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Book Reviews

The Wrath of *Roth*

Due Process in the Administrative State. By Jerry L. Mashaw.* *New Haven: Yale University Press, 1985. Pp. 271. \$24.00.*

Colin S. Diver†

Did we really once believe that *Goldberg v. Kelly*¹ was the opening volley in a due process “revolution”?² We may be forgiven the sense of mild embarrassment that accompanies such memories. Of course, we know better now. There was no revolution—or at least not the one expected. The bureaucracy was not radically humanized; the administrative state was not shaken to its foundations. Bathed in the harsh glare of hindsight, *Goldberg* itself looks very different now. Where once we saw a stirring manifesto for procedural justice, now we see a prefiguring of the coming retrenchment. In the Court’s recognition of welfare recipients’ “statutory entitlement”³ we see the seeds of *Roth*’s⁴ “entitlement trigger.”⁵ In the Court’s sympathetic “weighing” of the recipient’s interest against the government’s,⁶ we see the germ of *Eldridge*’s⁷ austere “social-cost accounting.”⁸

Was there some implacable logic that transformed the generous constitutionalism of *Goldberg* into the niggardly positivism of *Roth* and *Eldridge*? Were we betrayed by a changing Court or by our own false read-

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1. 397 U.S. 254 (1970).

2. Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971).

3. 397 U.S. at 262.

4. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

5. Michelman, *Formal and Associational Aims in Procedural Due Process*, in XVIII NOMOS: DUE PROCESS 126, 131 (J. Pennock & J. Chapman eds. 1977).

6. 397 U.S. at 263.

7. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

8. Mashaw, *Administrative Due Process as Social-Cost Accounting*, 9 HOFSTRA L. REV. 1423 (1981).

ing of its portents? These questions have set the research agenda for a generation of scholars. Foremost among them has been Professor Jerry Mashaw, whose prodigious output⁹ has gradually laid bare the deep paradoxes and contradictions lurking beneath the once-placid¹⁰ countenance of procedural due process.

Mashaw's long journey has reached a culmination with the publication of a major book entitled *Due Process and the Administrative State*.¹¹ His latest opus is not simply, or even primarily, a collection of his previous writings. Those who have followed his work will see much that is familiar, to be sure.¹² But there is much here that is new, as well. More important, Mashaw has integrated these fragments into a panoramic vision of the role that due process should play in our society. It is a rich, subtle, and complex vision. But, at bottom, it is deeply and stubbornly ambivalent. Mashaw's pilgrimage through the wilderness of due process yields a message and a lesson. Due process must save the individual from being engulfed by the bureaucratic state, reads the message. But the lesson answers: There is no escape from the positivist trap.

I. PROCESS

The procedural metaphor for *Due Process and the Administrative State* is conversation. The due process clause, Mashaw says, is an "interpretive placeholder around which or within which to structure our most general constitutional conversations about the evolution of American government."¹³ True to his metaphor, Mashaw has produced a book which is itself a conversation among the several voices that compete for recognition within each of us.

9. The principal entries in the list include: *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981) [hereinafter cited as *Dignitary Theory*]; *Administrative Due Process as Social-Cost Accounting*, 9 HOFSTRA L. REV. 1423 (1981) [hereinafter cited as *Social-Cost Accounting*]; *Conflict and Compromise Among Models of Administrative Justice*, 1981 DUKE L.J. 181 [hereinafter cited as *Conflict and Compromise*]; *How Much of What Quality? A Comment on Conscientious Procedural Design*, 65 CORNELL L. REV. 823 (1980); *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974). See also J. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983); J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL & M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM (1978).

10. See J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 19 (1980).

11. J. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985) [hereinafter cited by page number only].

12. Chapter 3, "The Model of Competence," is taken largely from Mashaw, *Social-Cost Accounting*, *supra* note 9, and chapters 4 and 5, "Toward a Model of Dignitary Values" and "Dignitary Process and the Liberal Tradition," are taken from Mashaw, *Dignitary Theory*, *supra* note 9.

13. P. 8.

Due Process and Administrative State

The structure of the conversation is not dialectical, but iterative. Mashaw circles in on his subject, laying out his argument in a rough and encompassing gesture, returning to refine and purify it, returning once again to enrich and complicate it. He is constantly building structures, reshaping, demolishing, and resurrecting them, leaving in his wake a trail of shimmering insights and murky ambiguities.

The introductory chapter sets the tone for the journey to follow. Its very title—"Was the Revolution a Success?"¹⁴—is pregnant with ambiguity. The "career"¹⁵ of the due process clause spans at least three "revolutions," from its origins in the American Revolution, to the *Goldberg* revolution, to an "emerging counterrevolution"¹⁶ against judicially imposed participatory procedures. There is also a touch of irony in the phrase, since the secondary meaning of "revolution" is a fitting metaphor for the circular path of Mashaw's argument, and indeed the historic path of administrative law itself,¹⁷ as it cycles through technocratic and democratic defenses of the administrative state.¹⁸

Largely by "historical accident,"¹⁹ the due process clause has become the central "interpretive placeholder" for that ongoing attempt at legitimation. Yet, Mashaw argues, two centuries of due process adjudication have failed to produce an acceptable jurisprudence—in either a "regulative (conflict-resolving)" or "symbolic (value-creating)" sense.²⁰ In an effort to fill that gap, Mashaw extracts from the history of due process adjudication three "themes"—tradition, interest balancing, and natural rights²¹—that furnish the inspiration for his models of "appropriateness," "competence," and "dignitary values." In the process of elaborating these models, Mashaw gradually assembles the elements of a complex vision of an acceptable due process jurisprudence.

The "model of appropriateness" describes the dominant style of judicial reasoning prior to *Goldberg*. It is, in essence, the invocation of tradition with an overlay of judicial self-restraint. Courts canvass customary procedural forms for the one that best matches the social function under scrutiny—that is, they search for the "appropriate" analogy. The model's moral justification is "maintenance of the social order";²² its institutional justification, the limited lawmaking capacity of courts.

14. P. 1.

15. P. 2.

16. P. 29.

17. P. 28.

18. See Shapiro, *On Predicting the Future of Administrative Law*, REGULATION, May/June 1982, at 18.

19. P. 8.

20. P. 31.

21. P. 44.

22. P. 54.

The problem with "appropriateness" reasoning, we are told, is not methodological but substantive. It is conceptually empty: a process of reasoning (by analogy) without reasons (criteria for selecting among competing analogies). "Appropriateness analysis . . . is a blend of the customary, the contemporary, the just, and the efficacious."²³ It is everything, in short, and nothing—judicial conservatism dressed as tradition, judicial whimsy dressed as flexibility.

Mashaw takes great pains and many pages to discredit so empty a caricature. As he himself concedes, "Poking holes in the logic of a due process jurisprudence that judges the appropriateness of governmental forms 'all things considered' is indeed child's play."²⁴ Nonetheless, the effort has not been wasted. By surveying nearly two centuries of due process adjudication, Mashaw has begun the process of unfolding its many mysteries. Moreover, while dispelling any lingering doubts about the need for a coherent normative theory, Mashaw has planted seeds of doubt about judicial capacity that will ripen into fruit four chapters later.

From the conceptual confusion of "appropriateness" analysis, emerges the model of "competence." Foreshadowed in the loyalty-security cases of the 1960's,²⁵ the competence model reached full flower in the explicit instrumentalism and interest-balancing of *Mathews v. Eldridge*.²⁶ In its flight from doctrinal confusion, the Court blundered into Bentham. Its vision of due process, much like Bentham's, is "instrumentalist, positivist, and utilitarian."²⁷ It is instrumentalist because it views process purely as a means, having no intrinsic value itself; positivist because the ends to be served by procedure are set by the positive law; and utilitarian because any particular procedure's contribution to those ends must be calculated by balancing private gain against social cost.

Once again, Mashaw's strikingly bland terminology betokens his disapproval. The Court's commitment to the "competence" model, we are told, is "erratic" and "limited,"²⁸ and when it does apply the model, its reasoning "sometimes seems to border on the lunatic."²⁹ No wonder, proclaims Mashaw, since the model is "intellectually overambitious" and "underinclusive."³⁰ The rest of chapter 3 is devoted to supporting these claims. In a long and fascinating passage illustrating how a conscientious judge

23. P. 57.

24. P. 97.

25. See, e.g., *Hannah v. Larche*, 363 U.S. 420 (1960); *Cafeteria & Restaurant Workers' Union v. McElroy*, 367 U.S. 886 (1961).

26. 424 U.S. 319 (1976).

27. P. 105.

28. P. 108.

29. P. 112.

30. P. 112.

might use the competence model to analyze *Goldberg* and *Eldridge*, Mashaw convincingly demonstrates the model's "enormous appetite for data that is disputable, unknown, and, sometimes, unknowable."³¹ The judicial process cannot satisfy that appetite, he concludes, nor can it successfully mask its incapacity behind the passive virtues of deference, evasion, or intuition.

But it is not the competence model's "intellectual hubris"³² so much as its positivism that ultimately seals its fate:

The aversion here is not just to extensive investigation. It is to balancing interests in the course of a demonstration that general social welfare demands the suppression of individual claims to procedural protection.

. . . A claim to due process, like a claim to any other Bill of Rights protection, is precisely a claim to the protection of minority interests in the face of majority desires.³³

Competence analysis is "underinclusive," in other words, precisely because it refuses to identify any value that can "trump legislative welfare judgments."³⁴ With this dismissal of the competence model, Mashaw has returned us to our journey's origin once again. We have tramped this landscape now three times, but never by quite the same path nor with the same innocence. Mashaw has instilled in us a deeper appreciation for the practical and theoretical obstacles to social welfare tradeoffs. But in the process, we have experienced the magnetic and irresistible tug of positivism that will doom to failure attempts ever to break entirely free of "social welfare talk."

In chapters 4 and 5, Mashaw begins to develop his answer to the Court's doctrinal confusion—the theory of "dignitary values." Here at last he offers us a beacon of hope. Though deeply skeptical of "natural rights talk,"³⁵ Mashaw is able to tease from our "liberal-democratic" traditions support for the notion that process has a value to the individual wholly apart from its capacity to produce correct outcomes. Once again, Mashaw's approach is iterative. After generating an intuitive list of "dignitary values," he tests his intuition against three branches of classical liberal philosophy—Lockean, Benthamite, and Kantian. A "rough hierarchy" of process values emerges from this exercise. The top tier includes three "fundamental" interests—equality, comprehensibility, and pri-

31. P. 115.

32. P. 113.

33. P. 152.

34. P. 152.

35. P. 169.

vacy—which “have strong claims to implementation via judicial review for constitutionality.”³⁶ A second tier consists of various “prudential or derivative values” such as “individualization, direct participation, accuracy, and the like,” that present only “prima facie constitutional claims for realization.”³⁷

After applying his taxonomy to several representative problems, Mashaw pronounces the dignitary methodology’s initial trial run a success. But doubts persist. His three fundamental values are not self-defining. Nor do they seem sufficiently robust to withstand attack from the encroaching welfare state without reinforcement from some “prudential” argument that requires courts somehow to balance a set of fuzzily-specified secondary values.³⁸ Implementation of a dignitary theory hardly seems assured.

As always, Mashaw awaits our emerging skepticism with an answer: “dignitary appropriateness.” This numbing linguistic hybrid is intended to connote the conjunction of Chapter 2’s analogical reasoning with Chapter 5’s liberal-democratic theory. The idea is to use liberal theory to construct a small set of prevalidated procedural models which courts can then use to resolve concrete disputes. Exhibiting his characteristic flair for constructing matrices,³⁹ Mashaw derives four models—negotiation, adjudication, administration, and majoritarian voting⁴⁰—from the cells of a two-by-two matrix. The horizontal dimension of the matrix distinguishes the two legitimate bases for exercising power in a liberal state (“consent” and “impersonal rules”). The vertical dimension distinguishes two “alternative positive conceptions of democratic social life” (“cooperation” and “conflict”).⁴¹

After more fully developing these four ideal types, Mashaw uses them in two ways: first, as a framework for identifying the central tensions in a wide range of contemporary doctrinal conundrums, and then as a guideline for resolving particular due process dilemmas. Yet, as Mashaw closes in upon his target, taxonomy in hand, earlier misgivings about judicial overreaching haunt him: “Judicial review identifying deviation from, or mixing of, ideal types as constitutional error would rapidly be perceived as a form of constitutional madness.”⁴² A court armed only with the methods of “appropriateness” and the values of classical liberalism threatens to

36. P. 204.

37. P. 204.

38. P. 200.

39. For other examples, see Mashaw, “Rights” in the Federal Administrative State, 92 YALE L.J. 1129 (1983); Mashaw, *Conflict and Compromise*, *supra* note 9.

40. Pp. 224–25.

41. P. 225.

42. P. 239.

“impos[e] on us some unified and simpleminded vision of a complex and compromised social reality.”⁴³ The formula is still radically incomplete.

The missing ingredient, of course, is proper judicial respect for the work-product of the political branches. Having so recently denounced the Court for falling into “positivist traps,” Mashaw’s renewed courting of positivism is understandably tentative: “[T]he Court need not wield these formal categories to second-guess legislative or administrative process choices. It can seek instead to understand what choice has been made and to ascertain whether that choice has been implemented in a reasonably coherent fashion.”⁴⁴ Thus, for example, where the state has “incoherently” mixed an openended substantive standard (individualized fault) with an administrative process (summary bureaucratic action), the Court should “remand[] to the legislature either to take out the fault standard or to put in an appropriate hearing process.”⁴⁵ The courts’ function, in other words, is not to supplant the legislative choice of decisionmaking structure, but to ensure its internal consistency with liberal values.

But Mashaw is not content to rest with even this cautious positivism. Concluding his book with three “cheerful sketches”⁴⁶ of contemporary administrative law, he gives a ringing affirmation of the extent to which liberal values have been incorporated into the positive law. In the statutory and common law rules governing participation in administrative policymaking, protection of welfare state entitlements, and mandatory use of general rules, Mashaw finds not “disparagement, frustration, or despair,” but “creativity, a responsiveness, and a capacity for complex experimentation.”⁴⁷ We have come, it seems, full circle: from the judicial “hubris” of constitutionalized social welfare accounting to the legislative, administrative, and even judicial creativity of an aggressive subconstitutional positivism. Despite a century of doctrinal fumbling, the revolution has perhaps been a success after all.

II. SUBSTANCE

As a “meaningful conversation about the appropriate modes of governmental action,”⁴⁸ *Due Process and the Administrative State* succeeds admirably. But, just as there is no procedure without substance, there is no conversation without a message. Mashaw’s gyrations are not aimless; they are anchored by discernible centripetal forces. The strongest of these is a

43. P. 240.

44. P. 242.

45. P. 243.

46. P. 255.

47. P. 255.

48. P. 244.

commitment to a liberal conception of the constitutional order. An individualistic construction of the due process clause accords with the libertarian impulse that he finds embodied in our Bill of Rights, political culture, and intellectual traditions. It is not as though Mashaw were insensitive to the allure of fraternalism. "Our fundamental demands are not for separateness, but for community,"⁴⁹ he concedes. But he would urge us to pursue those demands "through nonjudicial institutions of private and public ordering,"⁵⁰ not with the blunt and fragile instrument of constitutional interpretation.

Mashaw's decision to eschew pursuit of fraternal values presents no difficulties.⁵¹ Far more problematic, however, is his persistent ambivalence about the proper sources from which to derive his liberal jurisprudence. As is so often the case, Mashaw is his own best critic. "Which are we to be," he asks rhetorically at one point, "positive or natural lawyers? And, if the answer is some prudential combination of both, what could that mean?"⁵²

Which indeed? Mashaw is plainly unwilling to cast his lot entirely with either school. "General welfare simply will not do as a judicial measure of constitutional right,"⁵³ he declares while urging the Court to repudiate *Eldridge*. Yet, barely seventeen pages later, we find him agreeing with Bentham that "most natural rights talk is 'nonsense on stilts.'"⁵⁴ Mashaw seeks escape from this dilemma in a kind of contingent, contextualized natural law. The question he says, "is not what rights are natural to persons, but what rights persons must have to maintain a particular liberal-democratic polity."⁵⁵ Thus, the search for process values requires him to chart a middle course, between the pragmatism of the positive law and the dogmatism of "rights-talk,"⁵⁶ to the safe haven of enduring constitutional principle.

Like many such voyages, Mashaw's founders not on the reef of principle, but on the shoals of application. Stated in abstract terms, his taxon-

49. P. 216.

50. P. 218.

51. As Frank Michelman has argued:

[A] due process entitlement . . . cannot convey . . . the interpersonal meanings of revelation and participation, . . . because an 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.

Michelman, *supra* note 5, at 149 (emphasis in original).

52. P. 242.

53. P. 152.

54. P. 169.

55. P. 169.

56. See Perry, *Taking Neither Rights-Talk nor the "Critique of Rights" Too Seriously*, 62 TEX. L. REV. 1405 (1984).

omy of “dignitary values” is undeniably attractive.⁵⁷ Who, after all, would seriously contend that equality, rationality, and privacy are not necessary for the attainment of a liberal-democratic order? “[A]t its core,” Mashaw says of his theory, “it is noncontroversial.”⁵⁸ Fair enough, but the suspicion grows that he, like Roberto Unger’s natural rights theorist,⁵⁹ has avoided controversy only at the cost of triviality. Consider, for example, his analysis of *Roth*, one of the few decisions of the contemporary Court whose *result* he flatly repudiates. He begins by asking whether the Board of Regents, in refusing to renew Roth’s teaching contract, infringed any of his fundamental dignitary rights. Roth “has no very plausible *equality* claim,” Mashaw argues, because “[s]o far as we know, everyone on a term contract gets the same process—some form of evaluation and judgment.”⁶⁰ Mashaw had earlier defined “equality” in purely formal terms—as equal weighting of votes in popular elections, coupled with majority rule.⁶¹ In some unexplained manner, the “thin” equality of electoral participation has ripened into a more robust equality of “process” participation generally. Perhaps Mashaw has had second thoughts about the value of formal equality in a world of manifest social and economic inequality. Or perhaps he senses the increasing distance of electoral participation from the true centers of lawmaking power in the modern administrative state.

But as quickly as hope for a richer equality claim is kindled in Roth’s breast, it is extinguished. “So far as we know,” he was treated equitably. But how far is that? He was informed that his teaching contract would not be renewed, period.⁶² Without more—without an explanation or an interview or a hearing or *something*—how can we, or he, ever know *what* process was used or whether it bore any resemblance to the process used in similar cases? How, indeed, can we even know that the universe to which he should be compared is “everyone on a term contract”? We are back, it seems, to a purely formal—and empty⁶³—equality.

No matter, for Roth does have a good *rationality* claim, we are told. Since the president of his college gave him *no* reason for not renewing his contract, he has no basis for comprehending the action as serving any dis-

57. Indeed, I find his typology a considerable improvement over other comparable efforts, *see, e.g.*, Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978); Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537 (1983); Summers, *Evaluating and Improving Legal Processes—A Plea for “Process Values,”* 60 CORNELL L. REV. 1 (1974).

58. P. 220.

59. R. UNGER, *KNOWLEDGE AND POLITICS* 241 (1975).

60. P. 209.

61. P. 200.

62. *See Roth*, 408 U.S. 564, 568 (1972).

63. *See Westen, The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

cernible public purpose. He has been treated as an object, "a being for whom reasons are unimportant."⁶⁴ Keeping liberalism's promise of governmental rationality surely requires the state at least to tell those whom it injures the reasons for its action.

Yet, as Mashaw recognizes, our society relies on many public institutions that do not, and are not expected to, give reasons for their actions. He mentions legislative promulgation of statutes, draft lotteries, and jury verdicts.⁶⁵ He could have added executive pardons, most exercises of prosecutorial discretion, many grant and contract awards, or even the Supreme Court's denial of *certiorari*. "These are institutions," says Mashaw, "established to exercise discretion in the absence of, or outside of, revealed legal criteria. . . . [T]heir legitimacy lies instead in processes of selection or operation that support individual liberty and that render reason giving irrelevant."⁶⁶ If that is so, either comprehensibility is not a "fundamental value" or reason giving is not indispensable to making governmental action comprehensible.

In any event, we must decide why rationality requires reason giving in Roth's case, but not in these other contexts. Mashaw's only answer is this: "Presumably the college president has a reason."⁶⁷ But so, presumably, does a governor when she denies a pardon, or a jury when it awards a verdict. Yet death row prisoners and litigants in jury trials are *not* "entitled" to know what that reason is. Presumably, the distinction lies in the mysterious "processes of selection or operation" that legitimate those decisions. But Mashaw does not tell us what they are or why they do not apply with comparable force in Roth's case. Indeed, Mashaw finesses a perfectly plausible justification for unreasoned action uniquely available to Roth's president—consent. Roth accepted a teaching contract that was expressly limited to one academic year and cross-referenced a regulation declaring that "no reason for non-retention need be given."⁶⁸

The attentive reader will hear in this last argument an echo of the *Roth* Court's infamous entitlement trigger: Roth has been deprived of no "property" interest, because neither the statute, the board's regulations, nor his contract give him any legitimate expectation of renewal. For a subject that has bedeviled so many due process scholars,⁶⁹ the entitlement trigger re-

64. P. 209.

65. P. 210.

66. P. 210.

67. P. 210.

68. 408 U.S. at 566 n.1, 567 n.4.

69. See, e.g., Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977); Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry,* 71 CALIF. L. REV. 146 (1983); Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much,* 35 STAN. L. REV. 69 (1982); Terrell, "Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L.J. 861 (1982); Van Al-

ceives surprisingly short shrift from Mashaw. He dismisses it as merely an expedient, half-heartedly employed by the Court to avoid the pain of social welfare calculations.⁷⁰ But surely that will not do. There is, first, the problem of the constitutional text to be reckoned with: A claim to "due process" is expressly made contingent on a deprivation of "life, liberty, or property." It is not at all clear whether or how Mashaw's dignitary values map onto that constitutional language.

The problem does not disappear, moreover, merely by ignoring the text of the due process clause. Even "thin" comprehensibility requires some connection between the governmental action at issue and the person seeking to "comprehend" it. I am as bewildered by the regents' action as was Roth. Am I entitled to a statement of reasons or hearing? Surely not. My dignity was not offended by the regents' treatment of Roth. But the only way to distinguish between Roth's claim and mine is to have some theory of loss, or disappointment, or deprivation, call it what you will, that identifies the kinds of interests protected by due process. That theory must look either to the positive law or to some independent source of inspiration. If Mashaw would reject the former, he must spell out the latter. Yet his only answer—"substantial state involvement in our lives"⁷¹—merely rephrases the question.

Even if we overcome these objections, "There is still the question," Mashaw says, "of what counts as a reason"⁷² The answer, apparently, is anything that the president *says* is a reason—even "I don't like you." What good is such a "reason," you ask? It enables Roth to challenge the president's positive-law authority to act on the basis of personal preference, Mashaw replies. But if the positive law provides a remedy, constitutional protection is unnecessary. Roth can proceed directly to a state court to vindicate his statutory right. So long as Roth has a colorable statutory claim, the state court can compel the president to provide his reasons for the nonrenewal action.⁷³

Furthermore, a simple, unadorned explanation will rarely satisfy a claimant if he is not also given an opportunity to demand its further elaboration or to challenge its premises.⁷⁴ The moment we recognize the constitutional legitimacy of such demands, however, we are consigned to the

styne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

70. Pp. 145-51.

71. P. 199.

72. P. 210.

73. The federal courts certainly can and do. *See, e.g.*, *Dunlop v. Bachowski*, 421 U.S. 560 (1975); *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

74. *See* Pincoffs, *Due Process, Fraternity, and a Kantian Injunction*, in XVIII NOMOS: DUE PROCESS 172, 177-78 (J. Pennock & J. Chapman eds. 1977).

confusion of Mashaw's second tier, where more robust, but amorphous, values compete in a "prudential" balancing. "Accuracy" enters the picture here as the versatile handmaiden of both rationality and equality. So do additional values such as "individualization" and "participation." The problem is that we do not know how to manage these unruly visitors: "Prudential systems may balance and accommodate values in an *almost* infinite variety of ways."⁷⁵

Mashaw seeks refuge in the safety of subconstitutional balancing. Even if courts are no more adept at interest balancing carried on under the guise of statutory interpretation, at least their inevitable errors will be legislatively correctable. That is only a partial escape, however, because Mashaw is not willing to deconstitutionalize all claims for "thicker" rationality, as his discussion of *Goldberg* makes clear.⁷⁶ Yet, when he tries to show us how a court might conduct such a constitutionalized balancing,⁷⁷ it looks for all the world like a back-of-the-envelope version of the discredited *Eldridge* calculus. Mashaw may succeed in expunging *Eldridge's* "pseudoscientific" pretenses, but he merely buries its intractable problems of valuation and prediction under a blanket of "rough judgment."⁷⁸

Mashaw's "translation" of Chapter 5's taxonomy of values into Chapter 6's taxonomy of procedural models alleviates some of these problems, but only at the expense of creating others. Part of the difficulty lies in the models' derivation. By some strange alchemy, Mashaw has transformed equality, comprehensibility, and privacy into "consent" and "impersonality." He leaves the precise reach of each concept highly uncertain. "Impersonality" sometimes refers to the rules of decision, sometimes to the process of decision. "Consent" encompasses both "actual agreement to a decision"⁷⁹ and imputed agreement with the results of some hypothetical "metasocial bargaining."⁸⁰ The resulting confusion may explain how, on the very same page, Mashaw is able to characterize adjudication and voting as *both* consensual and impersonal.⁸¹

My principal objection to Mashaw's four models, however, is not their derivation or specification, but their use. Which model governs Roth's case, for example? There are two that seem to fit, and two that do not. "Bargaining" looks like an attractive candidate because Roth agreed with the Board of Regents to exchange his labor for a period of one academic

75. P. 204 (emphasis in original).

76. P. 214.

77. Pp. 207, 211.

78. P. 219.

79. Pp. 224-25.

80. P. 226.

81. Compare pp. 224-25 (carryover paragraph) with p. 225 (Table 1).

year, renewable solely at the will of the regents, in return for a stated salary and other benefits. The voting model also seems to apply, since the regulation leaving renewal to the sole discretion of the regents was promulgated pursuant to a statute adopted by a popularly elected state legislature.

Roth's treatment cannot, however, be legitimated as a proper exercise of either adjudication or administration. If one sees Roth's dispute with the regents as a conflict of *values*, he was denied the equality of access to a neutral decisionmaker required by the adjudicative model. If one sees his disagreement with the bureaucracy as purely *factual*, on the other hand, Roth was denied the protection of precise general rules which is the precondition for administrative legitimacy.

How, then, do we use Mashaw's models to solve Roth's puzzle? Should the Court choose a model? No, says Mashaw. It should defer to the legislature's choice and merely insist that the choice be "reasonably coherent." If the legislature intended nonrenewal of teaching contracts to be governed by adjudicative or administrative procedures, it botched the job. Roth wins. But if the legislature meant to treat renewals as a matter for bargaining or voting, Roth's claim fails. By selecting a pretested model from Mashaw's showroom, the legislature has given Roth all the process that is "due."

Mashaw is quick to point out the objections to his solution. First, it merely sweeps the constitutional uncertainties under the rug of statutory interpretation. Since legislatures do not customarily speak in Mashaw-talk, how are we to know which "choice" they meant to make? Mashaw's answer is depressingly uninformative: "There is no correct story [interpretation], or there are many. The Court, with the parties' assistance, will ultimately construct an approved version On the way to that construction, the Court can establish a meaningful conversation about the appropriate modes of governmental action."⁸² The medium ("conversation"), it would seem, *is* the message.

Second, we are right back in the clutches of the positivist trap. Yes, concedes Mashaw, but "this is a positivist trap that holds the Court in precisely the right grip. To escape, the judge must assert that there is a constitutional value beyond legislative will that justifies judicial intervention."⁸³ But the only examples of such values that he can muster are those embodied in the prohibition on bills of attainder and the deeply problematic "privacy" interests vindicated in *Griswold*⁸⁴ and *Wade*.⁸⁵ Mashaw's

82. P. 244.

83. P. 245.

84. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

85. *Roe v. Wade*, 410 U.S. 113 (1973).

models of legitimate governmental action *themselves* provide no such values, precisely because one of those models is "majoritarian voting" and because his typology contains *no* criteria for preferring one model to another. "Dignitary appropriateness" is, in the end, subject to precisely the same criticism that Mashaw leveled at the "competence" model: "[T]here is no principle here that can be defended against majoritarian desire."⁸⁶

III. THE POSITIVIST TRAP

There is a lesson in all this. If Jerry Mashaw, despite the extraordinary subtlety and richness of his mind, cannot exorcise the ghost of positivism, perhaps it cannot be done. There are, of course, other escapes that might be tried. The substantive aspect of the due process clause might become the font for a full set of judicially elaborated entitlements (constitutional "property" and "liberty" interests) that are then protected from arbitrary alienation by the procedural aspect of the clause.⁸⁷ But the utterance of two words—*Lochner*⁸⁸ and *Wade*⁸⁹—is usually enough to stop this idea in its tracks.⁹⁰ Even a much thinner set of substantive entitlements (including, for example, ownership of one's labor or freedom from bodily restraint) will be hard to confine or even to justify except by a rather questionable and arbitrary historicism.⁹¹

A more promising escape route may lie through the territory of "legislative failure."⁹² Courts should step in to protect those (and only those) procedural claims systematically undervalued by the political branches. At one point, Mashaw himself hints at such a theory as a way to justify the more robust constitutionalism of *Goldberg*. The theory would premise a "special doctrine applicable to income support" on the "peculiarly precarious positions" of welfare recipients as a group.⁹³ But it will take more than "precariousness" to construct a convincing political-failure theory of procedural due process. To paraphrase Frank Easterbrook, if we trust the political process, warts and all, to allocate *substantive* entitlements, why

86. P. 153.

87. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 15-1 to 15-21 (1978); Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261.

88. *Lochner v. New York*, 198 U.S. 45 (1905).

89. *Roe v. Wade*, 410 U.S. 113 (1973).

90. See, e.g., Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

91. See, e.g., Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85; Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044 (1984); Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3 (1983).

92. See, e.g., Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10 (1979); Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TULANE L. REV. 849, 874 (1980).

93. P. 214.

do we not also trust it to assign appropriate procedures for their protection?⁹⁴ The extent of procedural protection afforded is, after all, just another way of determining the value of the benefit.

A theory of political failure must explain not why legislatures systematically underprotect certain *groups* (such as welfare recipients), but why they undervalue certain kinds of interests (protection against arbitrariness). One possible answer may be that discretion facilitates impermissible discrimination against a disfavored subgroup (for example, blacks) within the larger benefited group. Rather than visibly discriminate against the subgroup (by fiddling with eligibility criteria), the legislature bestows upon its bureaucratic agents the *de facto* power to do its dirty work. A constitutional requirement of procedural regularity (and substantive clarity) may be the price we must pay to discourage such tactics and, thereby, to honor the commitment made in the equal protection clause.

A different version of the political failure approach might focus on the role played by an assumed bureaucratic preference for broad discretion. To the extent that agencies can influence legislative outcomes, they will skew the resulting legislation in a direction offering less protection against arbitrary administration than the beneficiary group or the public at large would prefer.

Taken together, these two theories might suggest that courts should be especially alert to provide due process protections to the objects of society's most paternalistic gestures, such as welfare families, the mentally ill, and prisoners. These groups are never politically strong enough by themselves to obtain legislative benefits without considerable assistance. One of their most powerful political allies is usually the bureaucracy that will administer the program. The price of that support may often be considerable administrative discretion, rationalized as the latitude necessary for exercise of "professional" judgment. Likewise, these groups will often contain many members of subgroups who are the objects of quite ignoble legislative sentiments. An impulse to nurture mingles, often in the same breast, with a desire to punish. That combination can easily express itself as a promise of generous assistance coupled with exposure to individualized tyranny.

There is a passage late in his essay suggesting that Mashaw glimpsed the possibility of a special role for due process in the operation of paternalistic programs.⁹⁵ But, like so many tantalizing insights of his restless mind, its full development awaits another day. In the meantime we must apparently be content with the inescapability of the positivist trap. As a

94. Easterbrook, *supra* note 91, at 110-11.

95. Pp. 249-51.

constitutional doctrine, procedural due process has perhaps lost its “regulative” bite. It is no longer needed to settle many disputes because ours is not the procedureless regime of Kafka’s *Trial*; ours is a society “overflowing” with process.⁹⁶ What remains for procedural due process is the “symbolic” role of “[s]tructuring the constitutional argument in the right way.”⁹⁷ No matter that Mashaw’s argument does not *conclude* so much as merely *end*. For he has shown us how to carry on the dangling conversation.

96. Easterbrook, *supra* note 91, at 117.

97. P. 247.