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Economic Analysis of Liberty and Property: A Critique

Peter N. Simon
University of Colorado Law School

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In a widely noted series of cases beginning in 1970, the Supreme Court had dealt with the question of the extent to which the denial of governmental benefits constitutes a deprivation of "life, liberty or property" within the contemplation of the due process clauses of the Constitution. In *Board of Regents v. Roth*[1] and *Perry v. Sinderman*[2], companion cases decided in 1972, the Court adopted an approach to this problem generally referred to as the "entitlements" approach. Under this analysis, those benefits whose disbursement turns upon the discretion of an administrator are not viewed as property, and are therefore not subjected to the procedural requirements of the due process clauses; those benefits which turn upon the existence *vel non* of specified factual criteria, however, are viewed as "property," and must therefore not be denied without the benefits of such procedural safeguards as might be required by the due process clauses.

In his article *Liberty and Property: The Problem of Government Benefits*,[3] Professor Stephen Williams advanced an original and provocative alternative to the Supreme Court's "entitlements" approach. His article raised cogent criticisms of the prevailing Supreme Court approach,[4] and of the two other approaches which have substantial judicial and academic support.[5] In lieu of these approaches, Professor Williams proposed an economic model to perform the difficult task of identifying those governmental benefits which ought to be protected by the due process clauses.

Professor Williams starts with the constitutional text. According

1. 408 U.S. 564 (1972).

2. 408 U.S. 593 (1972).

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

4. Williams, *supra* note 3, at 4-14. I defend the Court's current approach in an article published, by coincidence, in the same month as Professor Williams'. *See* Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146 (1983).

5. Williams, *supra* note 3, at 14-19 (criticizing the "important interests" approach of Goldberg v. Kelly, 397 U.S. 254 (1970), and an approach best referred to as "liberty as freedom from arbitrary adjudicative procedures"). The latter approach was proposed by Professor William Van Alstyne in his article, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977); Professor Van Alstyne's approach was subsequently adopted by the California Supreme Court, in its interpretation of the California State Constitution's due process clause. *See* People v. Ramirez, 25 Cal. 3d 260, 599 P.2d 622, 158 Cal. Rptr. 316 (1979).

to his research, the fifth amendment's due process clause was originally intended to protect against procedurally deficient deprivation of life, liberty or property in criminal proceedings, brought about by means of execution, incarceration or forfeitures.[6] The evidence concerning the meaning of the fourteenth amendment's due process clause is not so clear as the evidence of the fifth amendment's due process clause; on balance, however, the evidence suggests that the fourteenth amendment's due process clause also was intended to deal only with governmental actions associated with criminal trials.[7]

Today's due process clauses, of course, could hardly be squeezed back into their historical molds. As Professor Williams observes, the first major expansion of these provisions came during the period between 1897 and 1925. By the end of that period, the Supreme Court had read the clauses "to protect the various forms of what Isaiah Berlin has called negative liberty, or freedom from governmental restraints."[8] The Court had not read the clauses as entitling individuals to affirmative benefits from the government, but it had read the clauses as protecting substantial areas of individual activities against undue government control. Further, the Court had been willing to extend due process beyond the originally contemplated context of criminal proceedings.

The second great step in the expansion of due process clauses, according to Professor Williams, has come since 1970. In the series of cases beginning with *Goldberg v. Kelly*,[9] the Court has read the due process clauses as requiring the government to provide certain affirmative benefits — an extension from the protection of "negative liberties" to the protection of "positive liberties."

Isaiah Berlin's distinction between negative liberties and positive liberties is central to Professor Williams' article. "Negative liberty" is the right to be free from governmental interference. "Positive liberty," as the term is used in Professor Willams' article, is the right to demand certain rights, privileges or things from the government. Examples of the former are the rights to labor, pray and speak as one chooses; examples of the latter (at least at first glance) are the right to attend government schools, the right to use the government's roads, and the right to receive welfare payments, governmental jobs, and government contracts.

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6. Williams, *supra* note 3, at 20. Professor Williams examines the textual evidence in detail in Williams, *"Liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers' Intentions*, 53 U. COLO. L. REV. 117 (1981).

7. Williams, *supra* note 3, at 20.

8. *Id.*

9. 397 U.S. 254 (1970). *See supra* notes 1, 2 and accompanying text.

In Professor Williams' view, the enlargement of the due process clause from protection against arbitrary execution, incarceration and forfeitures, to protection of negative liberties in general, though a significant expansion, was "consistent with the original constitutional framework of limited government and individual liberties."[10] In his opinion, however, the later developments go far beyond any reasonable connection with either the text or the purpose of the due process clauses.[11] Accordingly, his analysis would limit application of due process review to cases involving interests of life, conventional property, and negative liberty.[12]

Discerning which governmental actions impinge upon negative liberties, however, is a much more subtle task than at first it might seem. The all-pervasive nature of government activities today means that an administrative action which appears merely to terminate an affirmative benefit might really constitute an interference with negative liberty. For example, because of the prevalence of government education and government roads, a rule which excluded an individual from using government schools or government roads would have an effect very similar to the interference with negative liberties which Professor Williams is willing to read into the framers' intentions. Accordingly, if the due process clauses are to protect only negative liberties, a test must be devised to identify those government benefits whose deprivation will constitute a denial of negative liberty.

Professor Williams looks, for his definition of negative liberty, to the world as it existed at an earlier time. If, in that world, the private market would have provided a particular benefit, and if governmental activity since that time has significantly lessened the availability of that benefit from the private market, then government activity has interfered with the individual's freedom to obtain the benefit on his own.[13] In effect, his negative liberty to compete for that benefit has been replaced by the opportunity of obtaining that benefit from the government. If an administrator terminates his access to the benefit, that termination should be viewed as involving either the liberty or property protected by the due process clauses.

Professor Williams describes two ways in which government activity may lessen the availability of benefits from private sources — by foreclosing those private sources (for example, by its regulation or taxation of the field), or by forcing "the claimant, if he is to use a private

10. Williams, *supra* note 3, at 20.

11. *Id.* at 20-21.

12. *Id.* at 21.

13. *Id.* at 21-23.

market substitute, in effect to pay twice for the same good."[14] If either of these has happened, then the government's dispensation of the benefit ought to conform to the procedural requirements of the due process clauses.

A brief example should make his proposal clear. Primary education exemplifies both forms of government activity. First, the government's use of taxation, plus its massive subsidy of public primary education, frequently "makes it economically impossible for a private grade school to complete successfully."[15] The effect has been a substantial narrowing (though not an absolute elimination) of the private market alternatives to public education at the primary level. Second, the substantial sums raised by property taxes earmarked for public education leads to at least the tentative conclusion that most individuals pay every year for public education, whether or not they or their children make use of it.[16] An individual who then chooses to send his child to a private school will have to pay twice, once for the public education which he has chosen not to use, and once for the private tuition at the school he has actually chosen. Forcing the individual to pay for public education, whether or not he uses it, significantly reduces his ability to use private alternatives; therefore, his access to public education ought to be protected by the due process clauses.

At the outset, Professor Williams should saluted for his proposal. It is unique. It is original. Above all, it emphasizes that which ought to be emphasized — constitutional rules should relate, as closely as possible, to the intentions actually expressed in the Constitution itself.[17] The question remains, however, whether his proposal is so much more useful than the entitlement analysis adopted by the Court in *Roth*, that the consistent practice of the post-*Roth* cases ought to be rejected in its favor.

In short, Professor Williams proposes that a benefit is "property" when the state has substantially precluded private market alternatives that would otherwise have existed.[18] This proposal has five substantial

14. *Id.* at 22.

15. *Id.* at 23.

16. As discussed by Professor Williams, the fact that a particular percentage of the usual real property taxes is "earmarked" for the public school system is not quite the same as forcing the taxpayer to pay for the school system. *See id.* at 24-27. But it is close enough to justify treating it as a direct forced payment to the school system, particularly in view of the fact that taxpayers are asked to view the tax as a direct payment to the school system. *See id.* at 25.

17. The article is to be appreciated, too, for reminding us of the difference between the government as regulator and the government as a proprietary enterprise. This distinction seems blurred by the Court, which has failed to distinguish cases involving occupational licensing from cases involving government employment. *See id.* at 31-34.

18. *See id.* at 22. *See supra* note 14 and accompanying text. My focus will be on government

disadvantages. First, it asks that serious litigation turn upon the answer to a question which is simply unanswerable. Second, though it starts with the text of the Constitution, it ends up as little more than an effort to constitutionalize free market economic analysis. Third, it ignores *Roth*'s great virtue: the protection of administrative discretion.[19] Fourth, it would have a certain "hit-or-miss" capriciousness in the interests protected; important interests would be unprotected, while less important interests would be protected. Finally, it gives meanings to "liberty" and "property" which seem unrelated to any natural or common meaning given those terms.

The first and most serious problem with Professor Williams' proposal is that it is unmanageable. Whether the protections of the due process clauses will extend to a particular government-provided benefit under his analysis seems to turn upon whether that benefit would have been available from the private market in the absence of the large increase in governmental activity over the past century; in other words, the question turns upon speculation about the hypothetical availability of a market if our country were being run with a nineteenth century government in a twentieth century world. One is reminded of Judge Friendly's comment, in a famous *renvoi* case, that "[o]ur principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought."[20] As arcane as that question might have been, Professor Williams' question would be even more so.

The problem with Professor Williams' inquiry is not that it calls for fine line-drawing, but that it is by its very nature unanswerable. There is simply no means, other than pure speculation, for a judge to answer the following question: would this benefit have been available from the private market today if the government had not grown so large? As a natural result of the speculation called for by this question, most benefits could be analyzed in a number of different ways, some leading to one conclusion and some to the other. Professor Williams himself gives the example of law teachers, who could be considered either teachers, in which case their employment might be "property," or lawyers, in which case their employment probably

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foreclosure of the private market alternative. The "pay twice" aspect of Professor Williams' analysis can be viewed as a subcategory of government foreclosure — by charging for a particular service, whether or not one chooses to use it, the government forecloses the private market alternative from those consumers who are either unwilling or unable to pay twice for the same benefit.

19. *See* Simon, *supra* note 4, *passim*.

20. Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960).

would not be considered "property."[21] Policemen could be considered as eligible for police work, which is government dominated, or as security employees, for which there still remains a substantial private market.[22] As a general matter, it would seem that the answer would almost always turn upon the level of generality with which the question was asked — even the President could be viewed as either the Commander-in-Chief, or simply a managerial executive. The only limits on the judge deciding the case would seem to be his imagination and his mood — hardly a recommendation for a system of law.

There is an additional, related problem. In addition to being, at bottom, an imponderable question, the inquiry called for by Professor Williams' article is one which, if it were answerable, would be answerable only by economists. Even an economist would ultimately rely on his biases to answer the question posed by Professor Williams' proposal. An attorney not fortunate enough to have great sophistication in the science of economics would hardly know where to begin, were he asked whether the benefit at issue would have been available from the private market had government remained at its nineteenth century proportions.

To put the matter in context, imagine that you are in the county attorney's office, and have been asked to advise the responsible county official whether a hearing is required prior to the termination of individual benefits under a particular county home relief program. What advice would you give, if the ultimate outcome of litigation were to turn on the following analysis?

> It seems virtually certain that government provision of welfare has entailed a degree of preclusion of the private charitable market. The demand for private welfare services arises out of private individuals' readiness to pay for the provision of relief to the needy. With government supply obviously meeting a portion of this demand, the private supply is presumably less than it would be in the absence of government intervention. *How much less is an empirical issue, requiring information on the relief contributions of the private and public sectors and, in principle at least, some basis for projecting the amount of private relief that would have been available in the absence of government action.*[23]

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21. Williams, *supra* note 3, at 30. Professor Williams seems to conclude that even if a government job would otherwise qualify as "property" under his proposal, the fact that the individual could have chosen an entirely different career and thereby avoided government employment should preclude his due process claim. But his discussion of law teachers and his discussion of policemen demonstrate an underlying, broad problem with his analysis — its indeterminacy.

22. *Id.*

23. *Id.* at 36-37 (emphasis added).

Professor Williams anticipates this criticism, by suggesting that courts develop rules of thumb: "For example, it might suffice to find present government control of, say, more than 50 percent of the market relevant to the specific program."[24] One shudders to contemplate the situation as we await the judicial development of these rules of thumb. Then, assuming that the courts could agree within a finite period of time, or that the Supreme Court might settle the issue sometime within the next two decades, just what would we have? A rule which says that where the particular government (or all governments, taken as a group — if that is what the "rule of thumb" calls for) provides half the type of relief in question, the due process clauses control, but not elsewhere. This would seem to have only the loosest association with the question of whether, if there were less government, this particular benefit would be so much more readily available from the private sector that the government should be subjected to constitutional controls in its dispensation of the benefit. Indeed, much of the welfare provided by the government is so different from that which has traditionally been available from private sources, that this rule would have a perverse effect. With regard to those benefits which were unlikely to be developed as private sources, the government will ordinarily be the primary source, and will therefore be more likely to be subjected to constitutional scrutiny, although it is acting in an area in which it has not narrowed private market alternatives. For example, umemployment insurance (as opposed to disability insurance) is provided largely, if not exclusively, by government. Under Professor Williams' rule of thumb, these benefits would constitute "property," even though they have not displaced private alternatives. Professor Williams' main claim for his proposal, its consistency with the due process clauses' implicit purpose of protecting negative liberties, seems largely to be lost when it is tranlated into his proposed "fifty percent" rule of thumb.

There is one other wrinkle to the manageability problem, which is suggested by Professor Williams' discusison of primary education. He suggests that not only must we determine whether, in the absence of governmental expansion, the private market would have provided the particular benefit in question, but we must then determine the level of procedures which would have been provided by those hypothetical private alternatives.[25]

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24. *Id.* at 37.

25. Professor Williams suggests that this question might be answered by reference to "[v]estigial private alternatives," which "might provide evidence as to what procedures were reasonable." *See id.* at 24.

In all the educational examples, the nature of the private alternative foreclosed is in some degree a matter of speculation: perhaps the private schools which would have existed would all have reserved the right to expel or suspend a student with little or no "process."[26] Under this proposal, then, the constitutionality of an administrator's actions would turn upon a judge's (or a jury's) guess about what private market alternatives would have been available, and the judge's (or jury's) guess about what level of procedural protection would have been provided by such private market alternatives as would have been available. It is hard to imagine what sort of advice one could give to an administrator, when the legality of his actions will ultimately turn upon the answer to such a question.

The second problem with the proposal, almost as serious as the first, is philosophical. The constitutional language in question, of course, protects against the deprivation of "life, liberty, or property, without due process of law." Professor Williams would read this as protecting only "the interests entitled to due process protection as of 1925 — life, negative liberty, and conventional property."[27] He then further translates this into a formula which imposes due process protections upon the government only when it has substantially interfered with the private market. Underlying all of this, there seems to be the assumption that if the matter had all been left to the private market, it would have worked itself out to the right conclusion. Therefore, what the judges and justices must do — what the Constitution *requires* them to do — is guess at how the private market would have worked out each of these particular problems, had the government's expansion not interfered with the private market's development. Even if such an approach could be made to work, it would be inappropriate for the Supreme Court to adopt it.

Generations of constitutional law students have grown up with Justice Holmes' aphorism, in his *Lochner* dissent, that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[28] Professor Williams' proposal seems based, ultimately, on the view that the fifth and fourteenth amendments *did* enact the framers' (and Professor Williams') *laissez faire* economic philosophy. I am sympathetic to Professor Williams' desire that the Supreme Court return to those economic philosophies which prevailed when the Constitution itself was adopted. I do not believe, however, that the Court is about to enact that economic philosophy, or any economic philoso-

26. *Id.*

27. *Id.* at 21.

28. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

phy, into constitutional law; nor, on balance, do I believe that it should. Economic orthodoxy is fine when it can be countered by the rough and tumble of the political process, but orthodoxy of any sort is dangerous when it infects the all-powerful Supreme Court.

The third problem with Professor Williams' approach is that it affords insufficient protection to administrative discretion. Theoretically, it would seem possible for a court to hold that administrative action deprives an individual of liberty or property, and is therefore subject to the procedural requirements of the due process clauses, and at the same time also hold that adminstrative discretion is so important to the particular decision that no judicially reviewable procedural requirements will be imposed by the courts. As a practical matter, however, this has not happened, and is not likely to happen. Rather, the tendency has been to impose what is viewed as a minimal requirement upon the administrator — the requirement that he or she provide the disappointed individual with a statement of reasons. But, in order for this requirement to have any teeth whatsoever, judicial review must be available to guarantee the substantive acceptability of the reasons given, to guarantee that the reasons given the deprived individual were in fact the reasons relied upon by the administrator, to guarantee that there was some basis in fact for the administrator's conclusions, and to make certain that the administrator did not in some manner interfere with the individual's opportunity to respond to the reasons specified by the administrator.[29] Without such review, an administrator could make a farce of a "reasons" requirement.[30] In short, a simple reasons requirement doesn't accomplish much unless it is judicially enforced, and the consequences of judicial enforcement of a reasons requirement, ultimately, will be judicialization of the formerly discretionary administrative decision. Therefore, as a practical matter, the determination that an administrative decision implicates the due process clause bodes ill for the survival of the administrator's discretion in future decisions affecting the same interest. *Roth*'s definition of property as an expectation to which the individual is "entitled," as opposed to expectations which turn upon an administrator's discretion, provides a nicely tailored protection of administrative

29. *See* Gouge v. Joint School Dist. No. 1, 310 F. Supp. 984, 991 (W.D. Wis. 1970).

30. Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 84 (1976):

> If the requirement of a rational explanation is to have meaning it must be based on more than an unenforceable obligation to supply reasons. Without some form of judicial review, the individual would remain vulnerable to irrevocable changes in status unsupported by an adequate explanation since the reasons requirement could be ignored with impunity.

See also Simon, *supra* note 4, at 158-163.

discretion.[31]

Professor Williams' approach would provide no such protection. For example, he concludes that primary and secondary education are areas in which government coercion has driven out significant private market alternatives to the government's product.[32] Accordingly, students would have a "property" in their public education, and by implication (at least arguably) teachers would have a "property" in their public school employment.[33] The consequence of Professor Williams' test would appear to be that every single decision affecting either students or teachers would be subject to the due process clause. Of course, this does not mean that an adversay hearing would be required as to every decision; that would turn on the determination of the question, "what process is due?" But the inevitable tendency of such an approach would be judicialization of the school house.[34]

The fourth problem with Professor Williams' proposal is the capricious fashion in which it singles out interests to be protected. While the theory behind it seems logical, in practice it would seem to have a certain "hit-or-miss" quality. For example, a policeman might not have a property interest in his job, but a fireman probably would; an applicant for a one-day elementary school substitute teaching job would have a property interest in his or her hope of being hired, but a tenured law professor might not.[35] The fact that this approach protects unimportant expectations and does not protect important ones, and the fact that it ignores the important policies protected by *Roth*, would not be fatal defects if the scheme were, in fact, that which the constitutional draftsmen comtemplated. But the historical link between the proposal and the draftsmen's intentions seems altogether too attenuated to support its otherwise capricious results.

Finally, while Professor Williams' proposal is interesting and provocative, it has no resemblance to any popular or technical use of the term "property" currently in use. One of the real advantages of *Roth*'s definition of property is that it is consistent with the widely held un-

31. This is the gist of my defense of *Roth*. *See* Simon, *supra* note 4, at 163-66. Perhaps the closest judicial expression of this rationale is Justice White's, in his opinion for the Court in Meachum v. Fano, 427 U.S. 215 (1976).

32. Williams, *supra* note 3, at 21-27.

33. *But see supra* note 21.

34. *See supra* note 31 and accompanying text. Professor Williams is sensitive to this concern, and would apparently deal with it by urging judges to show "a great deal of deference to legislative or administrative judgment about appropriate procedures." Williams, *supra* note 3, at 27. The courts, however, have not been highly responsive to similar urgings in the past. *See* Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978). *See also* Wilkinson, Goss v. Lopez: *The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25.

35. *See supra* note 21 and accompanying text.

derstanding that property consists of expectations which one can insist upon, not those which turn upon the discretion of another.[36] The notion that "property" constitutes the opportunity to compete for those benefits which would have been available from the private market "but for" the growth of government, is hardly a familiar, convenient, or manageable use of the term.

The Supreme Court adopted its "entitlement" analysis thirteen years ago. Since that time, it has shown a great deal more consistency in this area that in most other fields of constitutional law. Not only is it an approach which works, but it serves important institutional interests. All this should create a substantial presumption against alternative proposals. Though his analysis is useful, and his suggestions at the very least are provocative, Professor Williams has not rebutted the presumption.

36. *See* Jackson v. Housel, 17 Johns. 280, 283 (N.Y. Sup. Ct. 1820) ("Property is defined to be. . .that right which one hath to lands or tenements, goods or chattels, which no way depend on another man's courtesy.") *See also* Simon, *supra* note 4, at 171-72.