in the context of a brief discussion of the implementation of a dignitary theory.

III. Implementing a Dignitary Theory

A. A Prudential Approach

A prudential approach merely asks, "What is necessary, given the contingencies of modern government, to make effective the liberal state's promises of privacy, equality, and comprehensibility in public decisional processes?" To ask is not, of course, to answer, but the way the argument proceeds is quite familiar. (For purposes of illustration, we shall here be concerned only with the demands of equality and rationality.)

One begins with the notion that dignitary promises are not easily kept. The clearest decisional-process implication of equality—majority rule—requires support from several directions if it is to provide more than formal legitimation of public decisionmaking. First, much "majority rule" is mediated, rather than immediate—we have a representative, not a direct, democracy. Second, the electoral process is subject to many well-known forms of corruption—concentrations of power, information gaps, and so on. Third, the voting process, whether at referendum or within representative as-

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162 Process privacy claims are familiar in a wide range of evidentiary and procedural contexts. They need not be belabored here. Moreover, most of the demands for a "dignitary" orientation to process have proceeded not from a concern for privacy but for access and revelation.
sembles, has some basic theoretical problems—often described as voting paradoxes or agenda difficulties—which demand attention. Fourth, the output of the mediated voting process must be realized by administrative action, which is susceptible to influences that might undermine effectuation of such electoral preferences as survive to the stage of implementation.

Rationality in even the thin sense of "comprehensibility" is similarly subject to constant challenge. In part, the challenge proceeds from the weaknesses of the equality guarantee via majority rule. At the legislative level, majority rule is the legitimizing rationale for particular policy choices. We are to understand the output of the legislative process as simultaneously making substantive choices and supporting equality. But to the extent that the difficulties of effectuating equality through majoritarianism have undermined the connection between policy choice and electoral preferences, that "reason" seems implausible.

At the level of administrative implementation additional problems emerge. Instrumentally rational pursuit of legislative policy confronts the ambiguity and incoherence of legislative goals and the uncertainties of factfinding. An administrative articulation of a rationale instrumentally relating goal $X$ to state-of-the-world $A$ hardly provides the assurances of rationality necessary for responsible self-regulation when the citizen had presumed that goal $Y$ was intended and that situation $B$ obtained. Thus, rich possibilities begin to emerge for developing prudential legal rules demanding both legislative specificity and accuracy-seeking administrative processes combined with reasongiving.

There are also serious problems with structuring rational processes of decisionmaking when more than a few decisionmakers are involved. Bureaucratic decisionmaking should obviously strive for consistency across deciders; a process in which who decides matters—perhaps more than the articulated public policies or the facts—is an obvious example of arbitrariness, and hence, from one perspective, of irrationality. If the substantive outputs of administration seem contradictory, or explicable only in terms of the undisclosed propensities of different deciders, then we become, as K, the objects of official caprice.

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164 See Ackerman & Hassler, Beyond the New Deal: Coal and the Clean Air Act, 89 YALE L.J. 1466 (1980); Stewart, supra note 9, at 1682-87.
165 See Kuflik, Majority Rule Procedure, in DUE PROCESS, NOMOS XVIII, at 296, 321-22 (J. Pennock & J. Chapman eds. 1977); cf. id. at 323 (positing various justifications for majority rule, some reflecting concern for correctness of decisions, others for equality and procedural fairness).
166 See generally Stewart, supra note 9.
Yet, we should be clear that however plausible—even compelling—the arguments are for constructing prudential structures to support core demands for equality and rationality, implementation will not be straightforward. A concern for rationality, for example, leads to concern with inconsistency and apparent arbitrariness. Yet, the routines and ruleboundedness that make consistency possible in bureaucracies are among our prime examples of irrational behavior—the wooden inability to respond to differences in context. We thus seem to confront a choice between the irrationality of bureaucratic control and the irrationality of official discretion.

Similarly, when we return to the question of support for majoritarianism, we might think that the vagueness and mediateness of electoral decisions, plus the possibilities for corruption and agenda manipulation, demand direct participation by affected interests when administrators formulate implementing subsidiary norms. Yet it is equally sensible to argue the opposite, that more direct participation will in fact skew policy away from the desires of the general electorate and toward the demands of "special interest groups," thus lessening the effectiveness of general arrangements that sustain equality of voting power.168

We need not pursue the whole litany of problems and potential solutions to appreciate that in the prudential realm everything turns on one’s appreciation of highly uncertain social, political, economic, and psychological factors. That is not to say that all these factors will never point in the same direction. A decisional process, for example, that is neither consistent nor capable of finely textured individual judgments is not faced with the dilemma of choosing which of these ends to pursue at the expense of the other. Moreover, when we are faced with this choice, the mere demand that the official behave with sufficient rationality to provide an understandable legal order does not of itself determine which horn of the dilemma will be chosen, or whether some compromise between “systemic” and “intuitive” rationality might not turn out to be prudent. In some circumstances we might even wish to abandon transparent rationality entirely, either because the dilemma is too poignant (the draft lottery) or the reasons too distressing (allocation of life support systems).169 Prudential systems may balance and accommodate values in an almost infinite variety of ways.

Notwithstanding these difficulties, the preceding discussion may point the way toward a sensible strategy for implementing dignity values in the construction of administrative procedures. In outline, the argument proceeds, as follows: First, from the perspective of liberal theory, process values have a rough hierarchy—equality (as embodied in majority rule), minimal or "thin" rationality,7 and some set of privacy constraints have been seen to

170 I do not mean here to reject a "thicker" accuracy-seeking requirement for the protection of significant substantive entitlement, see note 92 and accompanying text
be more fundamental to the preservation of a political morality based on individual self-respect (i.e., liberalism) than are other values. These values therefore have strong claims to implementation via judicial review for constitutionality. Such claims may be defeated only by a demonstration that the procedures under review in fact seek to realize these values in plausible ways. Second, additional prudential or derivative values (individualization, direct participation, and the like) present *prima facie* constitutional claims for realization. They are the means for giving the basic values a content that realistically confronts the social context of the individual self. These claims may, however, be defeated by the recognition that the challenged process is explicable as a trade-off among competing values. Notwithstanding the weakness of these claims as constitutional standards they may, because of their *prima facie* status, have powerful effects as principles of statutory construction.

Thus far, of course, it would appear that we have labored long and hard, sometimes tediously, to bring forth, yet again, a two-tier approach that is as objectionable as it is familiar. But wait awhile. For there are two significant differences between the theory propounded here and the two-tier formula of fundamental and other values that has previously been so influential in equal protection analysis, \(^{171}\) and, to a lesser degree, in due process analysis. \(^{172}\) First, the criterion of "fundamentalness" employed here has some persuasive claim to more than intuitive plausibility. It relies on the consensus elements of liberal political theory, a philosophic tradition that virtually all would agree provides the ideological bedrock for the construction of American constitutional theory. Second, the hierarchy that is suggested is capable of a reasonably straightforward, albeit sometimes moderately sophisticated, application to the due process problems that have confronted the Supreme Court. More importantly, that application seems to solve those problems in coherent and (reasonably) convincing ways.

B. Some Hypothetical Applications

Perhaps the simplest way to proceed is by way of example—to consider a series of equality and rationality claims and how they might be analyzed. As we shall see, the application is not always nonproblematic, but it is not particularly elusive either. Consider the following:

\(^{supra}\), nor to deny the connection of that approach to preserving individual liberties. That conception of due process is, however, peripheral to a discussion of a non-positivist, noninstrumentalist dignitary approach.


1. Hypothetical #1: The Interplay of Primary (Constitutional) and Secondary (Statutory) Claims

The substantive context involves recoupment of wrongfully paid AFDC benefits. The federal statutory standard, let us assume, provides for recoupment except where the refund would create "undue hardship" and the recipient has received the benefits in "good faith." Assume further that state X has taken the position, as a matter of regulatory policy, that recipients who received improper payments because of their failure to report changes in earnings cannot satisfy the "good faith" standard. The claimant, who admittedly received improper payments because of a delay in reporting increased income, requests a hearing in which to demonstrate "good faith." She offers to prove that illness during the relevant time period prevented notification of the welfare department concerning the changed circumstances. The request for hearing is denied because of the previously announced policy.

The welfare recipient has two plausible due process claims. The first is that the refusal to consider individual circumstances is irrational. If her proofs are accepted, then she obviously did not act in "bad faith" when she failed to report increased income during the relevant time period. Denial of an opportunity to make those proofs would thus create an irrational process for deciding questions of good faith. The second due process claim is that because the hearing process refuses to hear her excuse, although it hears excuses from persons overpaid for other reasons, there is an obvious inequality in access to hearings among potentially affected persons.

Because these claims state plausible denials of process rationality and process equality, the plaintiff will be entitled to prevail unless the state can defend its action in the same terms that the case is stated. This is so because core value claims are not subject to being balanced against other considerations; a core value claim must be met with a core value response. The defendant must now talk about rationality and equality, not economy.

How might the state proceed? Its defense must, I think, begin by elaborating the meaning of rationality and equality. The state's equality defense is straightforward and determinative. First, there is obviously no violation of general voting rules involved here. Second, there is no special rule for this claimant's case. The attempt to compare her position to the cases of others to whom the rule does not apply is really an attack on the rationality of the rule, not the equality of the process, and it must be dealt with as such. Finally, she makes no claim about problems of "participation" in the development of the policy, so that sort of equality-supporting, prudential argument is not at issue here.

We turn then to the rationality claim. But here again the core value has been respected. The process is rational in the sense that it gives reasons. The claimant's case obviously fits under the rule. The decision is thus transpar-

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173 This hypothetical is based loosely on Califano v. Yamasaki, 442 U.S. 682 (1980).
ent and comprehensible. When the claimant says more, that the process is irrational because it produces errors due to overgeneralization, her claim moves into the prudential realm. It becomes one for "individualization."

Prudential claims such as "individualization" are prima facie winners, but they can be defeated by other countervailing interests. The state will probably focus its defense on the relationship of the challenged rule to "consistent" decisionmaking. And, consistency, after all, is one meaning of rationality. Pursuing this line of defense the state would first urge that discretionary judgments by a number of hearing officers concerning the good faith of persons who fail to report income changes would lead to inconsistent and, therefore, irrational (and unequal) administration of the "good faith" test. It thus promotes rationality in administration to use a rulemaking process to develop a general norm that can be consistently applied in subsequent decisional processes.

The state's defense need not prevail. The plaintiff might yet demonstrate that the choice between the types of rationality to be pursued was unnecessary—that there was no basis, in experience or otherwise, for the judgment that administration would be inconsistent under the general standard—so the state could have relatively costlessly allowed, and therefore must allow, for individualized determinations. But, obviously, the going will be tough.

A critic of the results of this example might, of course, argue that if that's the way the theory works, it justifies obvious irrationality. "Good faith," the critic would argue, obviously implies individualized judgment. And, I would reply as follows: either the critic means to say that there is in general a single perspective on rationality in administration, or he means to say that under this statute only a single perspective is permissible. The former meaning is too obviously false to require discussion. The latter argument may be a good one, but it is not a constitutional argument. It is a challenge to the authority of the agency under the statute. The question then becomes a question of statutory interpretation, of what protections are afforded by the positive law.

At the level of statutory construction many other questions are, of course, also relevant: the general structure of the statute, the language of other related sections, legislative history, and so on. But one can imagine a quite common scenario in which the prima facie case for individualization will carry the day: the general statutory structure is one in which there is a rigid general rule—recoupment—which may be relaxed by reference to a waiver standard—"good faith"—that appears designed to permit individualization. The legislative history is silent concerning the anticipated means of implementing the waiver provision. The rule-making authority that has been exercised is of the general empowering type, "to make such needful rules and regulations, etc." In these circumstances, a decision that the administrator has misconstrued the statute because he failed to give appropriate weight to the value of individualization would be justified. And because it is a non-constitutional ruling, the judicial construction would not preclude ma-
joritarian reversal or modification of that judgment. Judicial review based on a generous positivism—one informed by attention to dignitary process values—may be simultaneously protective and modest.

2. Hypothetical #2: Roth’s Case 174

The term contract of a nontenured state college professor is not renewed. The teacher claims he had a due process right to a statement of reasons and an evidentiary hearing before being fired.

As in the previous hypothetical, the plaintiff has no very plausible equality claim. Everyone on a term contract gets the same process—some form of evaluation and judgment. The fundamental problem relates to the rationality of the process. For all Roth can tell the judgment is based on whim. Because he is provided no reason, Roth is treated as a being for whom reasons are unimportant—an obvious affront to his self-respect.

The question is what the state college may say in defense. How can the failure to provide a reason be consistent with the value of rationality? In my view it cannot be. A reason must be provided as a constitutional minimum. 175 But as we saw in the previous hypothetical, a reason alone may or may not be enough. There is still the question of what counts as a reason—another way of stating the prudential argument for substantive rationality. And lurking in the background is our prior concern with how the rationality principle, once loosed on the administrative process, stops short of requiring that administrative judgments be absolutely correct in all cases.

Let us, therefore, elaborate. Suppose, for example, the college president’s letter says that Roth is not rehired because “I don’t like you.” Is that a reason? Of course. If Roth has a claim in these circumstances, it will relate to the authority of the president, under the governing legislation, to hire and fire on the basis of personal preference.

More commonly we would expect the president to give reasons such as: “It is necessary to cut back our staff by five percent”; or “Better qualified candidates are available to us”; or “Your teaching (research, etc.) have not been of a quality that justifies retention.” These are also, obviously, rational answers. They give reasons; they are not internally contradictory. Yet, Roth may certainly want more. To each of the president’s reasons we can imagine him saying: “Why me?”; “How better qualified?”; and, “What precisely are my shortcomings?”

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174 This hypothetical is based on Roth, 408 U.S. 564, discussed in the dialogue in text following note 23 supra and in text accompanying notes 117-18 supra.

175 On the present Supreme Court only Justice Marshall seems, explicitly, to hold this view. See Roth, 408 U.S. at 588-89 (Marshall, J., dissenting). Yet, some such notion seems implicit in the majority opinion in Dunlop v. Bachowski, 421 U.S. 560 (1975) (Secretary of Labor must supply explanation of decision in order to facilitate judicial review under Administrative Procedure Act).
These are again perfectly reasonable sorts of questions. Moreover, assuming that some answers are forthcoming, they lead ineluctably to a further round of queries of the "How do you know that?" sort. And in the next iteration, Roth can be expected to begin asserting that certain facts are wrong, or have been considered out of context, and to start demanding some further process for testing facts and placing them in proper perspective. Does a prudential right to process rationality carry him that far?

At the level of stating a claim, the answer is obviously "yes." But the possibilities for adequate defense by the state are so substantial that one is hard pressed to imagine that Roth would prevail. For the rationality of declining further process could be established from a number of directions: the impact of such processes on the resources available for the principal mission of the school; the effects of contentious processes on the willingness of supervisory personnel to act on their convictions in replacing existing staff; the low probability that proceedings will illuminate, rather than misdirect, decisionmaking that is subjective, incremental, comparative, and synthesizing. Any of these reasons, unless Roth can show that they are empty, would support the rationality of limiting Roth's involvement in the decisional process to the simple receipt of a reason. They, therefore, dispose of his constitutional claims to "participation" as well as to "rationality." Would a presumptive right to participate nevertheless carry the day for Roth were he to argue that the general education statutes should be "interpreted" to provide him with some kind of hearing? Given the general legal presumption that personal services contracts are nonrenewable, indeed terminable, at will, it seems unlikely, although not unimaginable. And such an argument would involve a prudential balancing process that considers the support that participation can give both to individual self-respect and to the achievement of collective ends. It could not proceed deductively from an absolute constitutional right.

These hypotheticals—indeed, any number of additional hypotheticals—could be further developed and analyzed. Enough has been said, however, to provide an idea of how dignitary theory can be applied in practice. There is also at least some indication from these examples of potential strengths and weaknesses. Although we began with a robust set of intuitive claims, the approach has proved rather restrained. The theory has some bedrock, non-tradeable rights—reasongiving and majority rule—but these are, standing alone, relatively thin protections. For although this theory avoids initial "positivist traps," it may refer many process issues to the construction of the positive law. A "generous positivism" may indeed be the appropriate label under which to proceed in further elaborating prudential process protections having their fundamental basis in the liberal ideal of individual self-respect.

For those who would vigorously "constitutionalize" administrative process in pursuit of dignitary values and who distrust balancing, the challenge is clear. Some basis beyond liberal theory is required to justify the pursuit.
IV. FROM LIBERTY TO FRATERNITY

That liberal theory should fail to provide a robust vision of process values will be, to many, unsurprising. The conventional criticism of individualist moral and political ideas—a criticism elegantly and forcefully stated by Robert Paul Wolff in *The Poverty of Liberalism*—explains the procedural barrenness of liberal theory. As Wolff puts it, individualistic notions of political rights are at war with man's basic sociability. We are fundamentally social beings, not individuals. Indeed, the concept of an individual is coherent only in the context of social existence. Our fundamental demands are not for separateness, but for community. We want not merely to be left alone, but to be related to others in significant ways. For Wolff an individualistic foundation for a philosophy of politics is about as informative as an explanation of the harmony of a string quartet that begins with the thesis that the musicians are competing with each other to produce a solo.

Wolff's account, whether viewed as an account of individual psychology or social reality, has some persuasive power. To send Roth away with a reason sufficient for him to understand what has occurred to him may be enough to protect his individuality, but it seems a niggardly response nevertheless. It is more likely that what Roth really wanted when he asked for a "reason" was a conversation. His interest was not just in a statement, to internalize as he might, but in a relationship in which he both knew and was known. For it may be that we cannot, after all, ever know ourselves except as mediated and reinforced by association with others.

From this perspective, demands for participation take on life and force. Notions of equality and rationality that seem somehow sterile when they are interpreted as creating equal rights to pull a voting machine's lever and to receive a reason from an official are energized when they are reconceived as promoting an ongoing dialogue in a community of equals. And it is this conception that seems to motivate much of the dignitary theory literature—a conception that Frank Michelman recognized in describing his discussion as a discussion of "associational aims" in due process.

It is not quite cricket, of course, for Wolff to suggest that liberal thought ignores demands for community. A cheerful reading of the history of liberal ideas might rather describe mediating the competition between individualist and associational drives as the central problem liberal thinkers have set for themselves—a problem resolvable in a variety of ways, none of which

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177 *Id.* at 50.
178 *Id.* at 183-93.
179 *Id.* at 50.
181 As Bruce Ackerman has asked, "What would our social world look like if no one ever suppressed another's questions of legitimacy, where every questioner met with a conscientious attempt at an answer?" B. ACKERMAN, *supra* note 49, at 4.
“forget” the duality of human nature. Indeed, the “communitarian” perspective of the Scots “moral sense” school seems to have strongly influenced Thomas Jefferson and James Wilson. Gordon Wood finds an undifferentiated communitarian ethic permeating the intellectual atmosphere at the founding of the American republic.

But these constitutionally significant communitarian ideas lead in a familiar direction—utilitarianism. The moral posture of the individual—benevolent action—translated at the community level into the promotion of the greatest good of the greatest number. The integration of the individual into the moral community was achieved by internalizing the good of the community as a maxim of individual moral action.

Wolff must, therefore, be suggesting some transformation of our ideas that goes further—that recognizes the separate reality and claims of community, but presumably maintains the reality of individual freedom. But I must confess that I have no clear vision of such a theory. And the determination of what “due process” claims such a theory might entail must await the event. In a world both genuinely communal and genuinely individualist, adjudicable dignitary claims to process just might be beside the point. One might even imagine such a theory leading to a rather Lockean distinction between private realms of fraternal self-realization and public realms of decisionmaking subject to the restraints of liberal constitutionalism. In such a state a liberal legal order would protect the opportunity for fraternity, but would not attempt to transform society into community.

184 G. Wills, supra note 99, at 200-06.
186 G. Wood, supra note 85, at 53-59.
189 Wolff, himself, provides only a possibility theorem on the conceptual coherence of a community value. R. Wolff, supra note 176, at 163-95.
190 Nor will I here rehearse the candidates and what clouds my perception; for an exemplary attempt at such a theory, see R. Unger, supra note 180. Suffice it to say that I suspect the theory to be “Rousseauian” in the sense that Frank Michelman describes in Politics and Values on What’s Really Wrong With Rationality Review?, 13 Creighton L. Rev. 487, 506-11 (1979). But as Michelman has also told us, supra note 8, translating this vision into a demand for procedural review is much more complicated than using it to explain our discomfiture at rationality cum efficiency as a constitutional standard for valid substantive legislation.