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Federal Court Review of Arbitrary State Court Decisions

INTRODUCTION

Occasionally, decisions by state courts or agencies on civil matters or criminal proceedings¹ seem entirely arbitrary. An “arbitrary” decision is one that appears irrational because it conflicts with the factual record, conflicts with statutes or precedent, or contradicts itself.² The Supreme Court’s position on whether arbitrary state decisions violate the due process clause of the fourteenth amendment is inconsistent. On one hand, the Court, relying on the well-established principle of federalism that federal courts may not review the correctness of state decisions of state law,³ has held that the arbitrariness of a state decision does not raise any issues of federal constitutional law. Thus, in cases where a state court or agency apparently has misinterpreted state law, the Court has held that “mere errors of state law” do not violate due process.⁴ In addition, the Court has been reluctant to review the sufficiency of the evidence in state civil proceedings.⁵ The Court has also been unwilling to require the state court or agency to explain any

1. For the purposes of this Note, state decisions encompass (1) state court and agency decisions on civil matters and (2) state court and agency decisions in criminal proceedings not constituting findings of misconduct that ignore the threat of prison confinement. Examples from the second category include sentencing decisions, but not criminal convictions or parole revocations.

2. *Cf.* *United States v. Carmack*, 329 U.S. 230, 243-44 n.14 (1946) (defining “arbitrary” as “without adequate determining principle” or “[f]ixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned”).

3. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874).

4. *See, e.g., Barclay v. Florida*, 463 U.S. 939, 951 n.8 (1983) (plurality opinion) (noting that “mere error of state law” in a death penalty case does not violate due process); *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1981) (“We have long recognized that a ‘mere error of state law’ is not a denial of due process. If the contrary were true, then every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.”) (citation omitted) (quoting *Gryger v. Burke*, 334 U.S. 728, 731 (1948)); *Martinez v. California*, 444 U.S. 277, 284 n.9 (1980) (“It must be remembered that even if a state decision does deprive an individual of life or property, and even if that decision is erroneous, it does not necessarily follow that the decision violated that individual’s right to due process.”); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (“state courts are the ultimate expositors of state law, and . . . we are bound by their constructions except in extreme circumstances”) (citation omitted); *Beck v. Washington*, 369 U.S. 541, 554-55 (1962) (“We have said time and again that the Fourteenth Amendment ‘does not assure uniformity of judicial decisions . . . [or] immunity from judicial error . . .’ Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question.”) (citation omitted) (quoting *Milwaukee Elec. R.R. & Light Co. v. Wisconsin ex rel. Milwaukee*, 252 U.S. 100, 106 (1920)); *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944) (mere error in reaching a jury verdict does not violate due process); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 455 (1924) (“The mere reversal by a state court of its previous decision, as in this case before us, whatever its effect upon contracts, does not, as we have seen, violate any clause of the Federal Constitution.”).

5. *See, e.g., American Radio Assn. v. Mobile S.S. Assn.*, 419 U.S. 215, 231 (1974); *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *see also Sumner v. Mata*, 449 U.S. 539, 550 (1981) (state court findings presumed to be correct in federal habeas corpus proceedings).

inconsistencies in its decisions.⁶

On the other hand, the Court appears to have reached an opposite result in three cases, suggesting that due process *does* require reversal of arbitrary state decisions in cases in which the state decision lacked evidentiary support or deviated from state law. In *Thompson v. City of Louisville*,⁷ the Court reversed a state criminal conviction that presented “the stark problem of arbitrariness” because the decision was entirely lacking in evidentiary support.⁸ In *Hicks v. Oklahoma*,⁹ the Court reversed a state sentencing decision that constituted an “arbitrary deprivation” because the decision applied an “invalid” statute. Finally, in *Logan v. Zimmerman Brush Co.*,¹⁰ the Court reversed an entitlement decision that constituted an “arbitrary” state action because the state’s established procedure denied a state-created entitlement in a “random” manner.¹¹ Together these cases may be viewed as providing support for a substantive due process rule against arbitrary state decisions,¹² even though they did not explicitly rely on substantive due process grounds.¹³

Although arguably *Thompson*, *Logan*, and *Hicks* support a rule against arbitrary state civil decisions, the Supreme Court has elected to read those cases narrowly or to avoid the issue altogether.¹⁴ In the

6. See, e.g., *Harris v. Rivera*, 454 U.S. 339 (1981) (apparently inconsistent verdicts); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (denying application for commutation of life sentence); *Arizona v. Washington*, 434 U.S. 497, 517 (1978) (explanation of reasons supporting a trial court decision “not constitutionally mandated”).

7. 362 U.S. 199 (1960). As this Note will be referring extensively to this case, *Thompson* will hereinafter be cited only when direction to specific pages is needed, or when the reference is especially helpful.

8. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (describing *Thompson*). Although *Thompson* dealt with a criminal conviction, its broad language has made it unclear whether the decision applies to state civil decisions, in addition to state criminal decisions. See *Thompson*, 362 U.S. at 204.

9. 447 U.S. 343 (1980).

10. 455 U.S. 422 (1982).

11. 455 U.S. at 433-34.

12. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (The Court infers that the *Thompson* no evidence rule is a substantive due process rule.) A number of courts of appeals have ruled that one has a substantive due process right to be free from arbitrary state decisions. See, e.g., *Shelton v. City of College Station*, 754 F.2d 1251, 1256-57 (5th Cir. 1985) (arbitrary denial of zoning variance may violate due process); *Scott v. Greenville County*, 716 F.2d 1409, 1420-21 (4th Cir. 1983) (arbitrary denial of building permit may violate due process); *Evans v. City of Chicago*, 689 F.2d 1286, 1298 (7th Cir. 1982) (delayed payment of tort judgment in violation of state law may violate due process). The court of appeals cases that have applied the *Hicks* rule have not described the rule in terms of a procedural or substantive due process right. See Part III.C *infra*.

13. In *Thompson*, the Court did not indicate whether the no-evidence rule was based on procedural or substantive due process. 362 U.S. at 199. But in *Superintendent, Mass. Correct. Inst. v. Hill*, 472 U.S. 445, 454 (1985), the Court described an identical “some evidence” standard as a procedural due process rule. See Part I.A.1.b *infra*. Both *Logan*, 455 U.S. at 432-34, and *Hicks*, 447 U.S. at 346, were based upon procedural due process grounds.

14. See *Cabana v. Bullock*, 474 U.S. 376, 387 n.4 (1986) (reading *Hicks* narrowly as a procedural due process case); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 223 (1985); *Pulley*

absence of further guidance from the Supreme Court, the courts of appeals have taken opposing positions on the issue.

Several courts of appeals have read the *Thompson*, *Logan*, and *Hicks* decisions broadly to support a rule against arbitrary state decisions. The Sixth Circuit decision in *Spruytte v. Walters*¹⁵ provides a good example of how the rule against arbitrary state decisions has been applied in practice. In *Spruytte*, the court applied the rule against arbitrary state decisions to a state prison board's decision to prohibit a prisoner from receiving a dictionary from his mother. The court, after concluding that the applicable state law only permitted the prison to prohibit prisoners from receiving books that posed a threat to security,¹⁶ held that the decision to prohibit the dictionary was unconstitutionally arbitrary, because the decision both lacked evidentiary support and deviated from state law. The court found doctrinal support for this rule against arbitrary decisions in the *Thompson* and *Logan* decisions.¹⁷

Other circuits have also used the rule against arbitrary state decisions. For example, the Eighth Circuit applied the *Thompson* doctrine to review a state educational institution decision that appeared to lack evidence.¹⁸ Reviewing a variety of state decisions, job terminations, and business license revocations, the Fourth, Fifth, Sixth, and Seventh Circuits have interpreted *Logan* broadly to support a rule against arbitrary state decisions that appeared to violate state law.¹⁹ Finally, after reviewing state sentencing decisions that appeared to apply incorrect statutes, the Fifth Circuit has held that *Hicks* supports a rule against arbitrary state decisions.²⁰

A number of commentators have also advocated a broad rule against arbitrary state civil decisions.²¹ In support of this rule, they

v. Harris, 465 U.S. 37 (1984); *Wood v. Strickland*, 420 U.S. 308, 322-24 (1975) (expressly declining to decide whether *Thompson* applied to state school board decisions).

15. 753 F.2d 498 (6th Cir. 1985), cert. denied, 474 U.S. 1054 (1986).

16. 753 F.2d at 507-08.

17. The court relied on *Thompson* in holding that the decision violated due process because the state officials deprived Spruytte of his dictionary without a determination "that the book posed a threat to security." 753 F.2d at 509. The Court also relied on *Logan* in holding that the state decision violated due process because the prison "willfully [and] systematically refused to follow state law." 753 F.2d at 510.

18. See notes 165 & 183-86 *infra* and accompanying text.

19. See notes 190-94 *infra* and accompanying text.

20. See notes 227-28 *infra* and accompanying text.

21. Although these commentators differ in their formulation of the rule, all are concerned about arbitrary state decisions that conflict with the facts in the record, conflict with the statutes or precedent, or contradict themselves. See J. RAZ, *THE AUTHORITY OF LAW* 217 & n.6 (1979) (rule of law applies primarily to prohibit arbitrary judicial law application, rather than arbitrary judicial law creation); Leubsdorf, *Constitutional Civil Procedure*, 63 TEXAS L. REV. 579, 594, 630 (1984) (judges must follow rule of "governmental consistency"); Morgan, *The Right To Know Why*, 17 HARV. C.R.-C.L. L. REV. 297, 299-317 (1982) [hereinafter Morgan, *Right To Know Why*] (courts should explain apparently internally inconsistent decisions); Morgan, *Playing by the Rules: Due Process and Errors of State Procedural Law*, 63 WASH. U. L.Q. 1, 29 (1985)

rely on *Thompson*, *Logan*, and *Hicks*,²² Administrative Procedures

[hereinafter Morgan, *Playing by the Rules*] ("fair play model" requires courts and agencies to comply with duly established procedural safeguards when depriving a person of life, liberty, or property); Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 80, 85 (1976) (employees terminated from status relationships should have a right to "an adequate explanation" for the dismissal); Rubin, *Administrative Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1103 (1984) (rule of law requires "treatment of individuals in accordance with legal standards"); Smolla, *The Erosion of the Principle That the Government Must Follow Self-Imposed Rules*, 52 FORDHAM L. REV. 472, 500 (1984) (court and agency decisions should meet "base requirement of fidelity to the ordinary meaning of words" when deciding on existence of entitlements created by statutes or regulations); Thompson, *Legitimate and Illegitimate Decisional Inconsistency: A Comment on Brilmayer's Wobble, or the Death of Error*, 59 S. CALIF. L. REV. 423, 434 (1986) (judges, as a matter of policy, should supply "candidly articulated reasons for decision[s]" to help reduce judicial manipulation of information in furtherance of unarticulated norms); Van Alstyne, *Cracks in "the New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 487-88 (1977) (individuals should have a right to be free from "arbitrary adjudicative procedures" that are "fundamentally unfair, biased, arbitrary, summary, peremptory, ex parte means that without justification create an intolerable margin of probable error or prejudice"); Note, *Protecting State Procedural Rights in Federal Court*, 30 STAN. L. REV. 1019, 1027 n.29, 1045-46 n.126 (1978) [hereinafter Note, *Procedural Rights*] (due process should prohibit "arbitrary" state court and agency deprivations of procedural entitlements); Note, *Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases*, 14 STAN. L. REV. 328, 334 (1962) [hereinafter Note, *State Fact Findings*] (due process should prohibit "arbitrary" state court findings of facts that result in deprivation of life, liberty, or property); Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561, 579 (1984) [hereinafter Note, *Guarantee Clause*] ("rule of law" should require reversal of state court decisions that are a "clear mistake"); Amsterdam, Speech Before the Judicial Conference of the Second Circuit (Sept. 11, 1982), reprinted in Annual Judicial Conference — Second Judicial Circuit of the United States, 97 F.R.D. 545, 626. See generally P. BATOR, P. MISHKIN, D. SHAPIRO & A. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 617-18 (2d ed. 1973) [hereinafter HART AND WECHSLER] (suggesting that the explicit announcement of a new statutory construction might provide more safeguards against "arbitrary" action than an unarticulated affirmation on few facts).

For a more theoretical argument that state supreme courts can commit "errors," see Lempert, *Error Behind the Plate and in the Law*, 59 S. CALIF. L. REV. 407 (1986). These errors of state law may violate due process solely because they are errors. Interview with Richard Lempert, Professor of Law, University of Michigan Law School, Ann Arbor, Michigan (Dec. 1, 1986).

22. For the argument that *Thompson* supports federal court review of arbitrary state decisions that lack evidence, see 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 4033, at 786-88 (1977) [hereinafter WRIGHT, FEDERAL PRACTICE]; Brilmayer, *The Institutional and Empirical Basis of the Rights Thesis*, 11 GA. L. REV. 1173, 1179 n.19 (1977) [hereinafter Brilmayer, *Rights Thesis*]; Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1057-58 (1977).

For the argument that *Logan* supports federal court review of arbitrary state decisions that deviate from state law, see Morgan, *Playing by the Rules*, *supra* note 21, at 8-11; Rubin, *supra* note 21, at 1108 & n.308; Comment, *Parratt v. Taylor: Don't Make a Federal Case out of It*, 63 B.U. L. REV. 1187, 1218-19 n.227 (1983) [hereinafter Comment, *Parratt v. Taylor*]; *The Supreme Court, 1981 Term — State Procedures and Remedies in Due Process Analysis*, 96 HARV. L. REV. 96, 102-05 (1982); Amsterdam, *supra* note 21, at 625-26.

For the argument that *Hicks* supports federal court review of arbitrary state decisions that deviate from state law, see Morgan, *Playing by the Rules*, *supra* note 21, at 7-8; Amsterdam, *supra* note 21, at 625-26; see also Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 644 n.79 (1983) [hereinafter Westen, *Meaning of Equality*].

Act cases,²³ equal protection cases,²⁴ death penalty cases,²⁵ the guarantee clause,²⁶ and the historical underpinnings of the due process clause.²⁷

In contrast, a number of courts of appeals have refused to interpret *Thompson*, *Logan*, and *Hicks* to support a rule against arbitrary state decisions. The First and Ninth Circuits have held that courts should not apply the *Thompson* no-evidence doctrine to civil decisions.²⁸ In addition, the First Circuit has consistently held that *Logan* should not be interpreted to support a rule against arbitrary state decisions that deviate from state law.²⁹ Finally, the Seventh and Tenth Circuits have held that *Hicks* should not be interpreted to support a rule against arbitrary state decisions, including state sentencing decisions, that deviate from state law.³⁰

23. The APA authorizes reviewing courts to set aside an agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C) (1982). See *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265-67 (1954).

A number of commentators have argued that the requirement that federal agencies follow their own regulations is rooted in due process. See, e.g., *Berger, Do Regulations Really Bind Regulators?*, 62 NW. U. L. REV. 137, 149-50 (1967); *Morgan, Playing by the Rules*, *supra* note 21, at 21-24; *Rubin, supra* note 21, at 1134-36; *Smolla, supra* note 21, at 504-05. Relying on this theory, *Amsterdam* argues that the APA cases support a rule against arbitrary state decisions. *Amsterdam, supra* note 21, at 624.

For the argument that the requirement is rooted in congressional legislative power, rather than constitutional due process, see *Raven-Hansen, Regulatory Estoppel: When Agencies Break Their Own "Laws,"* 64 TEXAS L. REV. 1, 6-13 (1985). See also *Westen, The Meaning of Equality*, *supra* note 22, at 644 n.79. At least two courts of appeals have rejected the argument that the APA cases support a rule against arbitrary state decisions. See *Atencio v. Board of Educ.*, 658 F.2d 774, 778-79 (10th Cir. 1981); *Bates v. Sponberg*, 547 F.2d 325, 330, 330 n.7 (6th Cir. 1976).

24. See generally *Morgan, Playing by the Rules*, *supra* note 21, at 8-9 n.42.

25. See *Morgan, Playing by the Rules*, *supra* note 21, at 13 n.56 (arguing that the role "the rule of law plays in our system is not limited to death penalty cases; the principle . . . underlies the basic concept of due process").

26. The guarantee clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion . . ." U.S. CONST. art. IV, § 4. Two commentators, *Rubin, supra* note 21, at 1106 n.297, and *Note, Guarantee Clause*, *supra* note 21, argue that the guarantee clause imposes a rule against arbitrary state decisions on state decisionmakers. The Supreme Court has refused to adopt this interpretation. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) ("the States are free to allocate the law-making function to whatever branch of state government they may choose"); see also *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980); *Ohio ex. rel. Bryant v. Akron Metro Park Dist.*, 281 U.S. 74, 79-80 (1930); *Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902).

27. The due process clause of the fifth amendment is an enlargement of the "law of the land" clause in the Magna Carta. See *Hovey v. Elliot*, 167 U.S. 409, 417 (1897). See also *Berger, supra* note 23, at 149-50 ("[c]ompliance with a regulation . . . is required by due process in its primal sense; i.e., a regulation, like a statute, is part of the 'law of the land' which must be observed"); *Morgan, Playing by the Rules*, *supra* note 21, at 18-19. The Court has rejected the argument that the historical underpinnings of the due process clause require that states follow state law. See e.g., *J. ELY, DEMOCRACY AND DISTRUST* 190 n.13 (1980) (criticizing Justice Black's "law of the land" requirement in *In re Winship* because "it would make every question of state law a federal question").

28. See note 186 *infra* and accompanying text.

29. See notes 217-219 *infra* and accompanying text.

30. See notes 231-32 *infra* and accompanying text.

This Note argues that the *Thompson*, *Logan*, and *Hicks* decisions should not be interpreted to support a rule against arbitrary state decisions. Rather, federal courts should only review state court and agency actions that violate state law if the state action itself — without reference to state law — violates specific constitutional guarantees, such as procedural protections, equal protection prohibitions, or first amendment freedoms. A constitutional due process rule against arbitrary state decisions, which permits federal courts to become the ultimate expositors of state law, conflicts with the fundamental tenets of federalism.³¹ In many cases, federal review of arbitrary state decisions may intrude upon the state decision-making processes. First, state decisions that appear arbitrary to a federal court may in fact be valid formulations of state law. Likewise, a state decision that apparently conflicts with state law may have been a valid interpretation of state law. Additionally, a state decision that seems internally inconsistent may have relied on important tacit rationales or assumptions. Finally, federal court review of arbitrary state decisions interferes with the state decisionmaking process by denying the different branches of state government the opportunity to challenge a state decision that appears to conflict with state statutes, regulations, or precedent.

Part I of this Note argues that the *Thompson*, *Logan*, and *Hicks* cases can be read narrowly to deal primarily with concern about protecting specific constitutional guarantees such as criminal procedural protections, equal protection guarantees, and first amendment freedoms. Arguably, in order to avoid dealing explicitly with the broader constitutional questions raised by the state decisions, the Court reversed the state decisions as arbitrary interpretations of state law. Part II argues that the rule against arbitrary state decisions suggested by *Thompson*, *Logan*, and *Hicks* is incompatible with federalism because it interferes with states' ability to develop law over state law matters, to make final decisions over state law issues, and to divide law-making power between different branches of state government. Part III examines how broad applications of *Thompson*, *Logan*, and *Hicks* have intruded upon state power. In many of these cases, rather than constituting an arbitrary decision, the state decision could be equally well explained as a valid application or interpretation of state law. By reviewing the state decisionmaker's decision, federal courts have not only imposed their own interpretation of state law on the state, but have also interfered with the division of power between state decisionmakers.

31. Many of the commentators who advocate a rule against arbitrary state decisions recognize that the rule conflicts with federalism. For this reason, many of these commentators try to limit the scope of the rule to minimize its impact on federalism. See notes 151-53 *infra* and accompanying text.

I. DISTINGUISHING *THOMPSON*, *LOGAN*, AND *HICKS*: CONCERN ABOUT PROTECTING SPECIFIC CONSTITUTIONAL GUARANTEES

Despite broad language about arbitrary state decisions, *Thompson*, *Logan*, and *Hicks* may have been primarily concerned with protecting other specific constitutional guarantees, such as criminal procedural protections, equal protection guarantees, and first amendment freedoms.³² The Court apparently relied on arbitrariness grounds to avoid addressing difficult questions about the scope of certain constitutional protections. For this reason, these cases need not be read to support a rule against arbitrary state decisions. Rather, these cases can be read narrowly as prophylactic rules that were only designed to protect specific constitutional freedoms.

A. *Thompson and Hicks as Criminal Procedure Cases*

In *Thompson*, the state's conviction implicated a number of criminal guarantees such as the presumption of innocence and the protection afforded by the *ex post facto* clause. In addition, the Court's analysis in a recent case, *Superintendent, Massachusetts Correctional Institution v. Hill*,³³ suggests that the *Thompson* no-evidence rule may apply only to state criminal decisions that constitute findings of misconduct that impose the threat of prison confinement. Likewise, *Hicks* can be read narrowly as a criminal procedural case because it appears that the Court was primarily concerned with protecting *Hicks*' right to jury sentencing and freedom from cruel and unusual punishment.

1. *Thompson: Concern About Protecting Criminal Procedural Guarantees*

In *Thompson v. City of Louisville*,³⁴ the Court reversed a state court decision solely for lack of evidence.³⁵ Sam Thompson was convicted by a city police court for loitering and disorderly conduct, and fined \$10 for each charge. The record showed that Thompson, a long-time resident of Louisville and frequent patron of the Liberty End Cafe, was in the cafe for half an hour, moving his feet in rhythm with the music of a jukebox.³⁶ Thompson testified that he had been waiting for a bus. Two police officers entered the cafe on a "routine check." One of the officers asked Thompson why he was there, and Thompson answered that he was waiting for a bus. The officer arrested

32. This analysis of *Thompson* was suggested in discussions with Professors Christina Whitman and Peter Westen of the University of Michigan Law School. This analysis of *Hicks* was suggested in discussions with Professor Peter Westen.

33. 472 U.S. 445 (1985).

34. 362 U.S. 199 (1960).

35. See generally Note, *State Fact Findings*, *supra* note 21, at 331-32 nn.20 & 25.

36. 362 U.S. at 202.

Thompson for loitering and took him outside. The officer testified that Thompson "was very argumentative — he argued with us back and forth." He was therefore arrested and convicted for disorderly conduct and loitering.³⁷ Because the offense was minor, no appellate review was available in the Kentucky courts.³⁸ The U.S. Supreme Court reversed.

In reviewing the conviction, the Court said that it was attempting to determine whether there was a total lack of evidence, rather than undertaking a general inquiry into the sufficiency of the evidence.³⁹ After examining the elements of each charge against Thompson, it concluded that the record was "entirely lacking in evidence to support any of the charges" and that punishment "without evidence of guilt" violates due process.⁴⁰

Since 1960, the Court has applied the no-evidence doctrine to reverse seven state criminal convictions⁴¹ and one state probation revocation decision.⁴² The doctrine no longer has significant application for review of criminal decisions because the *Thompson* doctrine has been displaced by *Jackson v. Virginia*.⁴³ *Jackson* established that, in addition to reviewing state convictions for total lack of evidence, federal courts may undertake a more extensive review for sufficiency of evidence.⁴⁴ The new standard, the Court stated, was designed to protect the principle articulated in *In Re Winship*: that due process requires criminal convictions to be based upon a showing of guilt beyond a "reasonable doubt."⁴⁵ While the Court explicitly limited *Jackson*

37. 362 U.S. at 199-202. Thompson received only a \$10 fine for each charge. However, he could have been subject to imprisonment or confinement in the workhouse if he failed to pay the fine. 362 U.S. at 201.

38. 362 U.S. at 202 & n.4.

39. 362 U.S. at 199; see also *Garner v. Louisiana*, 368 U.S. 157, 163-64 (1961).

40. 362 U.S. at 204, 206. Examining the loitering charge, the Court found the evidence lacking. The Court said Thompson had accounted for himself when he said he was waiting for a bus, there was *no evidence* that he was loitering or loafing "in the ordinary sense of the words," and finally, the manager's failure to object to Thompson's presence was "implied consent, which the city admitted in oral argument satisfies the ordinance." 362 U.S. at 205. Examining the disorderly conduct charge, the Court said that the officer's statement that Thompson was "argumentative" was not sufficient to constitute disorderly conduct. 362 U.S. at 206.

41. *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (per curiam); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Johnson v. Florida*, 391 U.S. 596 (1968) (per curiam); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Taylor v. Louisiana*, 370 U.S. 154 (1962) (per curiam); *Garner v. Louisiana*, 368 U.S. 157 (1961).

42. *Douglas v. Buder*, 412 U.S. 430 (1973) (per curiam). *Buder* rested alternatively on the *Bouie ex post facto* doctrine. *Buder*, 412 U.S. at 432 (citing *Bouie v. City of Columbia*, 378 U.S. 347 (1964)).

43. 443 U.S. 307 (1979).

44. The *Jackson* Court stated that the new standard does not require a federal court to "ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt," but only to consider whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 318-19 (emphasis in original) (quoting *Woodby v. INS*, 385 U.S. 276, 282 (1966); *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972)).

45. 443 U.S. at 313, 319 n.12.

review for sufficiency of evidence to criminal convictions, the Court never addressed the question of whether *Thompson* applies to civil decisions. The *Jackson* Court only stated that the *Thompson* case presented “the stark problem of arbitrariness.”⁴⁶

a. *The criminal procedural guarantees in Thompson.* The *Thompson* Court may have reversed Thompson’s state court conviction because it wanted to protect several of his constitutional criminal procedural rights.⁴⁷ First, the *Thompson* decision protected Thompson’s due process right to a presumption of innocence in criminal cases. Second, the Court may have been concerned about Thompson’s sixth amendment right to be informed of the nature and cause of the accusation.⁴⁸ Because the prosecution had presented no evidence to support an element of the crime, the defendant did not have notice that the element was an issue at the trial. Third, the Court may have been concerned that the state court’s interpretation of the state law violated the *ex post facto* prohibition applicable to criminal decisions. The *ex post facto* clause, applicable to courts through the due process clause,⁴⁹ prohibits state court criminal decisions that interpret a narrowly-drawn criminal statute in an “unforeseeable” manner.⁵⁰

46. 443 U.S. at 315.

47. The Court explicitly used the *Thompson* doctrine as a means to protect specific criminal procedural guarantees in *Harris v. United States*, 404 U.S. 1232 (1971) (Douglas, Circuit Justice). In *Harris*, Justice Douglas cited *Thompson* in reversing a federal district court judge’s denial of bail. The Court relied on *Thompson* in order to protect eighth amendment guarantees.

48. In defending against the loitering and disorderly conduct charges at trial, Thompson relied on a definition of these crimes that included certain specific elements. 362 U.S. at 204-06. By convicting Thompson without evidence of all of these elements, the state court apparently adopted a broader definition of the crime that did not include all the elements which Thompson believed were required. For this reason, Thompson did not know the elements of the charges that he should contest. The Court itself suggested that the no-evidence doctrine ensures proper notice of charges when it stated, “Just as ‘[c]onviction upon a charge not made would be sheer denial of due process,’ so is it a violation of due process to convict and punish a man without evidence of his guilt.” 362 U.S. at 206 (footnote omitted) (quoting *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937)).

The no-notice interpretation of *Thompson* is also supported by the statement in *Jackson* that the *Thompson* no-evidence doctrine is rooted in the right to a meaningful opportunity to defend oneself and the right to a trial. 443 U.S. at 314. See also Comment, *Federal Review of the Evidence Supporting State Convictions: Jackson v. Virginia*, 79 COLUM. L. REV. 1577, 1588 & n.76 (1979) [hereinafter Comment, *Jackson v. Virginia*] (discussing this interpretation of *Thompson*). A number of commentators have criticized this explanation of *Thompson*. See WRIGHT, FEDERAL PRACTICE, *supra* note 22, at § 4033; Tushnet, *Constitutional Limitations of Substantive Criminal Law: An Examination of the Meaning of Mullaney v. Wilber*, 55 B.U. L. REV. 775, 796-97 (1975); Note, *No Evidence Required To Support a Conviction*, 110 U. PA. L. REV. 1137, 1144 (1962) [hereinafter Note, *No Evidence*] (criticizing J. Harlan’s no-notice interpretation of *Thompson* in *Garner v. Louisiana*, 368 U.S. 157, 190 (1961)).

49. The *ex post facto* clause, on its face, applies only to legislative acts. See, e.g., *Marks v. United States*, 430 U.S. 188 (1977). But the Court has held that the due process clause bars a state appellate court from doing what the *ex post facto* clause prohibits a legislature from doing. See, e.g., *Bouie v. City of Columbia*, 378 U.S. 347 (1964). See generally W. LAFAYE & A. SCOTT, CRIMINAL LAW, § 2.4 (c) (2d ed. 1986).

50. See *Douglas v. Buder*, 412 U.S. 430 (1973) (per curiam). In *Buder*, the Court relied on

Fourth, the no-evidence rule can be viewed as a guarantee of the sixth amendment right to a fair criminal trial, constructed similarly to the prohibition against statutory presumptions. The presumption doctrine protects the jury's role as factfinder by preventing it from reaching conclusions based on statutory presumptions without a logical evidentiary basis for the presumption.⁵¹ Similarly, the no-evidence doctrine may simply declare that a defendant does not receive a fair trial when a judge or jury reaches a statutorily mandated conclusion that has no logical evidentiary basis.⁵² Finally, the *Thompson* court may have felt compelled to review the case because Thompson did not have a right to appeal the conviction. But even today, the Court has been unwilling to declare a right of appeal for criminal or civil decisions.⁵³

Thompson's conviction by the Kentucky state court implicated a number of his criminal procedural guarantees. By phrasing the *Thompson* decision in broad terms of arbitrariness, the Court managed to avoid explicitly addressing the scope of these criminal procedural guarantees. Viewed in this way, *Thompson* is limited to the protection of criminal procedural guarantees, and thus is inapplicable to non-criminal state decisions.⁵⁴

b. *Limiting the no-evidence doctrine to criminal convictions and other findings of misconduct that impose the threat of prison confine-*

Thompson and *Bouie v. City of Columbia*, 378 U.S. 347 (1964), to reverse a state court revocation of probation. The state court revoked Douglas' probation for failing to report a traffic citation. The terms of that probation required that "[a]ll arrests for any reason must be reported without delay to [petitioner's] probation and parole officer." 412 U.S. at 430. Examining the state statutes, the Court said that an "arrest" under Missouri and Arkansas law existed only when a person was subject to "actual restraint" or taken into "custody." 412 U.S. at 431-32. The Court concluded that the state's finding of an arrest violated due process because there was no evidence petitioner was subjected to an "actual restraint" or taken into "custody." 412 U.S. at 432 (citing *Thompson*). The Court rejected the argument that the state court had redefined "arrest" to include a traffic citation. 412 U.S. at 432.

51. See, e.g., *Leary v. United States*, 395 U.S. 6, 55 (1969) (Black, J., concurring).

52. Justice Douglas made this analogy between the *Thompson* no-evidence doctrine and the statutory presumption doctrine in his dissent to *Barnes v. United States*, 412 U.S. 837 (1972). *Barnes* upheld a statutory presumption that the unexplained possession of recently stolen mail is sufficient to enable a jury to find beyond a reasonable doubt that the defendant possessed the mail with knowledge it was stolen. Douglas argued in dissent that the statutory presumption violated the right to a fair trial. If *Thompson* means anything, he stated, it means that Congress may not "constitutionally enact a law that says juries can convict a defendant without any evidence at all from which an inference of guilt could be drawn." 412 U.S. at 850-51. See also Comment, *Jackson v. Virginia*, *supra* note 48, at 1588 n.74.

53. See, e.g., *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1536 (1987) (Stevens, J., concurring) (citing *McKane v. Durston*, 153 U.S. 684, 687-88 (1894)). But see *Pennzoil*, 107 S. Ct. at 1530 (Brennan, J., concurring) (arguing that "Texaco cannot, consistent with due process and equal protection, be arbitrarily denied the right to a meaningful opportunity to be heard on appeal").

54. See *United States v. One 56-Foot Motor Yacht Named the Tahuna*, 702 F.2d 1276, 1283 (9th Cir. 1983) (refusing to apply *Thompson* to a civil action); *Rose v. Nashua Bd. of Educ.*, 679 F.2d 279, 282 (1st Cir. 1982) (same). But cf. Leubsdorf, *supra* note 21, at 602 (arguing that the Court should ensure fair procedures just as vigorously in civil cases as in criminal cases).

ment. Recently, in *Superintendent, Massachusetts Correctional Institution v. Hill*,⁵⁵ the Court curiously applied a no-evidence rule identical to that in *Thompson*, yet failed to mention *Thompson* itself. The Court reviewed a state parole revocation decision to determine whether the decision was based on "some evidence."⁵⁶ In dicta, the *Hill* Court indicated its willingness to extend the some-evidence doctrine to other state civil decisions if they affect "important liberty interest[s]."⁵⁷

Hill involved a state parole board's revocation of two inmates' good-time credits.⁵⁸ The inmates sued in state court but based their arguments on federal, not state, constitutional law.⁵⁹ Instead, they successfully argued in the state supreme court that the state decision violated federal due process because it was not supported by "some evidence."⁶⁰ The Supreme Court accepted the some-evidence standard as applicable to state parole revocation decisions, but it found that the state decision was, in fact, supported by some evidence.⁶¹

The implication of *Hill* is that the federal courts may review state court decisions affirming parole board revocation decisions to determine whether the parole decision was supported by some evidence.⁶² Furthermore, the Court suggested in dicta that the some-evidence rule applies to state court decisions other than those involved with the revocation of parole and probation: "In a variety of contexts, the Court

55. 472 U.S. 445, 455 (1985).

56. 472 U.S. at 454. Although the Court did not cite *Thompson*, the *Hill* some-evidence rule and the *Thompson* no-evidence rule appear indistinguishable. In support of the *Hill* some-evidence rule, the Court cited *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam), which had relied upon the *Thompson* no-evidence rule to reverse a state probation revocation. A recent district court interpretation of *Thompson* and *Hill* supports the proposition that *Thompson* and *Hill* support a unitary no-evidence rule. See *Brands v. Sheldon Community School*, 671 F. Supp. 627, 632 (N.D. Iowa 1987) (citing *Thompson* and *Hill* in upholding a high school disciplinary action and stating that such decisions require "some evidence").

57. 472 U.S. at 455.

58. *Hill v. Superintendent, Mass. Correctional Inst.*, 392 Mass. 198, 466 N.E.2d 818 (1984), *rev'd*, 472 U.S. 445 (1985).

59. *Hill*, 392 Mass. at 199 n.2, 466 N.E.2d at 819 n.2; *Hill*, 472 U.S. at 448, 457. Under state law, the Massachusetts Supreme Judicial Court had discretionary power to review state parole board decisions to determine whether they were supported by "reliable evidence," as required by state regulations. *Hill*, 472 U.S. at 451-53.

60. *Hill*, 392 Mass. at 200-01, 466 N.E.2d at 821.

61. *Hill*, 472 U.S. at 454-57.

62. Note, *The Written Statement Requirement of Wolff v. McDonnell: An Argument for Factual Specificity*, 55 FORDHAM L. REV. 943, 943 n.6 (1987). The *Hill* some-evidence doctrine has also been applied to a variety of prison disciplinary actions, most frequently in cases in which the prison board's decision was based on the uncorroborated hearsay statements of confidential informants, see, e.g., *Brown v. Smith*, 828 F.2d 1493 (10th Cir. 1987) (such statements may not be sufficient); *Mendoza v. Miller*, 770 F.2d 1287, 1295 (7th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986) (such statements may not be sufficient); or when the prison board decision was based on urinalysis test results, see, e.g., *Spence v. Farrier*, 807 F.2d 753, 756 (8th Cir. 1986) (such tests may be sufficient); *Pella v. Adams*, 638 F. Supp. 94 (D. Nev. 1986) (such tests may not be sufficient).

has recognized that a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence.”⁶³ At the same time, the Court cautioned that federal courts should not use the some-evidence requirement to “second-guess” state factual findings.⁶⁴

In deciding to apply the some-evidence rule to state parole revocation decisions, the *Hill* Court relied on the three-prong balancing test of *Mathews v. Eldridge*.⁶⁵ In procedural due process cases, the Supreme Court has used the *Mathews* test to determine the types of procedural protections required when the government deprives an individual of a liberty or property interest.⁶⁶ The *Mathews* test considers three factors: (1) the private interest affected by the state action; (2) the governmental interest affected by requiring the procedural safeguard; and (3) the value of the additional procedural safeguard.⁶⁷ Applying this balancing test analysis in *Hill*, the Court held that the imposition of the some-evidence rule to other types of state civil decisions will depend on a balancing of the private and governmental interests affected in each case.⁶⁸ The *Hill* Court emphasized the individual’s important liberty interest in “freedom from confinement,” adding that the rule would not impose significant burdens on parole proceedings.⁶⁹

Although the dicta in *Hill* suggest that the no-evidence doctrine may extend to civil cases other than parole and probation revocation decisions, *Hill* should be read narrowly. The Court’s holding simply reaffirmed the *Buder* rule that the no-evidence doctrine applies to parole and probation revocation decisions as well as criminal decisions.⁷⁰ In addition, the Court indicated its reluctance to “second-guess” state factual findings, concluding that the evidence at issue satisfied the some-evidence requirement.⁷¹ Furthermore, the very dicta suggesting the no-evidence rule might apply to other types of state court decisions that affect “important liberty interests” contain references to *Schwartz v. Board of Bar Examiners*,⁷² and *United States ex rel. Vajtauer v.*

63. *Hill*, 472 U.S. at 455.

64. 472 U.S. at 455.

65. 424 U.S. 319 (1975).

66. See generally Rubin, *supra* note 21, at 1136-44.

67. *Mathews*, 424 U.S. at 335.

68. *Hill*, 472 U.S. at 454.

69. 472 U.S. at 455.

70. *Douglas v. Buder*, 412 U.S. 430 (1973) (per curiam). The Court cited *Buder* to support the proposition that the some-evidence rule might apply in other contexts. *Hill*, 472 U.S. at 455. The Court has established that parole and probation decisions deserve the same procedural due process protection. *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973).

71. *Hill*, 472 U.S. at 455.

72. 353 U.S. 232 (1957). *Schwartz* reversed a state bar’s denial of admission to a former member of the Communist Party because there was “no evidence in the record which rationally justifies a finding that Schwartz was morally unfit to practice law.” 353 U.S. at 246-47. It seems

Commissioner of Immigration,⁷³ which arguably undertook extensive evidentiary review only to protect first amendment freedoms.

The limitation of the no-evidence rule to parole and probation revocation decisions is equally evident from the Court's application of the *Mathews* balancing test. Although parole and probation revocation decisions are not technically part of criminal proceedings,⁷⁴ these decisions constitute findings of misconduct that affect more important liberty interests than do other civil decisions.⁷⁵ Accordingly, the no-evidence rule should only be applied where the state decision imposes the threat of prison confinement for criminal convictions and disciplinary actions.

This narrow reading of the *Thompson-Hill* doctrine is buttressed by Justice Powell's concurring opinion in *Regents of the University of Michigan v. Ewing*.⁷⁶ Ewing claimed that his dismissal from the University's six-year undergraduate/medical school program, allegedly unsupported by evidence, constituted a violation of his right to due process.⁷⁷ In their amicus brief, the National Education Association and the American Federation of Teachers argued that *Thompson* and *Hill* supported the proposition that the deprivation of *any* liberty or property interest without evidence violates due process.⁷⁸ The major-

likely the Court undertook extensive review of the evidence to protect Schwere's first amendment freedoms. See J. NOWAK, R. ROTUNDA & J.N. YOUNG, *CONSTITUTIONAL LAW* 970 (2d ed. 1983).

73. 273 U.S. 103 (1927). The Court's review of the evidence in *Vajtauer* also may have been motivated by a concern for first amendment freedoms. Vajtauer was deported because of his Communist activities. The Court stated that "[t]he ultimate question presented by this record . . . is whether the warrant of deportation was supported by any evidence that the alien when he entered the United States advocated opposition to all organized government or the overthrow of the United States government by force and violence, within the meaning of the statute." 273 U.S. at 106. In addition, the *Vajtauer* Court was reviewing a federal agency decision to determine whether the agency action complied with federal law, rather than reviewing a state decision on arbitrariness grounds. See generally Rubin, *supra* note 21, at 1048 & n.40, 1058-59 & nn.71-72 (discussing the due process implications of *Schwere* and *Vajtauer*).

74. See, e.g., *Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984); *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 483-85 (1972).

75. See *Morrissey v. Brewer*, 408 U.S. at 482, ("[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others."). A number of Court decisions have granted greater due process protection for state probation and parole decisions than for other state entitlement denial decisions. See, e.g., *Bearden v. Georgia*, 461 U.S. 660, 671-72 (1983) (state must consider alternatives before revoking probation); *Gagnon v. Scarpelli*, 411 U.S. at 781-82 (probationers and parolees are entitled to both a preliminary and a final hearing); *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam) (*Bouie ex post facto* rule only applies to criminal convictions and probation and parole revocation decisions, but not other civil decisions); *Prater v. United States Parole Commn.*, 802 F.2d 948, 952 (7th Cir. 1986) (same).

76. 474 U.S. 214 (1985). See generally Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 994 (1986).

77. 474 U.S. at 217-19.

78. Brief for the National Education Association (NEA) and the American Federation of Teachers (AFT) as *Amici Curiae* in Support of Respondent at 7-10, *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (No. 84-1273) [hereinafter *Amicus Brief for Ewing*].

ity opinion, however, avoided the due process issue. Even if Ewing had such a right, the majority stated, the University's action was supported by the evidence.⁷⁹ In addition, the Court expressed its reluctance to "trench on the prerogatives of state and local educational institutions."⁸⁰

Justice Powell squarely addressed the due process issue in his concurrence. He argued that Ewing did *not* have a substantive due process right to be free from state action taken without evidentiary support. Due process, Powell argued, requires the state to provide only *procedural* protections when the state deprives a person of a state-created property interest.⁸¹ Substantive due process rules, Powell argued, should only apply when the state infringes upon "fundamental interests" which historically have been "viewed as implicitly protected by the Constitution."⁸² Under Powell's analysis, state actions that violate state law do not violate due process if they interfere with liberty interests that are merely "important." Rather, such state actions violate due process only if they interfere with historically recognized "fundamental liberty interests." Powell's analysis suggests that the *Thompson* no-evidence doctrine should be limited at least to criminal convictions, parole/probation revocation decisions, and prison disciplinary actions. These decisions, which constitute findings of misconduct that impose the sanction of prison confinement, implicate historically recognized fundamental liberty interests not implicated by state civil decisions.⁸³ In this way, the no-evidence doctrine may be viewed as a criminal procedural right only applicable to criminal convictions and other disciplinary decisions that impose the threat of prison confinement.

2. *Hicks as a Criminal Procedure Case*

In *Hicks v. Oklahoma*, the Court again appears to have applied a rule against arbitrary state decisions to protect criminal procedural rights.⁸⁴ Defendant Hicks was tried and convicted for distributing heroin. Because he had two previous felony convictions, the jury had been instructed to sentence him to forty years' imprisonment based on the habitual offender statute then in effect. After Hicks' conviction, the Oklahoma Court of Criminal Appeals, in an unrelated case, invalidated the recidivist provision as unconstitutionally vague.⁸⁵ On his

79. 474 U.S. at 223.

80. 474 U.S. at 226.

81. 474 U.S. at 229-30 (Powell, J., concurring).

82. 474 U.S. at 229-30.

83. See note 75 *supra*; note 186 *infra*.

84. 447 U.S. 343 (1980). The following analysis of *Hicks* was, in part, suggested by Professor Peter Westen of the University of Michigan Law School.

85. *Thigpen v. State*, 571 P.2d 467, 471 (Okla. Crim. App. 1977).

subsequent appeal to that court, Hicks asked to have his forty-year sentence set aside. The Court of Criminal Appeals acknowledged that the statute was unconstitutional but affirmed the conviction and sentence nonetheless. The court reasoned that Hicks was not prejudiced by the impact of the invalid statute, since his sentence was within the range of punishment that could have been imposed in any event.⁸⁶

On certiorari, the Supreme Court applied its familiar two-step due process entitlement analysis. This test requires that a reviewing federal court first examine the relevant state law to determine whether a person had a "property" or "liberty" interest under that law.⁸⁷ This determination will normally depend on the state's statutory, regulatory, and judicial pronouncements.⁸⁸ Second, the court must determine whether the agency deprived the person of his or her "property" or "liberty" interest without due process. To determine the amount of procedure that is "due," the Court will employ the three-tiered analysis of *Mathews v. Eldridge*.⁸⁹

The most difficult part of the analysis is determining whether the state had created a "property" or "liberty" interest in the first place. In the typical case, after a state agency revokes a benefit, the aggrieved party goes immediately before federal district court, alleging a deprivation of constitutional rights under section 1983 of the Civil Rights Act.⁹⁰ To determine whether the party had an entitlement under state law, the federal court usually focuses on the state statute's language.⁹¹

86. *Hicks v. State*, No. F-77-751 (Okla. Crim. App. Mar. 8, 1979), *quoted in Hicks v. Oklahoma*, 447 U.S. at 345 n.2.

87. *See, e.g., Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

88. *See Bishop v. Wood*, 426 U.S. 341, 344-45 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972). *See generally* Smolla, *supra* note 21, at 473.

89. 424 U.S. 319 (1976). *See* notes 65-67 *supra* and accompanying text.

90. 42 U.S.C. § 1983 (1982). *Monroe v. Pape*, 365 U.S. 167, 183 (1961), established that state remedies need not be exhausted before a plaintiff may seek relief under section 1983. At the same time, the Court has held that a federal court should "stay its hand" when there is reason to believe that state judicial remedies would still be available. *Mabry v. Klimas*, 448 U.S. 444, 447 (1980).

91. *Ford v. Wainwright*, 477 U.S. 399, 428 (1986) (O'Connor, J., concurring in part, dissenting in part) ("Our cases leave no doubt that where a statute indicates with 'language of an unmistakable mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause.") (quoting *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983)); *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 12 (1979) ("whether . . . [a] state statute provides a protectible entitlement must be decided on a case-by-case basis" in view of each statute's "unique structure and language"); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

When the question is one of liberty rather than property, the Court has occasionally derived a constitutional liberty interest without reference to the state statute. *See Vitek v. Jones*, 445 U.S. 480, 491-94 (1980) (holding that, independent of a state statute regulating the transfer of prisoners to mental hospitals, such a transfer implicates liberty interests); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (right to be free from intrusions on personal security created by fourteenth amendment). In other prisoners' rights cases, the Court has held that no constitutional liberty interest was implicated. *See Hewitt v. Helms*, 459 U.S. at 466-67; *Olim v. Wakinekona*, 461 U.S. 238 (1983); *Meachum v. Fano*, 427 U.S. 215 (1976).

If the state supreme court has ruled on the existence-of-entitlement issue in the case at hand or in other similar cases, the Court has usually deferred to these rulings as authoritative statements of state law.⁹²

Applying this two-part due process analysis in *Hicks*, the Court first found that Hicks had a liberty interest. This liberty interest arose from Hicks' "substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion"⁹³ The Court stated that Hicks was "entitled under state law" to a different jury sentence. While Hicks had been sentenced under the recidivist statute, which required a forty-year mandatory sentence, the "correct" statute would have allowed the jury to impose a sentence of a minimum of ten years' imprisonment.⁹⁴

The Court next held that the state had deprived Hicks of this liberty interest without due process.⁹⁵ Even if the state court had the right to modify his sentence, its consideration of Hicks' claim did not provide him with adequate procedural protection, the Court said, because the appellate court did not "purport to cure the deprivation by itself reconsidering the appropriateness of the petitioner's 40-year sentence."⁹⁶ The Supreme Court deemed "arbitrary" the state court's "frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision."⁹⁷

The Court's reasoning in *Hicks* diverges from the facts. The Court said that the liberty interest was based on the statute. But, at the time

92. See *Olim v. Wakinekona*, 461 U.S. 238, 244 n.5, 249-50 (1983); cf. *Mabry v. Limas*, 448 U.S. 444, 447 (1979) (federal courts should defer hearing a habeas corpus action until the state courts have ruled on the issue, particularly when the claim arises from an alleged deprivation by state courts of rights created under state law); *Bishop v. Wood*, 426 U.S. 341, 345-47 (1976) (deferring to the District Court's interpretation of state law in the absence of a state supreme court ruling on the issue). See generally Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 439-42 (1977) (criticizing the Court's approach); Rubin, *supra* note 21, at 1091-92; Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CALIF. L. REV. 146, 182-83 (1983) (commenting on Monaghan).

93. 447 U.S. at 346-47.

94. 447 U.S. at 346.

95. 447 U.S. at 346.

96. 447 U.S. at 347. The Court also rejected the argument that the appellate court had the discretion to increase the sentence on appeal, even if the trial court had applied the wrong statute. Oklahoma Statute title 22, section 1066 (1971) gave Oklahoma appellate courts the power to "reverse, affirm or modify the judgment appealed from." 447 U.S. at 347. To justify its reluctance to accept the state court's interpretation of state law, the Court noted that the state's assistant attorney general had stated in oral argument that "it was doubtful whether the appellate court had power" under state law to increase a sentence on appeal. 447 U.S. at 347. Despite the Court's suggestion in *Hicks* that the Oklahoma state appellate courts did not have discretion to modify lower court sentences, the Oklahoma appellate court later reaffirmed its right to modify sentences. *Livingston v. State*, 614 P.2d 1118 (Okla. Crim. App. 1980), *cert. denied*, 449 U.S. 1102 (1981).

97. 447 U.S. at 346. On remand, Hicks' sentence was modified to the minimum possible under the valid section of the statute. *Hicks v. State*, No. F-77-751 (Okla. Jan. 15, 1981) (on remand) reported in *Nipps v. State*, 626 P.2d 1349, 1350 & n.4 (Okla. Crim. App. 1981).

Hicks was sentenced, the then-valid statute dictated that the jury impose a mandatory forty-year sentence. It is incorrect to say that Hicks had an expectation that he would be sentenced under any other statute. It is true that the Oklahoma appellate court later declared the statute under which Hicks had been sentenced unconstitutional. But the court's refusal to give retroactive effect to its earlier decision,⁹⁸ even to a case pending on appeal when the decision was made, was consistent with established principles of retroactivity.⁹⁹ In fact, the appellate court had declared the habitual offender statute unconstitutional because the statute mandated sentences that were too lenient on a defendant with two prior convictions (like Hicks).¹⁰⁰

Although the Court explicitly relied on procedural due process cases,¹⁰¹ *Hicks* cannot be squared with traditional procedural due process analysis. *Hicks* was not a case in which a state agency or court denied an entitlement without procedural due process. Rather, the state appellate court decided as an initial matter that state law did not give Hicks a substantive right to be resentenced by a jury under the jury sentence statute.¹⁰² Although allowing the jury to resentence Hicks under this statute might have resulted in a different sentence, Hicks nevertheless received procedural due process because he had full opportunity to argue in the appellate court that the court should have applied this statute to remand the case for jury resentencing.¹⁰³

Despite its broad due process language, *Hicks* should not be read

98. The Supreme Court has long held that a state court has discretion whether to give retrospective effect to a new constitutional rule or statutory interpretation. See *Linkletter v. Walker*, 381 U.S. 618, 629 (1965); *James v. United States*, 366 U.S. 213 (1961); *Great Northern Ry. v. Sunburst Oil & Ref.*, 287 U.S. 358, 364-66 (1932) (state court's decision to give retrospective effect to new rules depends on "the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature").

In *United States v. Johnson*, 457 U.S. 537 (1982), the Court modified the rule of retroactivity for the announcement of new constitutional rules of criminal procedure. The Court said courts can only refuse to apply a new constitutional rule on criminal procedure to cases pending on appeal if the rule was a "clear break" from the past. In *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), the Court again modified the rule, saying that courts could not refuse to apply a new constitutional rule to cases pending review. *Hicks* falls within this range of cases.

99. In *Andrews v. Shulsen*, 600 F. Supp. 408, 430 (D. Utah 1984), *aff'd*, 802 F.2d 1256 (10th Cir. 1986) (death penalty case) the defendant argued that *Hicks* supported the proposition that state courts must retroactively apply newly announced state constitutional rulings. The district and appellate courts refused to read *Hicks* so broadly. The district court rejected the argument, saying that the state court's decision was not "arbitrary" nor "based on mere conjecture," but rather "based on a rational application of established principles of retroactivity." The Court of Appeals rejected the argument on slightly different grounds. The court found *Hicks* inapposite because the state court had decided the defendant did not have a state-created entitlement. The court indicated it was not proper for it to review the state court's decision. 802 F.2d at 1271 n.13.

100. *Thigpen v. State*, 571 P.2d 467 (Okla. Crim. App. 1977). See also Justice Rehnquist's dissent, 447 U.S. at 351 (analyzing the case in equal protection terms and stating that Hicks "was a member of the favored class").

101. *Hicks*, 447 U.S. at 346.

102. See 447 U.S. at 347.

103. *Contra* 447 U.S. at 346-47.

to stand for the proposition that any state court decision that “arbitrarily” deviates from a state statute or prior state court holding violates due process. The Court may have been motivated by a concern that Hicks received a judge-determined sentence rather than a jury sentence. The Court expressed its concern that the state court had taken away Hicks’ statutorily-created right to jury sentencing on the “frail conjecture” that a judge could decide an alternative sentence that was consistent with a jury sentence.¹⁰⁴ The right to jury sentencing, the Court implied, was more than a mere statutory right. Rather, it was a constitutional right that the state could not take away, at least not without a good reason. Furthermore, the Court may have been concerned that Hicks’ forty-year sentence for the sale of heroin with two prior convictions violated the eighth amendment protection against cruel and unusual punishment because it was excessive.¹⁰⁵ By relying on the rule against arbitrary decisions, the Court was able to reverse the state court decision without explicitly addressing the broader constitutional issues concerning the eighth amendment and jury sentencing.¹⁰⁶

In both *Thompson* and *Hicks* the defendant challenged state actions that raised important questions about the scope of certain criminal guarantees, such as the right to an appeal or the right to jury sentencing. In both cases the Court managed to provide the defendant with relief without explicitly addressing these issues. Instead, the Court relied on broad language condemning arbitrary state decisions. Because it appears the Court was primarily concerned with securing criminal procedural protections, these cases should not be interpreted to support a broad rule against arbitrary state decisions.

104. *Hicks*, 447 U.S. at 346-47. The state appellate court emphasized that because the punishment imposed was within the range of punishment authorized by Oklahoma law, the defendant was not prejudiced by the use of the habitual offender statute. *Hicks v. State*, No. F-77-751 (Mar. 8, 1979) (quoted in *Hicks*, 447 U.S. at 345 n.2).

105. See Brief of Petitioner, at 69, n.30, *Hicks v. Oklahoma*, 447 U.S. 343 (1980) (No. 78-6885) (arguing that “this particular sentence under this statute is ‘excessive’ . . . because the sentence makes no measurable contribution to acceptable goals of punishment and because it was imposed in a feckless and arbitrary way”). The standard for deciding whether punishment violates the eighth amendment because it is excessive was outlined by the Court in *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (death penalty case). The Court later applied these principles to a noncapital case. *Solem v. Helm*, 463 U.S. 277 (1983) (5-4 decision) (invalidating on eighth amendment grounds a life imprisonment sentence imposed under a recidivist statute triggered by a seventh nonviolent felony conviction).

106. The Court in other cases has explicitly rejected the argument that the sixth amendment guarantees the right to jury sentencing. See, e.g., *Spaziano v. Florida*, 468 U.S. 447 (1984) (no constitutional right to jury sentencing in capital cases); *United States v. Neary*, 552 F.2d 1184 (7th Cir.), cert. denied, 434 U.S. 864 (1977) (no sixth amendment right to have jury fix one’s punishment).

B. Thompson and Logan: Concern About Protecting Constitutionally Protected Activity

A second framework for distinguishing the cases that seem to create a general rule against arbitrary state decisions focuses on the Court's concern for constitutionally protected activity. In *Thompson* and *Logan*, for example, it appears the Court was primarily concerned with preserving conduct protected by the first amendment and the equal protection clause yet chose to avoid the constitutional issues by phrasing its decision in terms of arbitrariness.

1. Thompson as a First Amendment and Equal Protection Case

In *Thompson*, the conviction for loitering and disorderly conduct constituted a decision that state law prohibited Thompson's conduct. This interpretation of state law may have violated Thompson's first amendment rights by convicting him for merely arguing.¹⁰⁷ In addition, the court may have violated his fundamental right to freedom of movement by punishing him for shuffling his feet.¹⁰⁸

In almost every subsequent Supreme Court case applying *Thompson* to a state decision, the Court has used the no-evidence doctrine as a prophylactic rule to protect first amendment and equal protection rights implicated by the state decision at issue.¹⁰⁹ In four cases involving segregation practices, the Court used the *Thompson* doctrine to protect first amendment and equal protection values. First, in *Garner v. Louisiana*,¹¹⁰ the Court reversed the "disturbing the peace" convictions of blacks who had conducted "sit-ins" at segregated lunch

107. A number of commentators have argued that the Court may have intended "no evidence to support a conviction" to mean "no evidence to support a conviction for constitutionally punishable conduct." See Tushnet, *supra* note 48, at 795-96; Wechsler, *supra* note 22, at 1058; Comment, *Recent Decisions — Conviction Without Evidence*, 58 MICH. L. REV. 306, 307 (1962) [hereinafter Comment, *Conviction Without Evidence*]; Note, *No Evidence*, *supra* note 48, at 1145-46.

108. The Court later recognized the fundamental right to "walk and stroll" in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1971).

109. Judge Brown of the Fifth Circuit has suggested that the Court has used the no-evidence doctrine to reverse convictions when the lack of evidence showed that the arrest and prosecution were racially motivated. In *Perkins v. Mississippi*, 455 F.2d 7 (5th Cir. 1972) (Brown, J., dissenting), he explained:

[A]n utter absence of evidence to support a criminal charge becomes of critical significance to a determination of whether or not the arrest and prosecution are racially motivated. . . . It is no mere coincidence that Negroes have figured prominently in many of those cases in which the Supreme Court has reversed State convictions grounded on evidence so insufficient as to constitute a denial of due process of law.

455 F.2d at 46 (citing *Thompson*, *Garner*, *Taylor*, *Bowie*, *Barr*, *Johnson*, and *Palmer*). *Douglas v. Buder*, 412 U.S. 430 (1973) (per curiam) (reversing a probation revocation) is the only *Thompson* case that does not appear to implicate first amendment or equal protection concerns. But the *Buder* case may be viewed as an *ex post facto* case. The Court explicitly recognized its *ex post facto* concerns in the decision which rested on alternative grounds. For a discussion of *Buder*, see note 50 *supra*.

110. 368 U.S. 157 (1961).

counters. Second, in *Taylor v. Louisiana*,¹¹¹ the Court again eschewed a constitutional decision and instead relied on the no-evidence doctrine to reverse breach-of-the-peace convictions of four blacks sitting in a “white” bus depot waiting room. Third, in *Barr v. City of Columbia*,¹¹² the Court reversed the criminal trespass convictions of five black sit-in demonstrators who refused to leave “white” lunch counters. And finally, in *Shuttlesworth v. City of Birmingham*,¹¹³ the Court relied on *Thompson* to reverse the conviction of a black civil rights leader charged with loitering and refusing to obey the police while he was engaged in a civil rights boycott. In all four cases, it appears that the Court refused to accept the state court’s interpretations of the state laws at issue primarily because the Court was unwilling to address fully the broader first amendment and equal protection issues implicated by the state actions.¹¹⁴

The Court’s reliance on *Thompson* in *Johnson v. Florida*,¹¹⁵ *Gregory v. City of Chicago*,¹¹⁶ and *Vachon v. New Hampshire*¹¹⁷ may also be explained as attempts to secure constitutional protection of the activities in question. In *Johnson*, the state’s actions interfered with the defendant’s right to freedom of movement.¹¹⁸ In *Gregory* and *Vachon*, the states’ actions implicated first amendment freedoms.

111. 370 U.S. 154 (1962).

112. 378 U.S. 146 (1964).

113. 382 U.S. 87 (1965). The Court concluded that there was no evidence that the policeman’s order for Shuttlesworth to move was given to help direct traffic. 382 U.S. at 95. The Court rejected Justice Fortas’s argument that “[a]ny attempt to punish Shuttlesworth in these circumstances would, in my view, violate the Fourteenth Amendment.” 382 U.S. at 102 (Fortas, J., concurring).

114. Jack Greenberg, in a tribute to Charles L. Black, Jr., who argued *Bouie* and *Barr* before the Supreme Court, described the Court’s reluctance to rule on the broader equal protection issue:

The big new issues of that period arose out of the sit-ins, freedom rides, and demonstrations of Martin Luther King, Jr., whom LDF (NAACP Legal Defense Fund) represented. Foremost among those issues was determining what constituted state action under the equal protection clause of the Fourteenth Amendment. . . . The Supreme Court went to great lengths not to decide the constitutional issue — probably out of uncertainty over what the implications of such a decision might be. Instead, the Court decided the demonstration cases on a variety of nonconstitutional statutory and evidentiary grounds. Greenberg, *Charles L. Black, Jr.*, 95 YALE L.J. 1559, 1560 (1986).

After the passage of the Civil Rights Act, the Court had less difficulty reversing similar convictions by relying explicitly on the Act. In *Hamm v. City of Rock Hill*, 379 U.S. 306, 308 (1965), the Court held that the Civil Rights Act “removes peaceful attempts to be served on an equal basis from the category of punishable activities.”

115. 391 U.S. 596 (1968) (per curiam).

116. 394 U.S. 111 (1969).

117. 414 U.S. 478 (1974) (per curiam).

118. The Court in *Johnson* relied on *Thompson* to reverse a vagrancy conviction. The vagrancy statute required a finding that a person was “wandering or strolling.” 391 U.S. at 596. The Court may have relied on the *Thompson* doctrine in *Johnson* because it was unwilling at that time to declare a broader constitutional right to freedom of movement later outlined in two vagrancy cases, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Gregory reversed the disorderly conduct convictions of a group of marchers.¹¹⁹ *Vachon* reversed the conviction of a store owner for "willfully" contributing to the delinquency of a minor by selling a button inscribed "Copulation Not Masturbation" to a fourteen-year-old girl.¹²⁰

In almost every *Thompson* no-evidence case, the Court used the *Thompson* doctrine to enforce constitutional protection of activities threatened by the state action at issue. Because *Thompson* is properly viewed as a doctrine designed to secure such constitutional protection, it need not be applied to state decisions that do not implicate the exercise of constitutional rights.

2. Logan: Concern About Protecting Equal Protection Values

In *Logan v. Zimmerman Brush Co.*, plaintiff Logan filed suit against his employer with the Illinois Fair Practices Commission, alleging unlawful termination because of his physical handicap.¹²¹ The Illinois statute required the Commission to convene a factfinding conference within 120 days after the complaint was filed.¹²² The Commission's representative, however, scheduled the factfinding conference five days *after* the expiration of the 120-day period. When the confer-

119. 394 U.S. 111 (1969). The Court stated that the defendants' march, if peaceful and orderly, was clearly protected by the first amendment. Still, it ruled on no-evidence grounds, saying there was no evidence of disorderly conduct. 394 U.S. at 112. See WRIGHT, *FEDERAL PRACTICE*, *supra* note 22, at 784 n.15 (arguing that the case could have been decided on first amendment grounds).

120. 414 U.S. 478 (1974). The Court concluded that New Hampshire law required the state to prove that the accused knew the girl was a minor, and that he personally sold her the button or personally caused another to sell it to her. 414 U.S. at 478-79. But the evidence, based solely on the girl's testimony, only showed that the girl bought the button from "some person" in the store. (The store owner conceded he "controlled the premises" on that date.) The Court concluded that there was "no evidence" the defendant sold the button, knew it had been sold to a minor, authorized sales to minors, or was even in the store at the time of the sale. 414 U.S. at 480. The Court rejected the argument that the state supreme court had reinterpreted the "willfully" requirement in the statute by affirming the conviction. The Court reversed on no-evidence grounds apparently because the Court was unwilling to declare a new constitutional rule of obscene speech, even though a strong argument can be made that the conviction violated the first amendment as it had been interpreted at that time. See Spann, *Functional Analysis of the Plain-Error Rule*, 71 GEO. L.J. 945, 949-50 & n.34 (1983); Tushnet, *supra* note 48, at 798 n.174.

Another explanation of *Vachon* is that the Court was seeking to protect a criminal procedural guarantee of a *mens rea* finding. Two commentators have argued that the Court in *Vachon* reversed the conviction because the state had created strict criminal liability by eliminating the *mens rea* element from the crime of contributing to the delinquency of a minor. See Tushnet, *supra* note 48, at 797-98; Comment, *Jackson v. Virginia*, *supra* note 48, at 1588 n.74.

121. 455 U.S. 422 (1982). The Illinois Fair Employment Practices Act, ILL. REV. STAT. ch. 48, §§ 851-867 (1979), repealed and replaced by Illinois Human Rights Act, Pub. Act No. 81-1216, § 10-108, 1979 Ill. Laws 4854, 4892-93, prohibited employment discrimination against the handicapped and created the commission to investigate and adjudicate claims of such discrimination.

122. At the factfinding conference, if the Commission found "substantial evidence" of illegal conduct, it was to try to reach conciliation, or, if that proved impossible, issue a formal complaint against the employer. FEPA §§ 858-858.01.

ence date arrived, the employer moved to dismiss the charge, but the Commission rejected the request. The employer petitioned the Illinois Supreme Court to stay the Commission proceeding. The court held that the statute's time deadline deprived the Commission of jurisdiction to hear Logan's claim.¹²³ Logan appealed to the U.S. Supreme Court, claiming, among other things, that the state decision violated due process because it was arbitrary.

The Supreme Court began its decision by employing the traditional two-part entitlement analysis.¹²⁴ First, the Court decided that Logan had a property interest consisting of a right to bring a claim under the Illinois Fair Employment Practices Act.¹²⁵ Next, the Court held that Logan did not receive procedural due process before he was deprived of his property interest.¹²⁶

At this point, the Court's reasoning is unclear. In the initial part of the decision, the Court indicated that Logan's property interest was his right to bring a claim.¹²⁷ Therefore, procedural due process would require only that Logan be given a hearing to determine whether he had this right. In fact, Logan was afforded a hearing in the Illinois Supreme Court. Yet later the Court suggested that Logan had a property right to a *favorable decision* that would vindicate his "right to be free from discriminatory treatment."¹²⁸ Thus, the Court held that procedural due process entitled Logan to a hearing on the *merits* of the claim (the procedure due) before the Commission decided to refuse his

123. The Illinois Supreme Court relied on a previous decision and noted the statute's policy concern for facilitating the "just and expeditious resolutions of employment disputes," while protecting employers "from unfounded charges of discrimination." *Logan*, 455 U.S. at 427 (quoting *Zimmerman Brush Co. v. Fair Employment Practices Commn.*, 82 Ill. 2d 99, 107, 106, 4 N.E.2d 277, 282, 281 (1980)). The Illinois Supreme Court also rejected Logan's argument that his due process and equal protection rights would be violated by allowing the Commission's error to extinguish his cause of action. The state legislature had established the right to petition for redress for discriminatory employment practices, the court said, and "[t]he legislature could establish reasonable procedures to be followed upon a charge." *Logan*, 455 U.S. at 427 (quoting *Zimmerman Brush Co.*, 82 Ill. 2d at 108, 411 N.E.2d at 282). The court also ruled that Logan could not file a second charge with the Commission based on the same act of alleged discrimination, because this would circumvent the design of the statute and frustrate the public interest in expeditious resolution of disputes. *Logan*, 455 U.S. at 428 (citing *Zimmerman Brush Co.*, 82 Ill. 2d at 108-09, 411 N.E.2d at 282-83).

124. See generally notes 87-89 *supra* and accompanying text.

125. This "property" interest was described as a "cause of action," 455 U.S. at 428, and "the right to use the FEPA's adjudicatory procedures." 455 U.S. at 431.

The Court acknowledged that state courts have the right to impose procedural limits on the right to an adjudication, including statutes of limitation, immunities defenses, and filing fees. 455 U.S. at 432-33, 437.

126. 455 U.S. at 430-34.

127. 455 U.S. at 428.

128. 455 U.S. at 437. Earlier, the Court referred to the property interest as "a state-created right to redress discrimination." 455 U.S. at 431 (emphasis added). See Comment, *Parratt v. Taylor*, *supra* note 22, at 1218-19 n.227; Note, *Parratt v. Taylor Revisited*, 65 B.U. L. REV. 607, 631-34 (1985).

right to redress his discrimination (the deprivation).¹²⁹ What the Court at first had deemed the property interest (the right to bring a claim) now became the procedure (the right to be heard on the merits) constitutionally necessary before the state could reject his claim on the merits.¹³⁰ Thus, Logan had the right to a hearing on the merits before the state refused to redress the discrimination.

The Court's willingness to disregard the state court's holding on the existence of a state-created entitlement (the right to bring a claim) may have been motivated by its concern over employment discrimination.¹³¹ The Court appears to be tacitly saying that Logan had a constitutional right to be free from discrimination. If this right were at stake, the Court could have reviewed the state procedural rules that blocked Logan from bringing a constitutional claim under the inadequate state ground doctrine.¹³² However, by silently changing the nature of the property interest while remaining within the traditional due process analysis, the Court was able to protect Logan's right to be free from discrimination without announcing a new constitutional doctrine concerning discrimination.

In *Thompson* and *Logan* it appears that the Court relied on the rule against arbitrary decisions to avoid explicitly addressing the scope of specific constitutional freedoms implicated by the state action. A number of courts of appeals have also adopted the *Thompson* and *Logan* rules against arbitrary decisions as a prophylactic means to review state decisions that implicated specific constitutional guarantees. In *Spruytte v. Walters*,¹³³ *Barnett v. Housing Authority of Atlanta*,¹³⁴

129. 455 U.S. at 433-34.

130. See Rubin, *supra* note 21, at 1088 (calling *Logan* a "convoluted" opinion).

131. See W. LOCKHART, J. CHOPER, Y. KAMISAR & S. SHIFFRIN, CONSTITUTIONAL LAW (6th ed. 1986) 613 n.105 (noting that "the Court never told us why it was disregarding the state court's construction of the state's statute"); Smolla, *supra* note 21, at 500 n.175. The *Logan* Court also noted that it was concerned with protecting a "fundamental interest." 455 U.S. at 430 n.5. See, also *Rutherford v. United States*, 702 F.2d 580, 583 (5th Cir. 1983) (suggesting that the Court's decision in *Logan* was motivated in part by the Court's concern about "Logan's right to be free from discriminatory treatment").

132. The inadequate state ground doctrine, as formulated in a number of Court cases, provides that state procedural grounds may be deemed "inadequate" when (1) they are "plainly untenable," "novel," or "an arid ritual of meaningless form"; (2) they lack fair or substantial support in state law; or (3) they place unreasonable obstacles to assertion of federal rights. See, e.g., *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930). See generally WRIGHT, FEDERAL PRACTICE, *supra* note 22, at § 4027; Spann, *supra* note 119, at 970-71.

133. 753 F.2d 498, 509 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). The court relied on *Thompson* and *Logan* in finding that a prison's refusal to allow a prisoner to receive a dictionary violated substantive due process where the refusal violated state administrative rules. The court made a brief reference to the prisoner's first amendment right to receive a dictionary. 753 F.2d at 501-02. See notes 15-17 *supra* and accompanying text.

134. 707 F.2d 1571, 1575, 1577-78 & n.3 (11th Cir. 1983). The court adopted a rule against arbitrary decisions, citing *Wood v. Strickland*, 420 U.S. 308, 326 (1975), which reversed a lower federal court *Thompson* decision. The *Barnette* court held that a state job termination in violation of state rules may violate substantive due process. The record indicated that the plaintiff was fired because one of her bosses was angry that a member of the plaintiff's staff talked to the

and *Neiderhiser v. Borough of Berwick*,¹³⁵ the state decisions implicated first amendment concerns. And in *Scott v. Greenville County*¹³⁶ and *Moore v. Warwick Public School District No. 29*,¹³⁷ the state decisions implicated equal protection concerns. Because the *Thompson* and *Logan* decisions were designed to protect specific constitutional freedoms, they should not be extended to state decisions that do not infringe constitutionally protected activities. Furthermore, when state action *does* implicate protected activity, a federal court should decide the case on the ground that the activity is protected because a decision on no-evidence grounds provides little guidance for the courts and little protection for future litigants.¹³⁸

II. A CONSTITUTIONAL RULE AGAINST ARBITRARY STATE DECISIONS IS INCOMPATIBLE WITH FEDERALISM

The rule against arbitrary state decisions, suggested by the *Thompson*, *Logan*, and *Hicks* decisions, is incompatible with federalism because it permits federal courts to become the ultimate expositors of state law. In addition, federal court review of arbitrary state decisions interferes with the state decisionmaking process by denying state branches of government the opportunity to evaluate and respond to one branch's arbitrary interpretation of state law.

A. A Functional Analysis of the Rule Against Arbitrariness and the Doctrine of Federalism

In *Thompson*, *Logan*, and *Hicks*, the Supreme Court never explained what values would be served by a rule against arbitrary state decisions. However, commentators in favor of a rule against arbitrary state decisions argue that the prohibition protects at least five values:

press. The court may have sought to protect the plaintiff's (and her staff's) first amendment right to talk to the press.

135. 840 F.2d 213, 217-18 (3d Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3850 (U.S. May 27, 1988) (No. 87-1969). The Court, citing *Wolff v. McDonnell*, 418 U.S. 529 (1974), held that a zoning board's refusal to grant an exemption to a video store may have violated due process. Additionally, the court said the decision may have violated the first amendment.

136. 716 F.2d 1409, 1420-21 & nn.17, 19 (4th Cir. 1983). The court, citing *Logan*, held that the refusal to grant a building permit to a black man may violate substantive due process if the refusal violated state law. The court's equal protection concerns were made evident in its discussion of the plaintiff's race discrimination claim.

137. 794 F.2d 322, 323, 327-8 (8th Cir. 1986). The court, citing *Logan*, held that the school board may have violated substantive due process by arbitrarily firing the plaintiff after he became blind. The court made its equal protection concerns explicit when it held that the plaintiff had stated a valid claim for discrimination under a federal anti-discrimination law.

138. Comment, *Jackson v. Virginia*, *supra* note 48, at 1588-89.

individual liberty,¹³⁹ accuracy,¹⁴⁰ consistency,¹⁴¹ reliance,¹⁴² and majoritarianism.¹⁴³

It is not clear that the rule against arbitrariness would serve these values. Procedural guarantees at the state level ensure that a participant is given full opportunity to argue the law and facts of the case.¹⁴⁴ Another layer of appellate review by the federal courts does not ensure a more accurate or consistent decision, but it does ensure additional costs and uncertainty while the case is pending. While an arbitrary decision may violate the expectations of some persons, the state court and agencies with discretionary power must have the power to change the law to conform to changing conditions and values.¹⁴⁵ The impor-

139. The concern for individual liberty arises from a concern that state decisionmakers will rely on "impermissible" factors in making their decisions. *See, e.g.,* J. RAZ, *THE AUTHORITY OF LAW*, *supra* note 21, at 220-21; Rubin, *supra* note 21, at 1103, 1105-06 & n.297 (Unfettered discretion may allow state agents to "demand bribes, seek unreasonable obeisance, take revenge, or act on the basis of caprice or inadvertence."); Smolla, *supra* note 21, at 501 (concern about "administrative action that goes beyond discretion into the realm of impermissible activity"); Van Alstyne, *supra* note 21, at 488 (concern about "adjudicative procedural arbitrariness"); *cf.* *McGautha v. California*, 402 U.S. 183, 258-60 (1971) (Brennan, J., dissenting) (*mandate stayed*, 403 U.S. 951 (1971), *rehg. denied*, 406 U.S. 978 (1972), *rehg. granted, vacated sub nom.*, *Cramp-ton v. Ohio*, 408 U.S. 941 (1972) (arguing that the underlying concern about vague statutes is a concern that courts might apply them for "impermissible" reasons).

140. *See, e.g.,* R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 279 (1977) (Judge-made law is only legitimate when the uniquely determined right answer is ascertained and followed.); Morgan, *Right To Know Why*, *supra* note 21, at 333-44 (Requiring that states provide reasons for their decisions promotes accuracy.); Rubin, *supra* note 21, at 1102 (Concern for accuracy underlies due process.); Van Alstyne, *supra* note 21, at 488 (Persons should have a right to be free from adjudicatory procedures that contain an "intolerable margin of probable error."). *See generally* Brilmayer, *Wobble, or the Death of Error*, 59 S. CALIF. L. REV. 363, 374 (1986) [hereinafter Brilmayer, *Death of Error*].

141. *See, e.g.,* Leubsdorf, *supra* note 21, at 595 (arguing for decisional consistency).

142. Arbitrary state decisions may violate people's expectations about how they will be treated. *See, e.g.,* HART & WECHSLER, *supra* note 21, at 617 (Arbitrary decisions do not provide defendants, police, prosecutors, or the courts with advance warning of the reach of state force.); J. RAZ, *supra* note 21, at 220-26 (Arbitrary court decisions may violate expectations and make law incapable of guiding behavior for the social good.); Rubin, *supra* note 21, at 1105-6 & n.297 ("[T]he failure to follow applicable rules subjects individuals to a totally arbitrary regime, thereby denying them any possible control over their fate.").

143. State court decisions or agency decisions that contradict legislative rules, these commentators argue, violate the majority's will. *See, e.g.,* Burin, *The Theory of the Rule of Law and the Structure of the Constitutional State*, 15 AM. U. L. REV. 313, 328 (arguing that judges cannot "act as lawmaker[s]" outside the "statutory frame"); Morgan, *Right To Know Why*, *supra* note 21, at 333-44 (arguing that a requirement that judges provide reasons would promote public order and facilitate self-government); Rubin, *supra* note 21, at 1106, 1116-20 (emphasizing that, under the "traditional model of government," the legislature makes the rules while the judiciary must obey them).

144. *Harris v. Rivera*, 454 U.S. 339 (1981); Brilmayer, *Death of Error*, *supra* note 140, at 375 (arguing that a state court decision on state law is "correct" whenever the parties "had an adequate opportunity to present their arguments in court"). *See also* J. ELY, *supra* note 27, at 14-21 (arguing that the doctrine of substantive due process is not justified historically or by the meaning of the language).

145. By overturning previous decisions and reinterpreting laws to reflect new conditions or values, the state court may thereby make the law more accurately reflect *current* majoritarian values. Brilmayer, *Rights Thesis*, *supra* note 22, at 1176-78. *See also* B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 84-97 (1921) (1977 ed.).

tance of judicial decisionmaking is at the root of the common law tradition. In addition, although strict judicial enforcement of statutes and regulations may serve the interests of majoritarianism, such enforcement may not be desirable. The judiciary and agencies with discretionary power need the flexibility to consider equitable factors when interpreting and applying the law to novel fact situations. Furthermore, state courts and agencies need the power to disobey "bad" laws — such as laws ordering racial discrimination — to promote constitutional and other external values. By allowing the federal courts to "correct" arbitrary state court and agency decisions, the federal courts prevent the state courts and agencies from operating as a valuable check on the legislature. Strict application of statutes may, in some cases, lead to injustice if the state law at issue is unjust.¹⁴⁶

1. *Difficulties in Applying a Rule Against Arbitrary State Decisions*

A fundamental tension exists between the rule against arbitrariness and federalism. The arbitrariness rule would dictate that every error of state law presents a justiciable federal question. But federal court review of arbitrary state decisions intrudes into state power to decide issues of state law: decisions that appear to be arbitrary may in fact be valid interpretations of state law. A state decision that appears to be based on insufficient evidence may in reality be redefining the law to apply to the facts present in the case.¹⁴⁷ In addition, an arbitrary state decision that appears to conflict with a statute may actually be a reinterpretation or invalidation of the law.¹⁴⁸ Also, decisions that appear

146. See, e.g., Greenawalt, *Policy, Rights, and Judicial Decision*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 88 (M. Cohen ed. 1983); Horwitz, Book Review, 86 YALE L.J. 561, 566 (1977) (arguing that legalist jurisprudence inevitably discourages the pursuit of substantive justice); Teachout, Book Review, 53 N.Y.U. L. REV. 241, 272-88 (1978) (arguing that the rule of law is only desirable when combined with a "respect for the fundamental worth and dignity of all persons" and a "central commitment to the ideals of equality, fairness, justice and freedom from arbitrary control"). But see Leubsdorf, *supra* note 21, at 596-97 (arguing that pursuit of the rule of law does not necessarily exclude pursuit of higher values).

Acceptance of this argument depends on one's view of the role of the state judiciary. Advocates of the rule against arbitrariness are primarily concerned about state judicial tyranny. See, e.g., Rubin, *supra* note 21, at 1105-06. Opponents of the rule against arbitrariness are more concerned about state legislative tyranny. They advocate a strong judiciary as a means to combat legislative tyranny. See, e.g., Brilmayer, *Death of Error*, *supra* note 140, at 374 n.20.

147. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1141 (1986) (arguing that the Court should view "open-textured decisions" as "judicial formulation of law"); Comment, *Jackson v. Virginia*, 79 COLUM. L. REV. at 1581-82, 1585-86 (1979) (arguing that state supreme court affirmances of convictions are "authoritative determinations that state law condemned whatever acts the prosecution proved beyond a reasonable doubt").

Wechsler takes a different view, arguing that a state supreme court affirmance does not necessarily mean the supreme court has redefined state law. Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1058-59 (1977). A state court affirmance of a conviction, Wechsler argues, is not necessarily an implied ruling that the element on which there was no evidence is no longer required by state law. See generally HART & WECHSLER, *supra* note 21, at 617-18.

148. Westen, *Meaning of Equality*, *supra* note 22, at 644 n.79 ("every alleged failure of a state court to comply with its own law can, conceptually, be described with equal validity as a

to be internally inconsistent may actually rest on unstated rationales or assumptions.¹⁴⁹ Federal court review of arbitrary state decisions is also problematic because states may allocate lawmaking power to different branches of government in any manner they choose.¹⁵⁰ For this reason, it is difficult for a federal court to decide that a decision by one branch is incorrect as a matter of state law because the decision may not yet have been evaluated by the other branches.

The commentators who advocate a rule against arbitrariness recognize that such a rule would interfere with state decisionmaking processes.¹⁵¹ To resolve this problem, they argue that state law errors should only create federal claims in *certain* instances,¹⁵² such as when the error is a “clear mistake”¹⁵³ or when it affects an individual’s rights.¹⁵⁴ But these modifications do not avoid the problem. Even a modified rule against arbitrariness makes a federal court the final interpreter of state law in some cases. Federal review, according to the rule against arbitrariness, is justified solely because the state has failed to decide its own law correctly. Such a rule would fundamentally change the nature of federal-state relations and thwart the values served by federalism.

redefinition by the state court of what its own law really is”) (emphasis in original); *see also* Brilmayer, *Death of Error*, *supra* note 140, at 369-71, 380 (arguing that state supreme courts are capable of “wobble,” but they cannot err). However, in an earlier article, Brilmayer wrote in a footnote that “[i]n exceptional instances . . . there may be Supreme Court review on the basis of arbitrariness, where the claim is that the decision is ad hoc rather than merely a change in law.” Brilmayer, *Rights Thesis*, *supra* note 22, at 1179 n.19. *But see* Morgan, *Playing by the Rules*, *supra* note 21, at 6-7.

149. *See, e.g.*, cases cited in note 6 *supra*; *Cf.* Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981) (holding that due process does not require the board to state its reasons for denying applications for commutation of life sentences)..

150. *See* cases cited in note 26 *supra*.

151. *See* Amsterdam, *supra* note 21, at 624-25; Morgan, *Right To Know Why*, *supra* note 21, at 341, 343-44; Note, *Guarantee Clause*, *supra* note 21, at 578.

152. Commentators place different limits on the application of the rule against arbitrary state decisions. Amsterdam admits that federal courts should not “get involved with correcting every nitty-gritty mistake of law made, for example, in a state criminal case in the application of state law.” Instead, Amsterdam argues, federal courts should get involved only when the decision adversely affects a “vital and important interest” and when the decision can be considered “crazy.” Amsterdam, *supra* note 21, at 626. Morgan and Smolla are concerned that states follow their own procedures, but only certain procedures. Morgan argues that states should not violate “procedural safeguards” which only include “rules . . . designed to protect individual’s interests” and not “rules . . . designed to promote efficiency or administrative convenience.” Morgan, *Playing by the Rules*, *supra* note 21, at 29-30. Smolla argues that “some rules should be breachable by either state or federal agencies,” without specifying which rules “should be breachable.” Smolla, *supra* note 21, at 505.

Rubin and Van Alstyne are more vague about their limitations on the rule against arbitrary state decisions. Rubin argues the “rule-obedience principle” should only apply when “the state brings its force to bear.” Rubin, *supra* note 21, at 1107. Van Alstyne argues that the extent of the right to be free from arbitrary procedures depends on the “contextual considerations.” Van Alstyne, *supra* note 21, at 488-89.

153. Note, *Guarantee Clause*, *supra* note 21, at 579.

154. Morgan, *Playing by the Rules*, *supra* note 21, at 30; Note, *Procedural Rights*, *supra* note 21, at 1024 n.20.

2. Values Served by Federalism

The Constitution mandates that powers not granted to the federal government be reserved to the states.¹⁵⁵ Federal courts may not review the correctness of state court determinations of state law.¹⁵⁶ This principle of federalism — that state courts are the ultimate expositors of state law — serves at least three important values.

First, with fifty different states formulating state law, the system provides fifty laboratories for multiple considerations of problems. Each state is free to create unique solutions unconstrained by a national standard.¹⁵⁷

Second, federalism promotes finality. Disputants know the state supreme court is the last forum in which to air grievances, providing final resolution of controversies and final interpretations of state law. Disputants are certain that these decisions will not be reversed later by another higher level court. An extra layer of review only adds costs and uncertainty.¹⁵⁸

Third, federalism prevents federal courts from interfering in state law-making processes. States are free to divide law-making power between state government branches in any manner they choose. While the federal constitution requires separation of powers for the federal government, it does not require separation of powers for state governments.¹⁵⁹ Within each state, power is divided among different

155. U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

156. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 516 (1858) ("[T]he power of the General government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres."); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874) (Congress does not have the power to authorize the Court to reverse the judgments of state courts in matters of state law unrelated to the vindication of any federal right.). See generally Hart, *The Relation Between State and Federal Law*, 54 COLUM. L. REV. 489, 499, 502-03 (1954).

157. See Brilmayer, *Death of Error*, *supra* note 140, at 378; Thompson, *supra* note 21, at 426-27.

158. Justice Jackson's concurrence in *Brown v. Allen*, 344 U.S. 443, 540 (1952), reflected this concern for finality:

Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is not doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

344 U.S. at 540 (Jackson, J. concurring). See also Brilmayer, *Death of Error*, *supra* note 140, at 368, 383 (1986) (arguing that at some point the decision must be "hardened"); Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957) (arguing that extra layers of review do not ensure more justice, but may increase costs and delay).

159. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) ("the states are free to allocate the lawmaking function to whatever branch of state government they may choose"); see also cases cited in note 26 *supra*.

branches of government according to the state constitution. Innovation and conflict between the branches of state government may be part of the law-making process.¹⁶⁰ If the federal courts intervene when they disagree with a state court or agency's interpretation of state law, they deny that branch the power to decide issues of state law and, at the same time, deny other branches the opportunity to review the decision themselves. The result may be the skewing of the balance of power in the state.

Federal courts should not review state decisions solely on the ground that they appear to violate state law. Federal courts should only review state court and agency actions that violate state law if the state action itself — without reference to state law — violates specific constitutional guarantees, such as procedural protections, equal protection prohibitions, or first amendment freedoms.¹⁶¹ Federal court review of arbitrary state decisions permits federal courts to become the ultimate expositors of state law. The examination in Part III of the cases applying the rule against arbitrary decisions demonstrates that such review interferes with the values promoted by federalism.

III. APPLICATION OF THE RULE AGAINST ARBITRARINESS DEMONSTRATES ITS INCOMPATIBILITY WITH FEDERALISM

A number of courts have read the *Thompson*, *Logan*, and *Hicks* decisions broadly to support a rule against arbitrary state decisions. The Sixth and Eighth Circuits have held that *Thompson* supports a rule against arbitrary civil decisions that lack evidence. These courts have relied on the no-evidence doctrine to review decisions by state educational institutions and prisons to determine whether they were supported by evidence. The Fourth, Fifth, Sixth, and Seventh Circuits have consistently interpreted *Logan* broadly to support a rule against arbitrary state decisions. These courts have relied on *Logan* to review a variety of state decisions, including zoning decisions, job termina-

160. See Hart, *supra* note 156, at 491-95, 499 (emphasizing the important position of state courts in relation to state legislatures and chief executives).

161. The Court has held that when a state court finding of fact is important to deciding a constitutional issue, the Court may make an independent examination of the facts when a conclusion of law relating to a federal right and a finding of fact are so intermingled that it is necessary to analyze the facts in order to pass upon the federal question. *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927). See generally WRIGHT, FEDERAL PRACTICE, *supra* note 22, at § 4033; Spann, *supra* note 120, at 971-72.

The Court has also held that federal courts may review state procedural rules if these rules block a party from raising a federal question claim in the state courts. See generally WRIGHT, FEDERAL PRACTICE, *supra* note 22, at §§ 4023-4028; Spann, *supra* note 120. Limited review of state court decisions is also allowed whenever theoretically independent substantive state grounds are advanced to support disregard of federal claims. See generally WRIGHT, FEDERAL PRACTICE, *supra* note 22, at §§ 4029-4033; Schlueter, *Judicial Federalism and the Supreme Court Review of State Court Decisions*, 59 NOTRE DAME L. REV. 1079 (1984) (reviewing Burger Court's handling of ambiguous state court decisions).

tions, and business license revocations, to determine whether they violated state law. In addition, the Fifth Circuit has held that *Hicks* supports a rule against arbitrary state decisions, reviewing sentencing decisions to determine whether the state court applied the correct sentencing statute. An examination of the cases interpreting *Thompson*, *Logan*, and *Hicks* to support a rule against arbitrariness demonstrates that this rule imposes an undue intrusion upon state power to decide issues of state law.

A. *The Cases Applying Thompson Intrude upon State Autonomy*

The *Thompson* decision has been widely criticized as “curious”¹⁶² and “bound to lead . . . into treacherous territory”¹⁶³ because it poses the threat of significant federal intrusion into state court powers. The danger of the *Thompson* doctrine is that federal courts might reverse state decisions which appear to lack evidence under state law (as interpreted by the federal court), even though the state decisions can be equally well explained as valid applications of state law supported by sufficient evidence.

The Sixth¹⁶⁴ and Eighth¹⁶⁵ Circuits have read the *Thompson* decision broadly to stand for the proposition that federal courts may reverse state civil decisions on substantive due process grounds when the federal court believes that the state decision is not supported by sufficient evidence under state law.¹⁶⁶ These federal courts intervened to

162. Tushnet, *supra* note 48, at 795-96; see also Note, *No Evidence*, *supra* note 48, at 1144 (criticizing the *Thompson* and *Garner* decisions as imposing “an unwarranted and severe limitation on a state’s power to interpret its own law”). See generally Note, *The Supreme Court, 1959 Term*, *Thompson v. Louisville*, 74 HARV. L. REV. 81, 108 (1960) (reviewing the facts of the case) [hereinafter Note, *Thompson*]; Comment, *Evidence Required To Sustain Criminal Conviction*, 62 W. VA. L. REV. 384, 386 (1960) (praising the decision, and predicting that it could produce “more cautious observation of due process procedures and requirements by lesser tribunals”) [hereinafter Comment, *Evidence Required*].

163. *Garner v. Louisiana*, 368 U.S. 157, 190 (1961) (Harlan, J., concurring).

164. In *Spruytte v. Walters*, 753 F.2d 498, 509 (6th Cir. 1985), the Sixth Circuit relied on *Thompson* in holding that state prison officials violated due process by refusing to allow a prisoner to receive a dictionary from his mother. The prison’s decision violated due process, the court said, because the action was not supported by evidence sufficient to satisfy state law requirements. For further discussion of *Spruytte*, see notes 15-17 *supra* and accompanying text.

165. In *Strickland v. Inlow*, 485 F.2d 186, 190 (8th Cir. 1973), *vac. sub nom. Wood v. Strickland*, 420 U.S. 308, 324-26 (1975), the Eighth Circuit reversed a high school board disciplinary action on the ground that there was “no evidence” that the students had violated the school district rule forbidding the use or possession of intoxicating beverages. Although the court of appeals did not cite *Thompson*, the Supreme Court said the court of appeals had applied the *Thompson* doctrine. *Wood v. Strickland*, 420 U.S. at 323. For further discussion of *Strickland*, see notes 182-85 *infra* and accompanying text.

166. In a separate line of cases that do not rely on *Thompson*, the Fifth, Sixth, Eighth, and Eleventh Circuits have held that substantive due process requires that state government job dismissals must be supported by “substantial evidence.” These courts view this requirement as a necessary corollary to procedural due process. See *Yashon v. Hunt*, 825 F.2d 1016, 1027 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 2015 (1988) (doctor’s dismissal must be “supported by substantial evidence to free it from arbitrariness,” quoting *Woodbury v. McKinnon*, 447 F.2d 839, 842); *Holley v. Seminore County School Dist.*, 755 F.2d 1492, 1499 (11th Cir. 1985) (due process

review state decisions, even though constitutionally required procedural protections provided the parties affected with adequate opportunity to argue their interpretations of state law before impartial state decisionmakers.

The intrusiveness of this type of review can be seen in a number of the *Thompson* Supreme Court decisions which reversed state decisions for lack of evidence. In *Thompson* itself, the state court's decision may be equally well explained as a valid decision that Thompson's conduct in standing at the cafe and arguing with the police officer constituted loitering and disorderly conduct under the state statute.¹⁶⁷ Similarly, in *Garner v. Louisiana*, the state court's decision may be equally well explained as a decision that the defendants' conduct in gathering at the lunch counter constituted disturbing the peace because the conduct could foreseeably have led to a public disturbance.¹⁶⁸ In *Vachon v. New Hampshire*, the state court's decision may also be explained as a decision that Vachon's conduct — controlling the premises when "someone" sold a nearly obscene button to a fourteen-year-old girl — constituted willfully contributing to the delinquency of a minor.¹⁶⁹ And in *Douglas v. Buder*, the state court's decision may be equally well explained as a decision that a traffic citation constituted an arrest for purposes of parole revocation.¹⁷⁰

The danger of extending the *Thompson* doctrine is also evident in three federal court decisions which relied on the *Thompson* doctrine to reverse decisions of state educational institutions for lack of evidence. In *Jones v. Latexo Independent School District*,¹⁷¹ after excluding evidence based on fourth amendment grounds, the district court con-

requires that there be "a rational basis for the deprivation of an individual's property"); *Klinge v. Lutheran Charities Assn.*, 523 F.2d 56, 60 (8th Cir. 1975) (doctor's dismissal must be supported by "substantial evidence"); *Ferguson v. Thomas*, 430 F.2d 852, 857 (5th Cir. 1970) (due process requires more than "mere ceremonial compliance with procedural due process"); see also *Byrd v. City of Atlanta*, 683 F. Supp. 804 (N.D. Ga. 1988) (policeman's dismissal must be supported by substantial evidence); *Chase v. Fall Mountain Regional School Dist.*, 330 F. Supp. 388 (D.N.H. 1973) (school teacher's dismissal). But see *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 888 (2d Cir. 1987) (refusing to review a denial of tow car medallions, and stating that "[s]ection 1983 is not a means for litigating in a federal forum whether a state or local administrative decision was arbitrary and capricious").

167. *Thompson v. City of Louisville*, 362 U.S. 199 (1960). For the argument that the *Thompson* state court decision was a valid attempt to redefine state law, see *Garner v. Louisiana*, 368 U.S. 157, 189 (1961) (Harlan, J., concurring); Note, *No Evidence*, *supra* note 48, at 1143-44; Comment, *Conviction Without Evidence*, *supra* note 107, at 309; see also notes 34-40 *supra* and accompanying text.

168. *Garner*, 368 U.S. 157 (1961). For the argument that the *Garner* state court decision was a valid attempt to redefine state law, see *Garner*, 368 U.S. at 190 (Harlan, J., dissenting); Note, *No Evidence*, *supra* note 48, at 1144.

169. *Vachon*, 414 U.S. 478 (1974) (per curiam). For the argument that the *Vachon* state court decision was a deliberate attempt to redefine state law, see *Vachon*, 414 U.S. at 486 (Rehnquist, J., dissenting); Spann, *supra* note 120, at 949-50; see also note 120 *supra* and accompanying text.

170. 412 U.S. 430, 432 (1973). See also note 50 *supra*.

171. 499 F. Supp. 223 (E.D. Tex. 1980).

cluded that there was no evidence to support a school board's disciplinary action, so it reversed the board's action. The court decided the state law issue and failed to give the school board or a state court an opportunity to decide for themselves whether the remaining evidence would justify the disciplinary action under state law.¹⁷²

Two other educational institution decisions — *Regents of the University of Michigan v. Ewing*¹⁷³ and *Wood v. Strickland*¹⁷⁴ — also demonstrate the intrusiveness of federal court review of state civil decisions. In both cases, federal review only added costs and uncertainty and did not ensure a more correct result. The controversy in *Ewing* arose in 1981 when a nine-member committee reviewed Ewing's record and dismissed him from the university's six-year undergraduate/medical school program. Ewing's record revealed that he had low grades, seven incompletes, several terms during which he had carried an irregular or reduced course load, and a failing score on the medical board exam — the lowest score in the program's history. Before the school made its final decision to dismiss him, Ewing was provided with four separate hearings in front of two different committees to challenge the action personally.¹⁷⁵ Ewing chose not to seek judicial relief under state law in state court but instead brought an action in federal court, claiming that the university violated his due process rights by arbitrarily expelling him.¹⁷⁶ The district court dismissed Ewing's due process claim,¹⁷⁷ the court of appeals upheld the claim,¹⁷⁸ and the Supreme Court finally dismissed the claim four years after the controversy arose,¹⁷⁹ agreeing with the district court that the university "had good reason to dismiss Ewing from the program."¹⁸⁰ As Justice Powell stated in concurrence, "this is a case that never should have been litigated."¹⁸¹

In *Strickland v. Inlow*, the Eighth Circuit reversed a school board disciplinary action on the ground that there was "no evidence" that

172. *Jones*, 499 F. Supp. at 239. In *Smyth v. Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975), the court faced a situation similar to *Jones*, but the *Smyth* court provided a more sensible remedy. The *Smyth* court excluded evidence from a disciplinary hearing, and then, unlike the *Jones* court, remanded the case to allow the school to retry it or dismiss the charges. 499 F. Supp. at 795.

173. 474 U.S. 214 (1985).

174. 420 U.S. 308 (1975).

175. 474 U.S. at 216-17, 227.

176. *Ewing v. Regents of Univ. of Mich.*, 559 F. Supp. 791, 797 (E.D. Mich. 1983), *revd.*, 742 F.2d 913 (6th Cir. 1984), *revd.*, 474 U.S. 214 (1985); *see also* Amicus Brief for Ewing, *supra* note 78, at 7-10 (arguing that *Thompson* and *Hill* support a broad rule against arbitrary state decisions depriving both liberty and property interests).

177. *Ewing*, 559 F. Supp. 791 (E.D. Mich. 1983).

178. *Ewing*, 742 F.2d 913 (6th Cir. 1984).

179. *Ewing*, 474 U.S. 214 (1985).

180. *Ewing*, 474 U.S. at 227 (quoting 559 F. Supp. at 800).

181. *Ewing*, 474 U.S. 230 (Powell, J., concurring).

the students violated the school district rule prohibiting the use or possession of intoxicating liquor.¹⁸² Although the Supreme Court reserved judgment on the issue of whether the *Thompson* doctrine applies to school board decisions,¹⁸³ it reversed the Eighth Circuit's application of the doctrine. The school board's decision that the students violated the state regulation by spiking punch with malt liquor, the Court said, was actually the *correct* interpretation of state law.¹⁸⁴ Rather than lacking evidence, the school board decision was a valid interpretation and application of state law. Calling the court of appeals' reliance on *Thompson* "improvident," the Court emphasized that federal courts should not use section 1983 as a vehicle to review school board decisions that do not violate specific constitutional guarantees.¹⁸⁵

The First and Ninth Circuits have refused to apply *Thompson* to state civil decisions, but they have given only cursory reasons for their refusal.¹⁸⁶ *Thompson* should not be applied to civil decisions because the application of the *Thompson* doctrine interferes with state autonomy. As stated in the dissent to the court of appeals decision in *Strickland*, a broad reading of *Thompson* "inevitably [leads] to an unwarranted invasion of the duties and responsibilities of state and local governments."¹⁸⁷

B. *The Cases Applying Logan Intrude upon State Autonomy*

An examination of the cases in which the federal courts relied on *Logan* to review state decisions for arbitrariness also demonstrates that such review similarly intrudes upon state power. A number of courts of appeals have relied on *Logan* in upholding substantive due process claims against a variety of state decisions. The *Logan* rule

182. 485 F.2d 186, 190 (8th Cir. 1973), *vac. sub nom.* Wood v. Strickland, 420 U.S. 308, 324-26 (1975).

183. 420 U.S. at 323.

184. *Strickland*, 420 U.S. at 323-26. The court of appeals interpreted the school board regulation prohibiting the use or possession of intoxicating liquor with reference to the term "intoxicating liquor" as defined in other state statutes. 485 F.2d at 190; 420 U.S. at 324. However, testimony at trial had convincingly established that the term "intoxicating beverage" in the school regulation was not intended at the time of its adoption to be linked to the definition of any state statutes or to any other technical definition of "intoxicating." 420 U.S. at 324.

185. 420 U.S. at 326.

186. In *Rose V. Nashua Bd. of Educ.*, 679 F.2d 279 (1st Cir. 1982), the First Circuit refused to apply *Thompson* to review a school board's disciplinary action. *Thompson* did not apply, the court said, simply because "[w]e are not dealing here . . . with criminal punishments or sending someone to prison without evidence." See 679 F.2d at 282; see also *Valazquez v. Thompson*, 321 F. Supp. 34, 40 (S.D.N.Y. 1970), *aff'd.*, 451 F.2d 202 (2d Cir. 1971) (refusing to apply *Thompson* in an eviction proceeding). In *United States v. One 56-Foot Motor Yacht Named the Tahuna*, 702 F.2d 1276 (9th Cir. 1983), the Ninth Circuit refused to apply *Thompson* to a civil forfeiture proceeding, stating only that *Thompson* was "distinguishable" because *Thompson* "concerns a criminal conviction." See 702 F.2d at 1283.

187. *Strickland*, 485 F.2d at 192 (McHaffey, J., dissenting).

against arbitrary state decisions has been described in the following manner: "[T]akings without any justification are 'governmental actions that even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process.'"¹⁸⁸ The types of state decisions reviewed include zoning decisions,¹⁸⁹ employment terminations,¹⁹⁰ a business license revocation,¹⁹¹ a prisoner's reading access decision,¹⁹² and a state tort judgment payment decision.¹⁹³ In most of these cases, the plaintiffs sought relief in federal court before appealing to the state court to determine whether the agency action violated state law. The federal court review of the state agency actions, prior to a state court ruling, intruded upon the state decisionmaking processes by denying the state court an opportunity to consider the agency's interpretation of state law.

The zoning cases demonstrate the intrusiveness of federal court review of arbitrary state decisions. The court in each case held that the plaintiff had a cognizable substantive due process claim on the ground that the zoning board or officials had arbitrarily violated state law.¹⁹⁴

188. *Evans v. City of Chicago*, 689 F.2d 1286, 1298 (7th Cir. 1982) (quoting *Parratt v. Taylor*, 451 U.S. 527, 545 (1981) (Blackmun, J., concurring)). Panels of the Fourth, Fifth, Sixth, and Seventh Circuits have also interpreted *Logan* to support a rule against arbitrary decisions, while panels of the Third, Eighth, and Eleventh Circuits have adopted the arbitrariness rule without citing *Logan*. Different panels in all seven of these circuits have expressed great reluctance or refused to adopt the rule against arbitrary state decisions. See notes 15-17 *supra* and notes 194, 208, & 217-225 *infra* and accompanying text.

189. See, e.g., *Shelton v. City of College Station*, 754 F.2d 1251, 1256-57 (5th Cir.), *rehg. ordered*, 765 F.2d 456 (5th Cir. 1985), *rehg.* 780 F.2d 475 (5th Cir.) (en banc), *cert. denied*, 477 U.S. 905 (1986) (denial of zoning variance); *Scott v. Greenville County*, 716 F.2d 1409, 1420-21 & n.17 (4th Cir. 1983) (denial of building permit).

In *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3850 (U.S. May 28, 1988) (No. 87-1968); *Neiderhiser v. Borough of Berwick*, 840 F.2d 213, 217 (3d Cir. 1988); *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986) (denial of building permit) and *Southern Coop Dev. Fund v. Driggers*, 696 F.2d 1347, 1355-56 (11th Cir.) (zoning commission refusal to approve plat in violation of local laws), *cert. denied*, 463 U.S. 120-8 (1983), the courts also decided that arbitrary zoning decisions violated due process, although they did not rely on *Logan*.

190. The courts in *Moore v. Warwick Pub. School Dist. No. 29*, 794 F.2d 322, 329-30 (8th Cir. 1986) (job termination in violation of contract), and *Barnett v. Housing Auth. of Atlanta*, 707 F.2d 1571, 1577 (11th Cir. 1983) (same), decided that arbitrary state job terminations violate due process, although they did not rely on *Logan*. See also *Byrd v. City of Atlanta*, 683 F. Supp. 804, 809 (N.D. Ga. 1988) (citing *Logan* in holding that a job termination in violation of a city ordinance may violate substantive due process).

191. In *Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir. 1983) (refusal to grant barbershop license), the court decided that arbitrary license denials violate due process, although the court did not rely on *Logan*.

192. *Spruytte v. Walters*, 753 F.2d 498, 509-10 (6th Cir. 1985) (prison refusal to allow prisoner to receive dictionary in violation of state administrative rule), *cert. denied*, 474; U.S. 1054 (1986) see also *Anderson v. City of New York*, 611 F. Supp. 481, 491-92 (S.D.N.Y. 1985) (judicial affirmance of police officer's refusal to return photos).

193. *Evans v. City of Chicago*, 689 F.2d 1286, 1298 (7th Cir. 1982) (delayed payment of tort judgment in violation of state law).

194. *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988) ("deliberate and arbitrary abuse of government power violates an individual's right to substantive due process"), *petition for cert. filed*, 56 U.S.L.W. 3850 (U.S. May 28, 1988) (No. 87-1968); *Neiderhiser v. Borough of Berwick*,

In each case, the applicants had been granted procedurally adequate hearings before the decision was made.¹⁹⁵ The federal courts upheld the substantive due process claims, despite the fact that the local zoning boards had been given discretion as quasi-legislative bodies to make zoning decisions.¹⁹⁶ The courts undertook extensive review of the applicable local zoning laws and ordinances to determine whether the zoning boards had adopted the correct interpretation of their own zoning laws. The federal courts, in these cases, essentially acted as zoning boards of appeals. The net result in each case was that federal court intervention disrupted the zoning decisionmaking process in that particular state.¹⁹⁷ State courts normally play an important role in developing zoning law because the zoning board decisions are review-

840 F.2d 213, 218 (3d Cir. 1988) (plaintiff may prevail by demonstrating government "arbitrarily or irrationally" denied an exemption), *petition for cert. filed*, 56 U.S.L.W. 3850 (U.S. May 27, 1988) (No. 87-1964); *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986) ("substantive due process claim . . . that the City acted capriciously and arbitrarily" in denying the building permit); *Shelton v. City of College Station*, 754 F.2d 1251, 1256 (5th Cir.) ("genuine dispute . . . as to whether the seemingly arbitrary denials of the parking variance were reasonably based in fact"), *rehg. ordered*, 765 F.2d 456 (5th Cir. 1985), *rehg.* 780 F.2d 475 (5th Cir.) (en banc), *cert. denied*, 477 U.S. 905 (1986); *Scott v. Greenville County*, 716 F.2d 1409, 1420-21 (4th Cir. 1983) ("meritorious" claim that the county took property by manifest arbitrariness and unfairness"); *Southern Coop. Dev. Fund v. Driggers*, 696 F.2d 1347, 1356 (11th Cir. 1983) ("refusal to [approve proposed plat] was a violation of the plaintiff's guarantee of due process").

In later decisions, different panels of the Eighth and Fifth Circuits have reconsidered these broad pronouncements regarding substantive due process analysis of zoning decisions. In *Lemke v. Cass County*, 846 F.2d 469 (8th Cir. 1987) (per curiam) (en banc) the court indicated its reluctance to follow its earlier statements in *Littlefield*. The court stated that "whether a substantive due process claim may arise from a denial of a zoning permit is an open question in this circuit." 846 F.2d at 470-71. In *Shelton v. City of College Station*, 780 F.2d 475, 480 (5th Cir.) (reh. en banc), *cert. denied*, 477 U.S. 905 (1986) [hereinafter *Shelton II*], the court criticized its earlier *Shelton* decision for "insisting upon trial-type proof of both the purpose, or basis, of the Zoning Board decision and the rationality of its attainment." The court stated: "[W]e are confident that the panel did not intend this result." 780 F.2d at 480.

A different panel of the Eleventh Circuit also recently took a narrower approach to a zoning committee decision than the panel in *Southern Coop.* *E & T Realty v. Strickland*, 830 F.2d 1107, 1114 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1225 (1988). In addressing an equal protection challenge to a sewage permit denial decision, the court expressed its unwillingness to find that "any departure from state law would give rise to a constitutional claim." 830 F.2d at 1114 (emphasis in original).

195. In *Bello*, the building permit denial had been upheld by the state lower court, but the state court later reversed its decision. 840 F.2d at 1126. In *Neiderhiser*, the exemption denial had been upheld by the board, but the state lower court reversed the decision. 840 F.2d at 215. In *Littlefield*, the building permit denial had been upheld by the zoning board and the city council after "a series of meetings." 785 F.2d at 603. In *Shelton*, 754 F.2d at 1258, the denial of a parking variance had been upheld by the zoning board and the city planning director. The court noted that judicial review was readily available in the state courts. 754 F.2d at 1257-58. In *Scott*, 716 F.2d at 1413, the denial of the building permit had been upheld by the city council, a state trial court, and the state supreme court, but the state supreme court later ordered the city council to grant the permit. In *Southern Coop.*, 696 F.2d at 1349-50, the county commission twice rejected the application after lengthy review.

196. See *Shelton II*, 780 F.2d at 480-82 (arguing that zoning board decisions should be viewed as quasi-legislative). But see *Scott*, 716 F.2d at 1420 n.16.

197. See *Shelton II*, 780 F.2d at 481 (expressing reluctance to "inject federal courts into matters historically the business of states [and] . . . alter the decisional processes for zoning issues").

able in the state courts.¹⁹⁸

In two cases, a federal court intervened before the state court had the opportunity to review the zoning board decision, depriving the state courts of their role in the decisionmaking process.¹⁹⁹ In three other cases, the errors were rectified by the state courts.²⁰⁰ But the federal courts held that the plaintiffs had a cause of action because they were damaged during the period before the state courts rectified the errors as a matter of law. The federal courts basically served as cheerleaders for the state courts, praising their finding that the zoning actions violated state law.²⁰¹ These cases support the curious result that state agency actions that violate state law violate due process, unless the state rectifies the error within a certain period of time.

A number of courts have attempted to limit the application of the *Logan* rule by relying on a distinction the *Logan* Court made between systematic violations of state law and random, unauthorized violations of state law. Under this theory, a state action in violation of state law can be cured by post-deprivation procedures if the action was random and unauthorized.²⁰² In contrast, a state action in violation of state law cannot be cured by post-deprivation procedures if it was systematic, established state procedure.²⁰³

The *Logan* Court made the distinction in attempting to differentiate its holding from its earlier holding in *Parratt v. Taylor*.²⁰⁴ *Parratt* addressed the issue of what types of procedural due process protections are required when a state official deprives an individual of a liberty or property interest in violation of state law.²⁰⁵ In *Parratt*, a prison official negligently took a prisoner's property in violation of state regulations. The Court held that due process required only a post-deprivation hearing, because prison supervisors cannot foresee

198. State judicial review of zoning board decisions was available in *Bello*, 840 F.2d at 1126; *Neiderhiser*, 840 F.2d at 215; *Littlefield*, 785 F.2d at 601 n.4; *Shelton*, 754 F.2d at 1258; and *Scott*, 716 F.2d at 1419. The record in *Southern Coop.*, 696 F.2d at 1351, does not reveal whether state court review was available.

199. *Littlefield*, 785 F.2d at 598-99; *Shelton*, 754 F.2d at 1254. In *Shelton II*, the court criticized the plaintiffs for not seeking initial relief in state court to determine whether, in fact, they had a right to the variance. "It can be argued that because [plaintiffs] bypassed this state-furnished remedy, the state did not deprive them of any property" in the first place. *Shelton II*, 780 F.2d at 479.

200. In *Bello*, the state court ordered the municipality to grant the permit eight months after the court initially refused to grant relief. 840 F.2d at 1126. In *Neiderhiser*, the state court ordered the board to grant the exemption eight months after the board's decision. 840 F.2d at 214-15. In *Scott*, the state supreme court ordered the city council to grant the permit sixteen months after the court initially affirmed the denial. 716 F.2d at 1413.

201. *Bello*, 840 F.2d at 1129; *Neiderhiser*, 840 F.2d at 217; *Scott*, 716 F.2d at 1423.

202. See generally Morgan, *Playing by the Rules*, *supra* note 21, at 10 n.46 (criticizing this reading of *Parratt* and *Logan*).

203. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982).

204. *Parratt v. Taylor*, 451 U.S. 527, 541 (1981).

205. 451 U.S. at 541; see also *Daniels v. Williams*, 474 U.S. 327 (1986) (discussing *Parratt*).

"random and unauthorized" actions and because the governmental interests at stake may require a prison official to act quickly.²⁰⁶

The *Logan* Court recognized that its holding seemed to conflict with *Parratt* because it now suggested that state actions deviating from state law violate due process, regardless of the procedural protections provided. The *Logan* Court held that post-deprivation remedies did not cure the due process problems. It made a feeble attempt to distinguish *Parratt*, saying that it did not apply where "the state system itself" destroyed a complainant's property interest "by operation of [state] law" or by systematic and "established state procedure." Instead, *Parratt* applied only where the state's action constituted "random and unauthorized" action by a state official.²⁰⁷ According to this distinction, post-deprivation remedies may cure state decisions that violate state law by "random and unauthorized" action, but not state decisions that violate state law by "established state procedure."²⁰⁸

The difficult task is, of course, determining whether a state court or agency violation of state law is "by operation of state law" or "unauthorized." In practice, this distinction is almost impossible to make, especially when a state court made the "arbitrary" decision. Two recent cases, *Holloway v. Walker*²⁰⁹ and *Anderson v. City of New York*,²¹⁰ illustrate the problem. In *Holloway*, the plaintiffs, having lost a state law claim at the state trial and appellate levels, sued the trial judge in federal court claiming that the judge's deviation from state law denied them a fair trial.²¹¹ In particular, they argued that the judge's action constituted established state procedure, and thus vio-

206. 451 U.S. at 541. See generally Blum, *Applying the Parratt/Hudson Doctrine: Defining the Scope of the Logan Established State Procedure Exception and Determining the Adequacy of State Postdeprivation Remedies*, 13 HASTINGS CONST. L.Q. 695 (1986); Morgan, *Playing by the Rules*, *supra* note 21, at 10 n.46.

207. 455 U.S. at 436; see also *Davidson v. Cannon*, 474 U.S. 344 (1986) (holding that a state's procedural system only constitutes a denial of due process if the procedures are "constitutionally inadequate" and "fundamentally unfair").

208. Applying this distinction to different fact situations, a number of federal courts have concluded that certain alleged violations were random and unauthorized, and therefore curable by state post-deprivation hearings. These courts deemed a variety of state decisions, including a job payment decision, see *Cohen v. City of Philadelphia*, 736 F.2d 81, 85-87 (3d Cir. 1984) (holding that state officials did not violate due process by denying back-pay after charges supporting the discharge later proved unfounded), *cert. denied*, 469 U.S. 1029 (1984); a judicial action, see *Holloway v. Walker*, 784 F.2d 1287, 1291-92 (5th Cir. 1986) (holding that a judge did not violate due process when he allegedly violated state law); a zoning decision, see *Albery v. Reddig*, 718 F.2d 245, 249-51, 249 n.7 (7th Cir. 1983) (holding that a zoning board refusal to grant a zoning variance in violation of state law did not violate due process); and a business license revocation, see *Flower Cab Co. v. Petite*, 685 F.2d 192, 193-95 (7th Cir. 1982) (Posner, J.) (holding that the refusal to approve taxicab license in violation of state law did not violate due process), to be random and unauthorized. No *Logan* due process violations were found, because the state law violations were cured by the presence of state procedural safeguards.

209. 784 F.2d 1287 (5th Cir. 1986).

210. 611 F. Supp. 481 (S.D.N.Y. 1985).

211. 784 F.2d at 1289-90.

lated due process despite the availability of state appellate review.²¹² The Fifth Circuit correctly rejected the due process claim, but only after straining to characterize the judge's action as unauthorized state action in order to bring it within the scope of *Parratt*.²¹³

In *Anderson*, the federal district court examined the petitioner's claim that a police officer's failure to return photos violated due process. The state trial court had held that the failure to return the photos did not violate state law. The district court held that the police officer's action (and the state court's affirmance) constituted a systematic deprivation without due process, because "the state system itself" caused the deprivation by a systematic failure to enforce the rules.²¹⁴ Thus, the availability of post-deprivation review in state court was irrelevant. The federal court was able to impose its own interpretation of state law on the state court by characterizing the state court's decision as a "systematic" violation of law.

The practical difficulties in applying the distinction between acts "operative of state law" and those that are merely "unauthorized" are compounded by the emptiness of the concept itself. This emptiness is readily apparent from the fact that the federal courts have placed different labels on similar sorts of state action. For example, similar types of state judicial actions that apparently deviated from state law have been found to be both authorized and unauthorized state action.²¹⁵ Similar inconsistencies have arisen in connection with certain state zoning decisions in apparent violation of state law.²¹⁶

A number of courts have explicitly refused to interpret *Logan* broadly to support a rule against arbitrary state decisions. These courts have declined to review the arbitrariness of zoning decisions,²¹⁷

212. 784 F.2d at 1291.

213. 784 F.2d at 1292. The court noted that "no judicial system offers any guarantee, other than the postdeprivation right of appeal, that an individual judge will not act arbitrarily or corruptly." 784 F.2d at 1292.

214. 611 F. Supp. at 491-92.

215. Compare *Holloway*, 784 F.2d at 1290-92 (judicial actions constituted unauthorized action) with *Anderson*, 611 F. Supp. at 491-92 (judicial actions constituted authorized action).

216. Compare *Albery v. Reddig*, 718 F.2d 245, 249-51, 249 n.7 (7th Cir. 1983) (refusal to grant zoning variance in violation of state law constituted a "substantive mistake" rather than "established state procedure") with *Shelton v. City of College Station*, 754 F.2d 1251, 1256-57 (5th Cir.), reh. ordered, 765 F.2d 456 (5th Cir. 1985), reh. 780 F.2d 475 (5th Cir.) (en banc), cert. denied, 477 U.S. 905 (1986) (denial of zoning variance constituted "established state procedure") and *Southern Coop. Dev. Fund v. Driggers*, 696 F.2d 1347, 1351 (11th Cir.) (zoning commission refusal to approve plat in violation of local laws constituted "authorized" action), cert. denied, 463 U.S. 1208 (1983).

217. See, e.g., *Muckway v. Craft*, 789 F.2d 517, 521-23 (7th Cir. 1986); *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985) (stating that "federal courts do not sit as a super zoning board or a zoning board of appeals"), cert. denied, 474 U.S. 845 (1985); *Cloutier v. Town of Epping*, 714 F.2d 1184, 1190 (1st Cir. 1983) (stating that "misapplication . . . of zoning laws [is not] cognizable under section 1983"); *Chiplin Enter. v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983) (stating that "a mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process"); *Scudder v. Town of*

job terminations,²¹⁸ a business license rejection,²¹⁹ a child custody decision,²²⁰ and a job payment decision.²²¹ Notably, the First Circuit has most consistently adhered to such a narrow reading of *Logan*. In a number of these decisions, the courts have noted that a broad reading of *Logan* directly conflicts with *Parratt*.²²² Others have placed particular emphasis on the fact that the litigants had ample opportunity to present their interpretation of state law to a state agency or in a judicial hearing.²²³

Moreover, these courts have reasoned that the *Logan* arbitrariness rule would intrude upon state power to decide state law issues and interfere with state lawmaking processes.²²⁴ Significantly, these courts have stated that the added layer of federal review does not ensure a more correct result.²²⁵ State court or agency actions that violate state law should only give rise to due process concerns if the state action *in itself* — without reference to state law — violates due process; that is, conduct that violates state law should not give rise to a federal claim just because it violates state law unless it implicates federal constitutional protections, such as fourth amendment or procedural due process.

Greendale, 704 F.2d 999 (7th Cir. 1983); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 831-33 (1st Cir. 1982) (citing *Parratt*).

218. See, e.g., *Schaper v. City of Huntsville*, 813 F.2d 709, 718 (5th Cir. 1987); *Mangels v. Pena*, 789 F.2d 836, 838 (10th Cir. 1986); *Bowens v. North Carolina Dept. of Human Resources*, 710 F.2d 1015, 1019 (4th Cir. 1983).

219. *Roy v. City of Augusta*, 712 F.2d 1517, 1522-23 (1st Cir. 1983) (examining refusal to renew business license and stating that “mere violations of state law do not, of course, create constitutional claims”).

220. *Ellis v. Hamilton*, 669 F.2d 510, 514 (7th Cir.), cert. denied, 459 U.S. 1069 (1982).

221. *Brown v. Brien*, 722 F.2d 360, 364 (7th Cir. 1983) (stating that “there is no rule that every breach of a public employment contract is a deprivation of property within the meaning of the due process clause”).

222. In *Schaper v. City of Huntsville*, 813 F.2d 709, 718 (5th Cir. 1987), the court stated the conflict succinctly:

[A]llowing [the *Logan* substantive due process] claim would effectively eviscerate the holding of *Parratt*. . . . It would allow a plaintiff to challenge a deprivation of a property interest on the ground that it resulted from arbitrary and capricious state action, while under *Parratt/Hudson* he would not be able to state a claim for the deprivation of the same right on the ground that it resulted from a random and unauthorized act of a state official. This remarkable result clearly was not envisioned by the Court in *Parratt* or *Hudson*.

813 F.2d at 718 (citation omitted). See also *Monaghan*, *supra* note 76, at 994 (arguing that a broad interpretation of *Ewing* conflicts with *Parratt*).

223. See, e.g., *Schaper v. City of Huntsville*, 813 F.2d at 718; *Bowens v. North Carolina Dept. of Human Resources*, 710 F.2d 1015, 1019 (4th Cir. 1983); *Creative Environments, Inc. v. Estabrook*, 680 F.2d at 832 n.9; *Ellis v. Hamilton*, 669 F.2d at 514.

224. See, e.g., *Muckway v. Craft*, 789 F.2d 517, 523 (7th Cir. 1986); *Roy v. City of Augusta*, 712 F.2d at 1523; *Scudder v. Town of Greendale*, 704 F.2d 999, 1003 (7th Cir. 1983); *Flower Cab Co. v. Petite*, 685 F.2d 192, 193-95 (7th Cir. 1982); *Creative Environments, Inc. v. Estabrook*, 680 F.2d at 831-33; *Hope Baptist Church v. City of Bellefontaine Neighbors*, 655 F. Supp. 1216, 1219 (E.D. Mo. 1987); *Ellis v. Hamilton*, 669 F.2d at 514; *Urban Sanitation Corp. v. City of Pell City*, 662 F. Supp. 1041, 1046 & n.12 (N.D. Ala. 1986).

225. See, e.g., *Roy v. City of Augusta*, 712 F.2d at 1523 (arguing that state law disputes should be left to state courts and agencies); *Ellis v. Hamilton*, 669 F.2d at 515 (“the courts of Indiana seem every bit as determined to prevent . . . wrongs as the federal courts”).

cess protections.²²⁶ For these reasons, *Logan* should not be read broadly to support a rule against arbitrary state decisions. *Logan* should instead be limited to its facts.

C. *The Cases Applying Hicks Intrude upon State Autonomy*

Only the Fifth Circuit has interpreted *Hicks* to support a rule against arbitrary decisions. In two cases, the Fifth Circuit relied on *Hicks* in holding that a state court violates due process if it applies the incorrect state sentencing statute.²²⁷ In each case, the trial judge's decision was affirmed by the state supreme court. The federal court reversed the state supreme court's interpretation of its own law and became the ultimate expositor of state law.

In three other cases, the Fifth Circuit has held that state sentencing decisions violate due process if it appears the judge was not aware of his sentencing alternatives.²²⁸ As interpreted by district courts in that circuit, these decisions effectively impose a reasons requirement on state judges: they can escape the *Hicks* prohibition only by explaining their reasons for their decisions.²²⁹ But the imposition of a reasons requirement on state sentencing judges contradicts Supreme Court precedent holding that state judges are not constitutionally required to state their reasons for making such decisions.²³⁰

Other courts of appeals have refused to interpret *Hicks* to support a rule against arbitrary decisions. The Tenth and Seventh Circuits

226. See e.g., *Mangels v. Pena*, 789 F.2d 836, 838 (10th Cir. 1986) ("the alleged violation must result in a procedure which itself falls short of standards derived from the Due Process Clause"); *Mann v. City of Tucson Dept. of Police*, 782 F.2d 790 (9th Cir. 1986) (search and seizure which violated state law may be unconstitutional).

227. *Brown v. Estelle*, 712 F.2d 1003 (5th Cir. 1983) (increase in length of sentence held improper judicial conduct in light of state statutes and case law), *modified on reh.*, 721 F.2d 1037 (5th Cir. 1984); *Coleman v. Estelle*, 689 F.2d 1244 (5th Cir. 1982) (sentencing judge relied on incorrect statute).

The Supreme Court has only relied on *Hicks* to reverse one other state court decision. In *Sam v. Oklahoma*, 447 U.S. 931 (1980), the Court granted certiorari, vacated the judgment and remanded for further consideration in light of *Hicks*.

228. *Williams v. Maggio*, 730 F.2d 1048 (5th Cir. 1984); *Hickerson v. Maggio*, 691 F.2d 792 (5th Cir. 1982); *Willeford v. Estelle*, 637 F.2d 271 (5th Cir. 1981).

The Fifth Circuit summarized its interpretation of *Hicks* in *Dupuy v. Butler*, 837 F.2d 699, 703 (5th Cir. 1988). The court stated that the liberty interest recognized in *Hicks* entitles a state criminal defendant to (1) "a sentencing decision . . . by the sentencing authority designated under state law" and (2) a decision by the designated sentencing authority with "knowledge and understanding of the range of sentencing discretion under state law." The court did not find a *Hicks* violation in *Dupuy* because there was no showing that the judge lacked an understanding of his discretionary powers or that the defendant suffered prejudice. *Dupuy*, 837 F.2d at 704.

229. See *Bullard v. Estelle*, 502 F. Supp. 887, 890 (N.D. Tex. 1980), *aff'd*, 665 F.2d 1347 (5th Cir. 1982), *vacated*, 459 U.S. 1139 (1983); *Airington v. Lindley*, 506 F. Supp. 222, 226 (W.D. Okla. 1980).

230. See, e.g., *Black v. Romano*, 471 U.S. 606, 613-14 (1985) (trial judge in probation revocation decisions not required to explain why alternatives to incarceration not selected); *Harris v. Rivera*, 454 U.S. 339, 346-48 (1981) (trial judge not required to explain apparent inconsistency between verdicts).

have refused to apply *Hicks* to reverse state court decisions which allegedly deviated from state law.²³¹ These courts correctly noted that a broad application of *Hicks* would intrude upon state power to decide issues of state law.²³² In *Hutchinson v. Marshall*,²³³ one of the few cases discussing the application of *Hicks* to a nonsentencing state judicial decision, the district court clearly stated the federalism concerns. In that case, the defendant, relying on *Hicks*, claimed that the Ohio courts "arbitrarily" denied his rights under the Ohio Speedy Trial Act. The court rejected this argument. "Even assuming that the state 'deviated' from a proper application of the Ohio Speedy Trial Act," the court said, the petitioner received due process because "he was able to present his objections on that score to the Ohio appellate courts." Furthermore, the court concluded that "[p]etitioner's arguments [were] nothing more than a disagreement with how the Ohio appellate courts dealt with (and rejected) his efforts to prevail under an Ohio statute."²³⁴

CONCLUSION

The *Thompson*, *Logan*, and *Hicks* cases should be read narrowly for two reasons. First, a close reading of the cases reveals that the Court may have been primarily concerned about protecting other constitutional guarantees implicated by the state decisions. These guarantees include sixth amendment criminal procedural protections and constitutional freedoms such as freedom of speech and equal protection. The Court appears to have relied on the rule against arbitrary state decisions to avoid addressing more difficult constitutional issues involved in the state action. Second, if federal courts rely on these cases to support federal court review of arbitrary state decisions, the federal courts will intrude upon state power to create and interpret state law. State decisions which a federal court believes arbitrarily deviated from state law may in fact be valid attempts by the state courts to redefine state law. In addition, federal court review of decisions that appear to violate state law is disruptive to the state lawmaking

231. *Andrews v. Shulsen*, 802 F.2d 1256, 1271 n.13 (10th Cir. 1986) (right to sentencing standard), *cert. denied*, 108 S. Ct. 1491 (1988); *Kelsie v. Trigg*, 657 F.2d 155 (7th Cir. 1981) (failure of judge to submit sentencing decision to jury); *Drennon v. Hess*, 642 F.2d 1204, 1205 (10th Cir. 1981) (right to resentencing by jury) (per curiam); *see also* *Gilcrist v. Kincheloe*, 589 F. Supp. 291, 296 (E.D. Wash. 1984) (right to jury trial), *aff'd*, 774 F.2d 1173 (9th Cir. 1985) (mem.); *Hutchinson v. Marshall*, 573 F. Supp. 496, 500 (S.D. Ohio 1983) (right to speedy trial) *aff'd*, 744 F.2d 44 (6th Cir. 1984), *cert. denied*, 469 U.S. 1221 (1985).

232. *Andrews v. Shulsen*, 802 F.2d at 1271 n.13 ("[T]he [state] court considered whether he had a right to be resentenced . . . and decided the question against him. *Hicks* is inapposite."); *Kelsie v. Trigg*, 657 F.2d at 158 ("[T]he Supreme Court of Indiana has decided that Indiana law does not give her the right."); *Drennon v. Hess*, 642 F.2d at 1205 ("[T]he proper construction of this statutory scheme . . . is plainly a matter of state law in the first instance.").

233. 573 F. Supp. 496 (S.D. Ohio 1983).

234. 573 F. Supp. at 500.

processes within each state. Unlike the federal government, the states are free to divide state lawmaking power between state government branches in any manner the states choose. As the First Circuit succinctly stated, a rule against arbitrary state decisions would allow “every disgruntled applicant [to move state law disputes] into the federal courts, even when the state provided adequate procedures, [and] any meaningful separation between federal and state jurisdiction would cease.”²³⁵ Thus far, most federal courts have correctly refused to read the *Thompson*, *Logan*, and *Hicks* decisions broadly, recognizing that such a reading would violate the rule that state courts are the ultimate expositors of state law.

— David T. Azrin

235. *Roy v. City of Augusta*, 712 F.2d 1517, 1523 (1st Cir. 1983).