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LAW REVIEW ARTICLES THAT BACKFIRE

Gerald L. Neuman*

Other articles in this Symposium have chronicled the real-world triumphs of legal scholarship. I have sadder tales to tell. I would like to discuss law review articles that have had an apparent influence on the course of legal development, but not in the manner that the author intended.

Many of the readers of this Symposium may have their favorite examples of this phenomenon.¹ Such misfortunes can befall anyone; both of the instances I will describe involve a highly respected constitutional scholar, Professor Henry Paul Monaghan of Columbia Law School. They illustrate two mechanisms by which good scholarship can lead to bad law. In the first instance, one of Professor Monaghan's proposed reinterpretations of a troubling Supreme Court decision inspired an even more troubling line of cases. In the second, the Supreme Court adopted a theoretical approach that Monaghan had advocated, but in an oversimplified form that yielded results far different from those he recommended.

I. FIRST CAUTIONARY TALE: FROM PAUL TO PARRATT

Of "Liberty" and "Property"² is Monaghan's midterm evaluation of the Burger Court's sacrifice of traditional constitutional understandings in order to cut back on the section 1983 litiga-

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This article is dedicated to Drucilla Cornell. I also owe thanks for helpful comments and suggestions to a number of other colleagues, especially Stephen Burbank, Michael Fitts, Frank Goodman, Seth Kreimer, Charles Mooney, Susan Sturm, Clyde Summers, and Alan Watson. And I would never get anything done without the help of Mrs. Margaret Ulrich.

1. The example most commonly suggested by my colleagues is the collected writings of Judge Robert Bork.

tion explosion. The portion of this article of interest to us here is Part I on “Liberty,” Monaghan’s shocked response to Justice Rehnquist’s expulsion of reputation from the sphere of constitutionally protected liberty in Paul v. Davis.

Davis was a news photographer allegedly defamed by unjustified inclusion in a police chief’s broadside identifying “active shoplifters.” He sued under section 1983 instead of bringing a state law defamation action. In his opinion for the Court disposing of this claim, Justice Rehnquist expressed fear that permitting the section 1983 action to proceed would make every tort committed by the state a constitutional violation. One of Justice Rehnquist’s techniques for avoiding this result was to hold that the defamation did not result in a deprivation of life, liberty, or property without due process of law because the reputational interest standing alone was not a form of liberty or property protected by the due process clause. Monaghan, like other scholars, was disturbed by two related aspects of Paul v. Davis: the dismissal of the deeply grounded common-law interest in security of reputation from the purview of the due process clause and Justice Rehnquist’s relentless distortion of precedents that stood in the way of his analysis.

In Of “Liberty” and “Property,” Monaghan urged that Paul v. Davis be sharply limited, or even overruled, a step he did not lightly recommend. Justice Rehnquist’s analysis was too inconsistent with traditional and appropriate constitutional understandings. Less brutal methods could keep the floodgates closed.


4. Monaghan, supra note 2, at 411-34.


7. Monaghan, supra note 2, at 423-29. Monaghan’s indignation was unmistakable: “The Court’s re-rationalization of the earlier cases is wholly startling to anyone familiar with those precedents. In many ways I find this aspect Paul’s most disturbing. Fair treatment by the Court of its own precedents is an indispensable condition of judicial legitimacy.” Id. at 424.

8. Id. at 432.
For starters, the Court might have narrowed the range of section 1983 litigation by reading section 1983 less broadly than the Constitution. But even if the Court insisted on tampering with the due process clause rather than with the statute, it did not need to deny that "liberty" includes reputation. Monaghan identified three points at which Davis's claim that the state had deprived him of liberty without due process of law could have been attacked.

The first was Justice Rehnquist's chosen target: the forms of liberty protected by the due process clause could be restricted. Monaghan found this retrenchment inconsistent with a long tradition of viewing fourteenth amendment liberty as "an idea embracing all the interests in personal security (including freedom from defamation), which had been protected from private interference by the common-law courts." He further found this approach "wholly at odds with our ethical, political, and constitutional assumption[s] about the worth of each individual."

Second, Monaghan observed that the police chief's circulation of the flyer might not have deprived Davis of reputation. The fourteenth amendment protects against abuse of government power. But not every government action that invades a liberty or property interest necessarily rises to the level of a "deprivation." Monaghan noted, for example, that "ordinarily, negligent conduct by the state would implicate liberty or property interests but would not . . . constitute a deprivation of these interests." This was the solution Monaghan advocated. It left him unimpressed with Justice Rehnquist's expressed fear that recognizing reputation as liberty would make every defamation a constitutional violation and would convert the fourteenth amendment into "a font of tort law to be superimposed upon whatever systems may already be administered by the States." Indeed, a decade later, after initially holding to the contrary, the Court per Justice Rehnquist adopted precisely this solution in Daniels v. Williams and Davidson v. Cannon. Justice Rehnquist did

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9. *Id.* at 429-30. This would, however, require overruling a long line of cases beginning with Monroe v. Pape, 365 U.S. 167 (1961), holding that civil actions may be brought under § 1983 for all fourteenth amendment violations, regardless of the existence of state remedies.
10. *Id.* at 423.
11. *Id.* at 427.
12. *Id.* at 428.
not, however, credit Of “Liberty” and “Property.” One can only speculate as to how much influence Monaghan’s article had in this respect.

Of more immediate importance was a third point of attack that Monaghan identified in passing.\(^\text{16}\) Even if Davis had been deprived of liberty, the deprivation might not have been \textit{without due process of law}. Davis’s claim rested on the due process explosion and its “much criticized insistence upon adversary proceedings, absent exigent circumstances, \textit{before} governmental actions adversely affecting individual interests occur.”\(^\text{17}\) The Court could have concluded that Davis had been afforded due process of law because the police department’s ex parte “procedures” and the availability of a subsequent tort action for defamation provided sufficient protection. Moreover, said Monaghan:

[P]rior hearings might well be dispensed with in many circumstances in which the state’s conduct, if not adequately justified, would constitute a common-law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff, and this procedural consequence would be quite harmonious with the substantive view that the fourteenth amendment encompasses the same liberties as those protected by the common law.\(^\text{18}\)

This is the passage whose influence I shall trace. In its context (an important qualification), it addresses the \textit{timing} of a due process hearing and suggests that a common-law tort action may often provide a sufficient, though later, vehicle for assessing the justifiability of the state’s interference with the plaintiff’s property or liberty interest. The ambiguous, aesthetic observation about the “harmoniousness” of this approach does not imply that the common-law remedy is by definition the only constitutionally required “process” for an interest with a common-law pedigree. Monaghan also made clear that his proposal extended only to procedural, and not to substantive, due process.\(^\text{19}\)

Monaghan took no notice of a fourth point of attack: that Davis might not have been deprived of liberty \textit{by the state}. The argument would be that although the police chief, a state em-

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16. Monaghan, \textit{supra} note 2, at 431 (“I do not pursue these inquiries here because they are wide of my primary concern.”).
17. \textit{Id.} at 430-31 (emphasis in original).
18. \textit{Id.} at 431.
19. \textit{Id.} at 432.
ployee, had infringed Davis's reputational interest, he had none­
theless done so on his own, in violation of state tort law. The
state itself arguably stood ready to repudiate its employee’s ac­
tion by offering redress in a defamation suit. The initial defama­
tion was “state action” in a sense; but the state action was not
yet “complete,” because the state had not yet acted through its
officially established procedures. Only if the state denied Davis a
means of redress would it deprive him of liberty without due
process of law. Essentially, this argument had been made by a
Seventh Circuit judge before Paul v. Davis was decided, in a sec­
tion 1983 action brought by a prisoner against prison officials
who had negligently left his cell door open after a search,
thereby permitting persons unknown to steal his personal prop­
ty.20 The judge was named John Paul Stevens, and the case
was titled Bonner v. Coughlin,21 after Judge Stevens’s elevation
to the Supreme Court, the Seventh Circuit sitting en bane af­
irmed his decision on alternative grounds, including a reliance
on Paul v. Davis.22

Although both this fourth, state-action-based approach and
the third, due-process-based approach treat the tort action as
satisfying the state’s obligation to provide due process, the dif­
fERENCE between them is profound. The due-process-based ap­
proach involves a case-by-case assessment of whether procedural
due process values are adequately served by postponing the in­
dividual’s opportunity for a hearing until after the initial state ac­
tion that deprives her of liberty or property. This assessment
could rest on a cost-benefit analysis of the Mathews v. Eldridge
sort23 or could employ other doctrinal or theoretical perspec­
tives. The state-action-based approach, on the other hand, de­

20. Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975), modified en banc, 545 F.2d
565 (7th Cir. 1976), cert. denied, 435 U.S. 932 (1978).

21. 517 F.2d 1311 (7th Cir. 1975), modified en banc, 545 F.2d 565 (7th Cir. 1976),


23. 424 U.S. 319, 334-35 (1976) (listing three relevant factors: 1) the private interest
  at stake; 2) the risk of erroneous deprivation of this interest and the value of additional
  procedures; and 3) the government’s interest). See generally J. Mashaw, Due Process in
  the Administrative State (1985).
nies that the state has finally acted because the remedial avenue remains open. Nothing in its logic is limited to the procedural due process context. Most importantly, this approach reverses well-settled understandings regarding what constitutes "state action" under the fourteenth amendment; indeed, the reversal is so extreme that it is perhaps not surprising that Monaghan overlooked this tactic.

Of "Liberty" and "Property" appeared in the March 1977 issue of the Cornell Law Review. It had an immediate effect. In April 1977, Justice Powell quoted the passage that appears above in support of his holding in Ingraham v. Wright that due process did not require a prior hearing before the imposition of corporal punishment in the Florida public schools. Justice Powell reaffirmed the view that constitutional "liberty" embraced the common-law rights of personal security. But he also noted the historical basis for an exception covering "moderate correction" and found that Florida law preserved both the traditional common-law tort remedy and the exception. By intertwined avenues of doctrinal reasoning and cost-benefit analysis, Justice Powell found the tort action adequate to protect the schoolchildren's interest in avoiding unjustified intrusions on their physical security.

At this point in the decision, Justice Powell's reasoning became remarkable in a number of respects. First, his doctrinal analysis cited in one breath both Monaghan's approach and the Stevens opinion in Bonner v. Coughlin—betraying no awareness of any difference between them. Second, Justice Powell was writing in a mode, not uncommon for him, that tended to equate due process with tradition. He invoked Monaghan's article as if

24. See infra text accompanying note 45.
25. See supra text accompanying note 18.
27. Id. at 672-74; cf. Monaghan, supra note 2, at 413-14 (discussing the transformation of common-law rights into liberties protected from governmental interference).
28. See 3 W. BLACKSTONE, COMMENTARIES *120 (stating that "battery is, in some cases, justifiable or lawful; as where one who hath authority, a parent or master, gives moderate correction to his child, his scholar, or his apprentice").
29. 430 U.S. at 676-77.
30. Id. at 678-82.
31. Id. at 679 n.47. The citation to Bonner v. Coughlin did not win Justice Stevens's vote; he both joined a dissent written by Justice White and added a brief opinion of his own speculating that the majority's analysis, though unacceptable in the context of corporal punishment, could apply to certain deprivations of property and might supply a more defensible rationale for Paul v. Davis. Id. at 701-02 (Stevens, J., dissenting).
Monaghan shared his view that due process incorporated common-law liberties with their historical encrustations intact. Third, Justice Powell seemed untroubled by the fact that Florida law provided neither a prior hearing nor a subsequent remedy for a child who was punished through a teacher's reasonable, good faith error. He even equivocated about whether a good faith error would "justify" an undeserved paddling as a noninfringing "correction." But whether or not Monaghan would condone this gloss on his proposal, *Ingraham* laid the groundwork for worse things to come.

Justice Rehnquist returned to these themes in *Parratt v. Taylor*, another due process case involving a prisoner who had suffered a loss of personal property through the apparent negligence of prison personnel. The prison officials pitched their case on *Ingraham* and won big. Justice Rehnquist began his analysis of this claim with what was either a passing impulse of liberality or a brilliant Machiavellian move, holding that negligent loss of property amounts to a "deprivation" within the meaning of both section 1983 and the due process clause. Repeating his fear that upholding the claim would convert the fourteenth amendment into "a font of tort law," he invoked *Bonner v. Coughlin* and *Ingraham* as demonstrating that the state's subsequent tort remedy satisfied its obligation to supply due process of law. Not sharing Justice Powell's romance with the common law, Justice Rehnquist wrote in positivist terms, distinguishing between deprivations pursuant to "established state procedure" and "unauthorized act[s]" of deprivation. "Unauthorized acts," though "under 'color of law,'" were "beyond the control of the State." In the latter situation, a subsequent damage remedy supplied all that due process required.

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33. *Ingraham v. Wright*, 430 U.S. 651, 677 n.45 (1977); see also id. at 693-95 (White, J., dissenting).
34. Id. at 675-78.
39. Id. at 541.
Like Ingraham, the Parratt opinion was Janus-faced, looking both to the issue of when to hold the state responsible for officials' actions and to the practicability of requiring a predeprivation hearing. The opinion did not make fully clear whether his analysis embraced only procedural, or also substantive, due process. Some concurring Justices worried that the majority opinion read as if substantive due process did not even exist.40

Parratt's revisionist approach to the relationship between due process and state postdeprivation remedies for "unauthorized" acts has spread like wildfire through the federal courts.41 The Supreme Court extended its application to the intentional—and allegedly malicious—"unauthorized" destruction of a prisoner's property in Hudson v. Palmer.42 Chief Justice Burger continued the Ingraham-Parratt tradition of failing to distinguish between the "impracticability" of a prior hearing and a holding that "the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy."43 This latter analysis runs violently counter to Monaghan's recommendations. As he acidly wrote in Of "Liberty" and "Property," "the more reprehensible and subject to legal redress the conduct, the freer the state is to engage in it."44

If Parratt is read to permit the state to disavow a state officer's misconduct as "not complete" or not the state's own action simply because the misconduct is unlawful and remediable under state tort law, the case threatens to revolutionize well-settled aspects of the "state action" doctrine under the fourteenth amendment. Acts by state officials, even if unlawful under state law, have been understood as incontestably "state action" since 1913, when the Supreme Court characterized the contrary proposition as follows:

The vice which not only underlies but permeates the proposition is not far to seek. It consists first in causing by an artificial construction the provisions of the Four-

40. Id. at 545 (Blackmun, J., concurring); id. at 547 (Powell, J., concurring).
43. Id. at 533 (emphasis added); see id. at 533 n.14 (calling result "foreshadowed" by discussion of Ingraham in Parratt).
44. Monaghan, supra note 2, at 427.
teenth Amendment not to reach those to whom they are addressed when reasonably construed; and second in wholly misconceiving the scope and operation of the Fourteenth Amendment, thereby removing from the control of that Amendment the great body of rights which it was intended it should safeguard and in taking out of reach of its prohibitions the wrongs which it was the purpose of the Amendment to condemn.46

Some Justices have insisted that Parratt does not apply to liberty interests (as opposed to property interests) or to substantive due process (as opposed to procedural due process).46 But these issues remain unresolved by the Supreme Court as of this writing, and it is hard to see why the distinctions make sense if a state action analysis is truly involved.47

Parratt's capacity for turning the clock back a century with regard to the relationship between the federal government and state officials, particularly once extended to intentional conduct, provoked Monaghan to take up the cudgels against this line of cases again, in a 1986 article entitled State Law Wrongs, State Law Remedies, and the Fourteenth Amendment.48 He identified a number of possible strategies for limiting or refashioning Parratt, including: (1) restricting it to a procedural due process analysis;49 (2) treating it as a judicially crafted abstention or exhaustion doctrine;50 (3) limiting it to the actions of "lower echelon state employees";51 and (4) recharacterizing it as a construction of the conditions for liability under section 1983.52


47. Monaghan reads Parratt itself as rejecting a substantive due process claim, Monaghan, supra note 45, at 985-86, but the opinion is at the very least ambiguous on this point and surely open to reexamination in light of the doubts of the concurring Justices, see Parratt, 451 U.S. at 545 (Blackmun, J., concurring); id. at 552-53 (Powell, J., concurring in the result).

48. Monaghan, supra note 45.

49. Id. at 984.

50. Id. at 987-88.

51. Id. at 994 & n.98 (quoting Dwyer v. Regan, 777 F.2d 825, 832 (2d Cir. 1985)).

52. Id. at 999.
Monaghan called for *Parratt* to be overruled, or at least re-shaped into a nonconstitutional doctrine. We may wish him greater success this time.

* * *

Even when limited to a procedural due process doctrine turning on the "impracticability" of prior hearings, *Parratt* and *Hudson* threaten serious damage to settled understandings. With the reader's indulgence, I will add to Monaghan's critique of *Parratt* a perspective of my own.53 Because the Supreme Court's *Parratt* cases arose as section 1983 actions, the state tort action has been the hypothetical road not taken. Its characteristics and probable outcome have been somewhat speculative.

But suppose we consider the problem from the alternative viewpoint: the plaintiff has been deprived of liberty or property without a hearing by means of "random and unauthorized" official acts, has pursued a state law remedy, and has lost. Does any federal issue remain for direct review in the Supreme Court or for habeas corpus relief if the plaintiff remains in confinement? The *Parratt* approach would suggest that the only federal issue available is the adequacy of the state law remedy. But in that case, what does "adequacy" mean?

In its eagerness to close the door on the section 1983 plaintiff, the Supreme Court has put the burden on the plaintiff to demonstrate "inadequacy" and has tended to compare the features of state tort law with those of section 1983.54 This has led some courts and commentators to suggest that a state law remedy may be "adequate" for *Parratt* purposes even if the plaintiff's loss is foreordained by defenses of sovereign immunity or official immunity that could have been raised in a section 1983 action.55 Yet this would permit the plaintiff to be deprived of her liberty or property without ever having had an opportunity

53. I recognize the risk that I will thereby make this article prove its own thesis, since pointing out absurd consequences that could flow from a legal doctrine generally has three possible effects: (1) no effect at all (the most likely); (2) modification of the doctrine (perhaps the least likely); or (3) bringing on the absurd consequences.


55. See, e.g., Blum, supra note 41, at 723-25; B.U. Note, supra note 41, at 623-27, 638; see also Daniels, 474 U.S. at 341-43 (Stevens, J., concurring in the judgment) (stating that sovereign immunity does not render procedure "fundamentally unfair").
to test the merits of her claim to it. The opportunity to be heard required by due process is the opportunity to be heard on the merits of the deprivation.\(^{56}\) For example, the Court’s precedents upholding summary action generally do so on the ground that exigent circumstances require swift action, and that an opportunity for a hearing on the merits unprejudiced by the prior summary determination is afforded.\(^{57}\)

A more appropriate standard of comparison in Parratt cases, rather than the section 1983 procedure, is the procedure that due process would have required if the deprivation had been authorized under state law. To the extent that the latter question is controlled by Mathews v. Eldridge-type cost-benefit balancing, Ingraham suggests that exigencies may sometimes result in due process being satisfied by a sufficiently trustworthy ex parte procedure, followed only by a deferential judicial hearing, rather than by the usual opportunity for a full airing of the merits.\(^{58}\) But there is little reason to regard random and unauthorized deprivations of liberty or property by state officials as a trustworthy ex parte procedure comparable to the authorized exercises of disciplinary judgment by public school teachers. Thus, even a Mathews v. Eldridge analysis suggests that the “adequate” state remedy must provide a full inquiry into the merits, unhampered by deferential standards of review or defenses of good faith or reasonable belief. Sovereign immunity and official immunity in particular cannot be defensive shields in the remedial action, as they would not have been available as swords in the affirmative proceeding that the state should have brought against the individual.

Confusion about the “adequacy” issue is especially evident in the lower court cases that apply the Parratt analysis to “random and unauthorized” departures from procedural regularity in the course of a predeprivation hearing conducted under state law.\(^{59}\)

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59. Compare Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 830 F.2d 977 (holding that Parratt bars § 1983 claim based on county supervisor's financial interest in zoning decision), amended, 841 F.2d 872 (9th Cir. 1987), cert. denied, 109 S. Ct. 79 (1988); Schaper v. City of Huntsville, 813 F.2d 709 (5th Cir. 1987) (holding that Parratt bars § 1983 claim based on firing of police captain by biased superiors); Lee v. Hutson,
For example, in *Holloway v. Walker*, the Fifth Circuit held that a plaintiff who had allegedly been deprived of a fair trial by a state trial court judge who was allegedly bribed could not bring a section 1983 action because the state provided "adequate" appellate review.\(^{60}\) Treating this due process deprivation as "not complete" until the state has failed to provide an "adequate" appellate remedy seems quite consistent with the peculiar logic of *Hudson v. Palmer*.\(^{61}\) But note the consequence: so long as the state appellate remedy provides an "adequate" opportunity to show that the trial was a mockery, the plaintiff has been afforded due process regardless of whether the appellate court correctly rules on the facts or the law concerning the trial's validity. The *only* federal issue available on direct review is then the "adequacy" of the appellate procedure, *not* whether the trial was fair. Applying this to the field of criminal procedure, we would say that neither direct review nor habeas corpus will lie for "random and unauthorized" trial court improprieties so long as the state affords "adequate" corrective process, since the *only* federal issue in such cases is the "adequacy" of the state's corrective process. Needless to say, this would revolutionize criminal

810 F.2d 1030 (11th Cir. 1987) (holding that *Parratt* bars § 1983 claim that civil service board hearing was a sham); *Holloway v. Walker*, 784 F.2d 1287 (5th Cir.) (holding that *Parratt* bars § 1983 claim based on alleged bribery of state court judge), *cert. denied*, 479 U.S. 984 (1986) and *Collins v. King*, 743 F.2d 248 (5th Cir. 1984) (holding that *Parratt* bars § 1983 claim based on participation of biased prison official in disciplinary hearing) *with* *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985) (en banc) (holding that *Parratt* does not bar § 1983 claim based on prosecutor's conspiratorial abuse of criminal process) *and* *Patterson v. Coughlin*, 761 F.2d 886 (2d Cir. 1985) (holding that *Parratt* does not bar § 1983 claim based on concededly defective prison disciplinary hearing that also violated state rules), *cert. denied*, 474 U.S. 1100 (1986).

60. *Holloway v. Walker*, 784 F.2d, 1287, 1292-93 (5th Cir.), *cert. denied*, 479 U.S. 984 (1986). In fact, the state courts found that the plaintiffs' effort to overturn the state trial court judgment in federal court barred them from seeking state appellate review. *Id.* at 1290 (citing *Humble Exploration Co. v. Browning*, 690 S.W.2d 321 (Tex. Ct. App. 1985), *cert. denied*, 475 U.S. 1065 (1986)).

61. 468 U.S. 517, 533 (1984) ("Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent."). Some courts have tried to distinguish between *Parratt*-type cases, in which state officials act unlawfully outside any established state procedure, and cases in which state officials act unlawfully within an established state procedure whose rules they do not follow. *See* *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985) (en banc); *Patterson v. Coughlin*, 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986). The Ninth Circuit tried to justify this distinction in terms of the language of the *Parratt* cases and particularly *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). But the Supreme Court's approach does not seem to support this distinction. In *Logan*, the Court emphasized that "the state system itself" destroyed the plaintiff's property, and that Logan was "challenging not the Commission's error, but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards." *Id.* at 436.
procedure: it has been settled since 1953 that federal courts have the power to review on habeas state appellate rulings on constitutional defects in trial procedure, regardless of the adequacy of the state's corrective process, and the fairness of the trial was an issue open to direct review long before that time.62

Thus, when a lawless state official acting within an established state procedure required by due process utterly vitiates the individual's right to a hearing, no process that fails to lead to a substitute de novo hearing can be "adequate" to afford the process due.63 The failed hearing is as good as no hearing at all, and the state must provide as postdeprivation process the hearing on the merits that due process requires.

II. SECOND CAUTIONARY TALE: TO CHEVRON, AND BACK AGAIN?

My second example implicates deeper questions about the relationship of scholarship to law, and it may be on the road to a happier ending. It concerns a standard conundrum of administrative law: the degree of deference that a court should show to an administrative agency in interpreting a statute that the agency administers. Monaghan set forth his views on this question in a 1983 article with the catchy title, Marbury and the Administrative State.64 The Supreme Court quickly took notice of his proposal, and then, a year later, elaborated a strikingly similar position in the leading case of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.65

The problem of judicial deference to administrative interpretations has traditionally been analyzed under such rubrics as "scope of review on issues of law."66 One common approach has


63. In the criminal procedure context, the Supreme Court has held that even the opportunity for a de novo trial as of right before an unbiased judge does not redeem a statutory procedure that begins with a trial before a judge tainted by pecuniary interest. Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972). This makes sense from a cost-benefit analysis point of view, given the ease with which the state can eliminate the biased first tier.


called for courts to decide issues of statutory interpretation independently, without ceding any authority in the matter to administrative agencies. More frequently, courts have given significant weight to administrative interpretations, often going so far as to say that any reasonable interpretation by an agency of its governing statute must be upheld. From the point of view of administrative law, the problem is either (descriptively) to explain when a court is likely to take the former attitude and when the latter, or (prescriptively) to identify the circumstances under which such deference is appropriate.

The administrative law of the Administrative Procedure Act generation never settled on an accepted solution to this problem. As Judge Friendly concluded, there were simply "two lines of Supreme Court decisions . . . which are analytically in conflict." When the legal scholarship of the 1970's and 1980's increasingly emphasized the play of political forces underlying the exercise of administrative "expertise" and the contested enterprise of legal interpretation, one could reasonably expect that new perspectives would be brought to bear on this unanswered question.

Monaghan did not set out to provide a full account of the circumstances dictating particular degrees of deference to administrative interpretation. Unlike the complex inquiries of some of his colleagues more deeply interested in the day-to-day workings of administrative law, Monaghan's investigation focused on a

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69. See, e.g., NLRB v. Hearst Publications, 322 U.S. 111 (1944); Gray v. Powell, 314 U.S. 402 (1941); 5 K. Davis, supra note 67, § 29.16, at 401-02; 4 K. Davis, supra note 66, § 30.05.


73. See, e.g., Mayburg v. Secretary of Health & Human Servs., 740 F.2d 100, 105-07 (1st Cir. 1984) (Breyer, J.); Breyer, Judicial Review of Questions of Law and Policy, 38
more fundamental aspect of the problem. He posed the question of how judicial deference to administrative interpretation could be squared with separation of powers and with the traditional insistence on final judicial authority in matters of legal interpretation. Thus, in accord with its title, Marbury and the Administrative State juxtaposes the Supreme Court’s consistent exercise of independent authority in constitutional interpretation with its frequent exercise of deference to the executive branch in statutory interpretation.

Monaghan rejected the view that courts defer to administrators when the latter’s “expertise” assists the judge in resolving her uncertainty about a statute’s meaning.\(^{74}\) When a court states that it is deferring to an agency in resolving a legal issue, the court does not express uncertainty about how the statute should be interpreted. Rather, the court \textit{interprets} the statute as \textit{delegating} authority to resolve the issue to the agency. Thus, deference is consistent with the notion that “[i]t is emphatically the province and duty of the judicial department to say what the law is,”\(^{75}\) so long as we recognize that “the law” sometimes “is” nothing more than a delegation of authority to the executive branch. Monaghan did not claim that this was a wholly original insight. He generously credited earlier scholars who had seen that the \textit{effect} of deference was to create a delegation.\(^{76}\) But Monaghan went beyond these precursors in \textit{conceptualizing} all deference as an interpretive act recognizing tacit delegation as the statute’s \textit{meaning}.

Monaghan never claimed that this theoretical reconceptualization of deference solved the problems of when and how much to defer. Rather, he said, “the degree of deference that a court should give any agency interpretation of law is properly, within broad constitutional limits, entirely a matter of legislative intent.”\(^{77}\) Because legislatures rarely provide much instruction in such matters, courts may evolve presumptions concerning the degree of deference appropriate to a given agency action in a given statutory configuration.\(^{78}\)

Once more, the Supreme Court quickly picked up on Monaghan’s contribution. Marbury and the Administrative

\begin{footnotesize}
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  \item 74. See Monaghan, \textit{supra} note 64, at 30 nn.176-77.
  \item 75. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
  \item 76. Monaghan, \textit{supra} note 64, at 26 n.149, 27 & n.158.
  \item 77. \textit{Id.} at 31 n.184.
  \item 78. \textit{Id.} at 31 & nn.184-85.
\end{itemize}
\end{footnotesize}

Monaghan's thesis reappeared, without citation, as the core of Justice Stevens's new approach to statutory interpretation in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.80 The Chevron opinion purported to reconcile the two lines of administrative deference cases by setting out a two-stage analysis. In reviewing an agency's interpretation of a statute committed to its care, a court should first ask "whether Congress has directly spoken to the precise question at issue."81 The court should conduct this inquiry independently, without any deference to the agency's views. But if the court is unable to find a clearly expressed congressional intent, "if the statute is silent or ambiguous with respect to the specific issue,"82 then the question has been delegated explicitly or implicitly to the agency.83 The court must then accept any "reasonable interpretation" the agency adopts.84 In Chevron, the Supreme Court applied this analysis on its way to enforcing deference to the Environmental Protection Agency's redefinition of the term "stationary source" as employed in the Clean Air Act.85

The Chevron two-stage analysis has been widely recognized as a significant innovation in administrative law and a substantial reallocation of power from the judiciary to the executive branch.86 Chevron's equation between deference and delegation adopts Monaghan's conceptualization, but its implementation involves simplifications that Monaghan never recommended.

79. 462 U.S. 919, 986 n.19 (White, J., dissenting). "But as Henry Monaghan has observed: 'Judicial deference to agency "interpretation" of law is simply one way of recognizing a delegation of lawmaking authority to an agency.'" Id.
81. Id. at 842.
82. Id. at 843.
83. Id. at 843-44.
84. Id. at 844. It is surely a sign of the Court's estrangement from the constitutional "nondelegation doctrine" that the Court announced unblinkingly as a general principle what amounts to a reverse clear statement approach: the Court will always assume Congress delegated legislative power, unless Congress clearly expresses a contrary intent. See id. at 843-44. Justice Stevens had purported to be influenced by an opposite norm, construing a statute in a manner that restricted delegation in Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 646 (1980) (Stevens, J., plurality opinion).
85. 467 U.S. at 866.
First, a very controversial aspect of the *Chevron* methodology involves the translation of all statutory ambiguity into delegation to the executive branch. The *Chevron* opinion is a prime candidate for deconstruction. The text engages in an extravagant reification of an entity known as the "intent of Congress" that must be "unambiguously expressed." At the same time, tucked away in a footnote, we find a reaffirmation that a court can "ascertain[]" congressional intent using "traditional tools of statutory construction." Justice Stevens was later to be reminded, to his discomfort, how facilely his colleagues could manufacture ambiguity in statutory language. Statutes always require interpretation; the real question is how much interpretive authority has been delegated to the court and how much to the agency.

Second, *Chevron* mandates a uniform test of "reasonableness" for review of all agency interpretations. This carries even further the opinion's insensitivity to matters of degree.

Monaghan's *Marbury* had been clear in emphasizing the varying degrees to which courts shared with agencies the responsibility for interpreting statutory language. "Frequently the court will (or should) understand the statutory mandate as directing it, not the agency, to supply all or most of the relevant meaning. In these circumstances, the agency view is a datum, a highly relevant one, but a datum only . . . ." With other statutes, "[t]he court's task is to fix the boundaries of delegated authority, an inquiry that includes defining the range of permissible criteria." The court thus defines the zone of discretion within which the agency may operate: "the judicial role is to specify what the statute cannot mean, and some of what it must mean, but not all that it does mean." Where Congress does not communicate the degree of deference it expects, courts may rely on presumptive

87. *Chevron*, 467 U.S. at 843; see also id. at 861 ("an actual intent of Congress"). Ironically, this occurs in a discussion whose very subject is interpretation, and which cites no evidence whatsoever of congressional intent regarding norms of interpretation.


91. Id. at 27.

92. Id.

93. Id.
"rules tying the degree of deference to be accorded agency action to the type of agency action involved."\textsuperscript{94}

One explanation for the crudeness of the \textit{Chevron} analysis lies in the political goal underlying the decision: reining in policy-making under the rubric of statutory interpretation by the D.C. Circuit.\textsuperscript{95} Just as in the \textit{Vermont Yankee} case,\textsuperscript{96} which was directed at the D.C. Circuit's policy-making in the guise of policing agency procedures,\textsuperscript{97} indignation and rhetorical momentum may have led the Justices to overstated positions that they will prove unable to live with.\textsuperscript{98}

Beyond that, however, the \textit{Chevron} standard may have been a "natural," though not necessary, consequence of equating deference with delegation.\textsuperscript{99} Reconceptualizing deference as the recognition of delegation changes the way questions are asked and affects the verisimilitude of various answers. For example, it facilitates a collapse of the distinction between administrative interpretation of a statute and administrative adoption of "legislative" rules pursuant to an express delegation of lawmaking authority. The former is now just an "implicit" instance of the latter.\textsuperscript{100} Courts are so accustomed to applying a single, very relaxed reasonableness standard (in a word, "arbitrary-and-capricious")\textsuperscript{101} to the review of expressly authorized rulemaking that \textit{Chevron}'s all-or-nothing approach to the review of "implicitly" authorized lawmaking seems to follow naturally.\textsuperscript{102} If defer-

\textsuperscript{94} Id. at 31 n.184.
\textsuperscript{97} See, \textit{e.g.}, id. at 524-25, 546-48, 555, 558.
\textsuperscript{99} I would hesitate to say that the adoption of a particular conceptualization of deference \textit{necessarily} entails particular consequences concerning the extent and scope of deference. See Fish, \textit{Consequences}, 11 CRITICAL INQUIRY 433, 445-47 (1985).
\textsuperscript{102} See Note, \textit{Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC}, 87 COLUM. L. REV. 986, 997 (1987) ("Congress either delegated interpretive authority to the agency or it did not.").
ence, viewed as delegation, becomes a matter of congressional intent, then the obvious place to look for indications of degree of deference would be where Congress virtually never puts them—in statutory language.\textsuperscript{103} Of course, the Court could just as easily have imputed to Congress all the complex factors judges had evolved before \textit{Chevron} for determining the "weight" of administrative opinion.\textsuperscript{104} But the simplism of \textit{Chevron} was the path of least effort.

Viewing deference as the recognition of a delegation tends to favor certain answers to other questions as well. In \textit{Chevron} itself, the Court emphasized that an agency was free to change its interpretation: "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."\textsuperscript{105} When agency interpretations were accorded "weight" because the agency's expertise gave it special insight into what Congress meant, or because the agency's contribution to the drafting of the statute gave it insider's knowledge, the timing and consistency of the interpretation received greater emphasis.\textsuperscript{106}

Although the delegation rationale for deference deemphasizes traditional factors of timing and consistency, it gives new prominence to the traditional factor "thoroughness of reasoning." If agency interpretation is delegated lawmaking, then presumably courts ought to review the policy-based reasoning of the interpreter as thoroughly as they review notice-and-comment rulemaking. The court should ask not only whether the agency's interpretation is among the reasonable alternatives, but also whether the agency acted reasonably in preferring that interpretation.\textsuperscript{107} \textit{Chevron} was decided only a year after the Supreme

\textsuperscript{103} See Diver, supra note 68, at 570.

The Executive has successfully fought off the Bumpers Amendment, which would forbid judicial deference to agency interpretations. \textit{See, e.g.}, Levin, supra note 73, at 2-9. Furthermore, the language of the Administrative Procedure Act (APA), directing the reviewing court to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action," 5 U.S.C. § 706 (1982), has rarely been taken seriously.

\textsuperscript{104} See, \textit{e.g.}, Breyer, supra note 73, at 371-73, 379-81 (urging "less univocal, less far-reaching interpretation of \textit{Chevron}").


\textsuperscript{106} See Breyer, supra note 73, at 368-71. Of course, these factors can be reemphasized within Monaghan's framework by imputing them to congressional intent, see Monaghan, supra note 64, at 31 nn.184-85, and even within the \textit{Chevron} analysis by building them into the definition of reasonableness, see NLRB v. United Food Workers, 108 S. Ct. 413, 421 n.20 (1987).

\textsuperscript{107} See, \textit{e.g.}, \textit{Chevron}, 467 U.S. at 858 (discussing agency's "reasons for concluding that [its interpretation] was more appropriate"); id. at 863-65; Garland, \textit{Deregulation}
Court's ratification of the "hard look" approach to review of rulemaking. The Chenery principle insists that the agency must spell out its own reasoning when its order "is valid only as a determination of policy or judgment which the agency alone is authorized to make." The Chevron approach vastly increases the range of issues, formerly viewed as statutory interpretation, that are now matters of agency discretion. Looser practices developed in the days when agency opinion was a "factor" entitled to "weight" would appear suspect after Chevron.

Similarly, it is hard to see why a court would now "defer" to an agency's interpretation of its organic statute as not delegating to it the power to regulate certain activity. Deferring would mean recognizing that the choice of whether or not to regulate that activity had been delegated to the agency. Permitting the agency to contradict the court on that point seems inconsistent with the delegation analysis. Rather, the agency would now have to justify the refusal to regulate as a policy-determined exercise of its delegated authority. The agency may base this refusal on its understanding of technical and administrative realities and on its regulatory philosophy, but not on its superior knowledge of legislative history or legal precedent.

The reconceptualization of deference tends to reopen other problems. The Chevron framework leaves little room for accommodating "interpretive" regulations that lack binding force of law. Furthermore, the delegation analysis does not explain how to conceptualize judicial deference to officials like the Comptroller General, who cannot receive delegations of lawmak-

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110. Id. at 88.
112. See Breyer, supra note 73, at 371-72; Saunders, Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation, 1988 Duke L.J. 346, 357. The fact that the APA specifically contemplates "interpretative rules" and exempts them from notice-and-comment rulemaking procedures, 5 U.S.C. § 553(b)(A) (1982), makes this more than a nominal inconvenience. See Saunders, supra, at 367. Monaghan had recognized that, under his theory, the difference between substantive and interpretive rules was one of degree, not of kind, and that notice-and-comment procedures should apply. Monaghan, supra note 64, at 26 & nn.151-52.
ing authority.\textsuperscript{113} Resolving these questions may force the Court to reintroduce considerations of degree that \textit{Chevron} had purported to banish. This may in turn destabilize the uniform "reasonableness" analysis.

\textit{Chevron} also tells us nothing about how to review an agency's interpretation of its own regulations. Construing a regulation as the agency's delegation to itself of authority to adopt reasonable resolutions of its own ambiguities would not only be ludicrous, but would distract us from the practical reasons for second-guessing agency interpretations of regulations—unfair surprise and circumvention of procedures for amending rules.\textsuperscript{114} The Court in \textit{Chevron} encouraged agencies to revise their \textit{statutory} interpretations in order to provide flexible responses to changing situations without the need to return to Congress for new legislation.\textsuperscript{115} The Court has not yet indicated a willingness to eviscerate the notice-and-comment rulemaking procedures of the Administrative Procedure Act in order to maximize agency flexibility.\textsuperscript{116}

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Moreover, understanding federal judicial deference in delegation terms should caution against a facile transfer of federal deference practices to federal court handling of state agency interpretations in diversity and civil rights cases. But see Huggins v. Isenbarger, 798 F.2d 203, 207-10 (7th Cir. 1986) (Easterbrook, J., concurring). The federal Constitution may not require states to employ separation of powers principles as strict as the federal ones, but it does not inhibit them from employing stricter ones either. Traditionally, state law has been less cavalier about delegation and less deferential to agency interpretations of statutes than federal law. See, e.g., A. Bonfield, \textit{State Administrative Rule Making} § 9.2.12(f) (1986); 2 F. Cooper, \textit{State Administrative Law} 707-10 (1965); L. Jaffe, \textit{Judicial Control of Administrative Action} 73-85, 570-71 & n.86 (1965); Brodie & Linde, \textit{State Court Review of Administrative Action: Prescribing the Scope of Review}, 1977 Ariz. St. L.J. 537, 546.


\end{footnotesize}
Several thoughtful commentators have found *Chevron*, in its standard reading, too blunt an instrument for the delicate operation of judicial review. More recently, the Supreme Court has shown signs of repentance. Justice Stevens seized an opportunity to reinterpret his *Chevron* opinion in *Immigration and Naturalization Service v. Cardoza-Fonseca*. He brought up into text his former footnote stressing "traditional tools of statutory construction" and used it to support rejection of the Executive's views on "a pure question of statutory construction." Justice Scalia refused to join this opinion, emphasizing *Chevron*'s importance in the courts of appeals and insisting that Justice Stevens now misunderstands his own opinion. The outcome of this struggle is unclear—even more recently, Justice Scalia and three other Justices joined in a concurring opinion condemning lower court decisions that had viewed *Cardoza-Fonseca* as creating a category of "pure questions of statutory construction" where *Chevron* does not automatically translate ambiguity into delegation and deference. But Monaghan's reconceptualization nonetheless seems secure. Even without further intervention on his part, the Court may also be moving closer to his perspective on matters of implementation.

**IN PLACE OF A MORAL**

Why do law review articles backfire? I think that there are many possible reasons. The examples I have discussed here illustrate two of them.


119. *Id.* at 446; see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 108 S. Ct. 1392, 1397 (1988) (holding that the *Chevron* approach to statutory interpretation is trumped by the rule that statutes should be construed, if possible, to avoid constitutional questions).

120. 480 U.S. at 453-55 (Scalia, J., concurring in the judgment).

Of "Liberty" and "Property"\textsuperscript{122} backfired because the Court seized upon an idea Monaghan had sketched briefly and in passing. Due process methodology was in flux at the time. Monaghan wrote too allusively for his suggestion to be unambiguously identified with a particular approach to ascertaining how much process is due. His suggestion therefore lent itself too easily to a historicist interpretation or to a forum-allocation interpretation. Monaghan's discussion had some of the traditional failings of obiter dicta: one could not foresee all the contexts in which the general statement might be applied. (Of course, refraining from obiter dicta is not even a purported norm of scholarly writing.) The most extreme interpretation, in terms of state action, is probably one that Monaghan would not have imagined except as a student's blunder.\textsuperscript{123} Thus, part of the responsibility lies with Monaghan's article. It set out too concisely a tempting solution to a current problem. But part of the responsibility lies also with the unpredictable ingenuity of Chief Justice Rehnquist.

Marbury and the Administrative State\textsuperscript{124} misfired less understandably and therefore more illuminatingly. In this article, Monaghan had suggested a more complex model of deference than the Court subsequently adopted. The Court simply lifted his central reconciling conception—Justice White in Chadha even quoted a key sentence that Monaghan had italicized—without taking along the complexities that rooted it in existing judicial practice. Trimmed to an abstraction, Monaghan's solution became "revolutionary"\textsuperscript{125} and produced a "watershed"\textsuperscript{126} that he had not intended to cross.

An unfortunate process of oversimplification, a kind of Gresham's Law of legal theories, operated to produce Chevron. I cannot say for sure where it operated, whether the subtleties were filtered out along the path of communication from the scholar to the Justices,\textsuperscript{127} or whether the Justices stylized their message to ensure its clear reception by the judges of the lower courts. If contemporary caseload pressures leave even the Supreme Court impatient with textured analysis, then sophisti-

\textsuperscript{122} Monaghan, supra note 2.

\textsuperscript{123} Monaghan's seeming unawareness of Bonner v. Coughlin may have resulted from any combination of three factors: the peripheral character of his interest, the ever-increasing volume of lower court precedent, and the tendency of many elite scholars to concentrate their attention on the Supreme Court.

\textsuperscript{124} Monaghan, supra note 64.

\textsuperscript{125} Starr, supra note 86, at 284.

\textsuperscript{126} Id. at 283.

\textsuperscript{127} Nor can I say what role law clerks may have played in the filtering process. See, e.g., Vining, Justice, Bureaucracy, and Legal Method, 80 Mich. L. Rev. 248, 252 (1981).
icated scholarly inquiries are likely to evoke misunderstandings like *Chevron*. Such events augur particularly ill for a contributory judicial role in administrative law, a subject that has long suffered from conflicting pulls toward imposition of greater uniformity than the diversity of administrative processes will bear and toward an unmanageable fragmentation into numerous independent subbranches. Unless courts are going to abandon the field altogether, they need to grapple with complexity, not shy away from it.

If the problem lies in the Supreme Court's lack of confidence that lower federal judges will follow less elementary directives, then the lesson for scholarship may be less dire. Would-be law reformers may have to devote more attention to the syntax of the Supreme Court's dialogue with the lower courts. Perhaps with greater fluency in this language, scholars could behave more like those poets and novelists who oppose distortion by taking a hand in their own translation.

In either case, continued study of how articles backfire may tell us much about both the capacities of scholarship and the processes of more potent legal actors. After all, we usually see things by virtue of the light that bounces off them.
