Due Process and the Problem of Public Contracts: A Critical Look at Current Doctrine

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NOTE

DUE PROCESS AND THE PROBLEM OF PUBLIC CONTRACTS: A CRITICAL LOOK AT CURRENT DOCTRINE

Zachary D. Krug†

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INTRODUCTION

Something is amiss in our current due process doctrine. While the last thirty years have seen a tremendous expansion in the scope of property encompassed by procedural due process, there has been one notable exception: service and supply public contracts. Accordingly, while individuals employed under fixed-term employment contracts enjoy at least minimal due process rights, others employed under fixed-term service contracts have no procedural guarantees of employment. Although both categories of employees would have an equally valid contract law claim if terminated without justification, only the former has a constitutional claim under the Due Process Clause. Disturbingly, courts have not been able to explain why this is so; indeed, as of late, they have ceased the endeavor altogether.

The Constitution requires that when the government deprives a person of life, liberty, or property, it must first afford that individual due process of law.1 The Supreme Court has long acknowledged that

1 The Fifth Amendment, which mandates that the federal government abide by certain procedures, reads: "No person shall . . . be deprived of life, liberty, or property, with-
the Due Process Clause protects more than just real and personal property—rather, property "denotes a broad range of interests." Accordingly, the Court has recognized a degree of protected interest in diverse categories of property, including continued welfare benefits, tenured government employment, driver's licenses, and continued utility services.

In regard to service and supply contracts with the government, however, courts have been hesitant to expand the procedural protections of due process. This has been due in part to a general notion that the property interests in such contracts are less deserving of constitutional protection, either because they are not sufficiently similar to traditional forms of protected property (e.g., one's car), or because they do not engender the same level of reliance as some forms of nontraditional property that have been afforded protection (e.g., one's statutory benefits). Further, because cases involving such contracts readily lend themselves to traditional contract law analysis, due process concerns may be muted. The denial of process may be comfortably conceived of as a mere breach of contract, for which the appropriate remedy is a suit for contractual damages rather than a civil rights claim under § 1983.

This Note argues that the current approach to the procedural due process concerns raised by contractual relations with the government is problematic. The distinction drawn between those types of
contracts for which the courts have accorded due process protection,\textsuperscript{11} and those for which the courts have denied protection,\textsuperscript{12} is unsound in theory and inconsistent in practice. Courts, perhaps in recognition of these difficulties, have attempted a resolution by placing greater emphasis on the question of what process is due, rather than on the nature of the interest at stake. The result has generally been that courts find very little process due.\textsuperscript{13}

Although courts have typically limited government contractors' due process claims to breach of contract suits, their rationale for doing so has generally been unpersuasive. In many cases, postdeprivation remedies are not necessarily congruent with the procedural guarantees of due process. Some breach of contract cases may well belong in federal courts, and these should be properly conceived of as breach of process cases, rather than as simple contract disputes. Courts and commentators often endeavor to distinguish government contracts by arguing that when the government participates in the marketplace, external constraints are sufficient to guarantee adequate process.\textsuperscript{14} However, this argument is problematic because it both underestimates the value of process and overestimates the constraining forces of the market. Finally, the inconsistency that results from attempts to find some principled distinction, however laudable, threatens to undermine the doctrine as a whole.

Part I of this Note briefly traces the rise of modern procedural due process jurisprudence, and highlights the particular difficulty of government contracts within that context. Part II analyzes the Court's most recent ruling in this arena, \textit{Lujan v. G \& G Fire Sprinklers, Inc.}\textsuperscript{15} Part III argues that \textit{G \& G Fire Sprinklers} represents an unsettling trend that warrants close scrutiny. Next, Part III criticizes the traditional justifications for the current approach, and suggests guidelines which would resolve at least some of the existing inconsistencies.

\textsuperscript{11} For example, the courts have generally afforded protection to interests in tenured employment contracts. See, e.g., \textit{Perry v. Sindermann}, 408 U.S. 593 (1972) (holding that a de facto tenure program entitled employee to procedural protections).

\textsuperscript{12} The courts have, for example, generally denied protection to interests in service contracts. See, e.g., \textit{S \& S Research, Inc. v. Paulszcyk}, No. 01-2456, slip op. at 746 (7th Cir. Aug. 14, 2002) (holding that a de facto tenure program did not entitle a government service provider to procedural protections).

\textsuperscript{13} See, e.g., \textit{DeBoer v. Pennington}, 287 F.3d 748 (9th Cir. 2002) (finding that a state court suit for breach of contract is sufficient process where there has been no denial of a present entitlement); \textit{S \& D Maint. Co. v. Goldin}, 844 F.2d 962 (2d Cir. 1988) (reaching the same conclusion on similar facts).

\textsuperscript{14} See infra Part III.C.

\textsuperscript{15} 532 U.S. 189 (2001).
I

DUE PROCESS AND THE PROBLEM OF PUBLIC CONTRACTS

The analytical framework for determining whether an interest is protected by due process, and if so, what process is due, is relatively well settled. As the text of the Due Process Clause suggests, successful claimants must show that the government deprived them of (1) a protected property interest, (2) without appropriate procedural guarantees. In each of these prongs, however, the status of government contracts raises particularly troublesome concerns that have made articulation of consistent principles difficult.

A. Determining the Scope of Constitutional Property

Due process is an ancient doctrine. Yet its current procedural application is of recent vintage, arising in response to the growth of the administrative state and, perhaps necessarily related to that growth, from a more expansive understanding of what constitutes property in the modern era. Traditional common law notions of property, which had served well to distinguish the inviolate rights of ownership from the mere privileges of enjoyment, became of little use to courts grappling with contemporary problems of due process.

To be sure, substantial disagreement exists as to the range of interests afforded protection (i.e., as to the substantive meaning of life, liberty, and property), as well as to the degree of procedural protection that is sufficient to satisfy the constitutional requirements. See, e.g., Cynthia R. Farina, On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act, 50 ADMIN. L. REV. 591 (1998); Richard J. Pierce, Jr., The Due Process Counterrevolution of the 1990s?, 96 COLUM. L. REV. 1973 (1996). But the approach outlined above is generally well accepted. See 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.5 (3d ed. 1999) (discussing the due process constitutional framework).

See U.S. CONST. amend. V, XIV.

See MAGNA CARTA ch. 39 (1215), reprinted in J.C. HOLT, MAGNA CARTA 327 (1965) ("No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful [judgment] of his peers or by the law of the land."). For a discussion of the Magna Carta's origins, and a useful collection of scholarly materials on the subject, see R.H. Helmholz, Magna Carta and the ius commune, 66 U. CHI. L. REV. 297 (1999).


This traditional distinction between right and privilege was famously stated by Justice Holmes in McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892), where he quipped that a dismissed policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Id. at 517; see also McCormick v. Oklahoma City, 236 U.S. 657, 659-60 (1915) (finding that a government breach of contract is not, without more, a deprivation of property because there is no right to such a contract).

Accordingly, the Supreme Court took up the task of giving “some meaning” to the scope of constitutional property in *Board of Regents v. Roth*, and its companion *Perry v. Sindermann*. At issue in both *Roth* and *Sindermann* was the extent to which employees of public universities were entitled to due process before termination or nonrenewal of their employment contracts. The Court’s resolution rested largely on an analysis of the teachers’ respective contracts. While acknowledging that the protections of the Due Process Clause must extend to more than “actual ownership of real estate, chattels, or money,” the Court concluded that “the range of interests protected . . . is not infinite.” The Court reasoned that property interests, as protected by due process, rest on a “legitimate claim of entitlement,” rather than a “unilateral expectation” that the interests will continue to exist. Thus, Roth, who was employed for a fixed term, had no legitimate claim to continued employment; Sindermann, in contrast, by virtue of his implied long-term contract, had a property interest that could not be taken absent the protections of due process.

Although the *Roth* and *Sindermann* opinions were cast in the language of contract, subsequent decisions examining the scope of procedural protections arising from government contracts have struggled with how to apply the doctrine. The issue has not been whether, as a matter of legal principle, contracts may give rise to constitutionally protected property. The *Roth* Court settled that question when it

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23 408 U.S. 564 (1972).
24 408 U.S. 593 (1972).
25 See *Sindermann*, 408 U.S. at 596; *Roth*, 408 U.S. at 566.
26 See *Sindermann*, 408 U.S. at 599–605 (discussing the significance of a quasi-contractual employment relationship); *Roth*, 408 U.S. at 566 n.1, 578 (analyzing the contractual provisions governing the employment relationship).
27 *Roth*, 408 U.S. at 572.
28 *Id*. at 570.
29 *Id*. at 577. For a critique of entitlement analysis as being too restrictive in the scope of interests protected, see Henry Paul Monaghan, Of “Liberty” and “Property,” 62 CORNELL L. REV. 405, 409 (1977) (arguing that due process protects “all interests valued by sensible men”).
30 See *Roth*, 408 U.S. at 578.
31 See *Sindermann*, 408 U.S. 602–03. The Supreme Court did not rule specifically on whether Sindermann’s employment relationship gave rise to an implied contract (an issue governed by state law), *id*. at 602 n.7, but it nevertheless affirmatively resolved the question as to whether such a contractual relationship with the government, once proven, would give rise to a constitutionally protected property interest. See *id*. at 602–03.
32 See supra note 26 and accompanying text.
sought to define constitutional property by looking at whether an individual has an entitlement under state law.34

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.35

Thus, under Roth, a contractual relationship giving rise to an enforceable claim under state contract law may also support a constitutional claim subsequent to a deprivation of property without due process.36

Many courts, however, have hesitated to apply the logic of Roth, as exemplified in Sindermann, to contracts outside of the traditional employment context. For example, despite the Supreme Court’s conclusion in Roth that the weight of an interest has no bearing on whether it is constitutionally protected by due process,37 lower courts have attempted to distinguish among various types of contracts based on their apparent relative importance to the employee and the related status conferred.38

Frequently, courts have applied a formal approach, which categorizes service and supply contracts as distinct from employment contracts, in order to differentiate ‘mere’ contracts from constitutionally protected property interests.39 The Ninth Circuit’s decision in San Bernardino Physicians’ Services Medical Group, Inc. v. County of San Bernardino is instructive.40 The dispute centered around a four-year fixed-term contract between the county and the physicians

34 See Roth, 408 U.S. at 577.
35 Id. at 577.
36 Some limitations, of course, exist on the extent to which state entitlement schemes can confer constitutional protection. For example, while state law governs whether an entitlement exists, the question of constitutional protection remains distinctly one of federal law. Ultimately, federal law appropriately determines the scope of protection—the process afforded—rather than the existence of an entitlement. See Henri G. Minette, San Bernardino Physicians’ Services Medical Group, Inc. v. County of San Bernardino: Constitutionally Protected Public Contract Property Interests Under 42 U.S.C. Section 1983, 74 MINN. L. REV. 879, 887–88 (1990).
37 The Court noted that the weight of an interest is relevant to the question of how much process is due, but “to determine whether due process requirements apply in the first place, we must look not to the ‘weight’ but to the nature of the interest at stake.” 408 U.S. at 570–71 (citation omitted).
38 See, e.g., Vail v. Bd. of Educ., 706 F.2d 1435, 1440 (7th Cir. 1983). Moreover, the Supreme Court has spoken to this issue only infrequently, and with little illumination. See Bd. of Educ. v. Vail, 466 U.S. 377 (1984) (per curiam), aff’d by an equally divided court 706 F.2d 1435 (7th Cir. 1983). For a discussion of Vail, see infra text accompanying notes 63–66.
39 See Mid-Am. Waste Sys. v. City of Gary, 49 F.3d 286, 289–91 (7th Cir. 1995) (discussing, but ultimately rejecting, the formal approach of other circuits).
40 825 F.2d 1404 (9th Cir. 1986).
to provide services in the county-run hospital, which could only be terminated for cause.41 The court proceeded to distinguish personal employment contracts and service contracts on the basis of "the importance of the interest to the holder as an individual."42 An individual, the court reasoned, has a "right . . . not to be deprived of employment that he or she has been guaranteed." Such a right "is more easily characterized as a civil right, meant to be protected [by due process], than are many other contractual rights."43 Finally, in rejecting the group's claim, the court summarized:

[T]here may be great variety in the types of state-secured entitlements subject to constitutional protection. Yet[,] the farther the purely contractual claim is from an interest as central to the individual as employment, the more difficult it is to extend it constitutional protection without subsuming the entire state law of public contracts.44

Although the court did recognize that a contract may give rise to a constitutionally protected property interest,45 and indeed left open the possibility that some service contracts could warrant due process protection,46 it nevertheless rested its decision largely on the "preferred position of employment contracts" as the "prime protected category."47

Other circuits have approached the issue less formally, looking instead at the nature of the employment relationship and the reliance incurred by the employee. For example, the Second Circuit, in S & D Maintenance Co. v. Goldin,48 articulated a standard that has been widely followed throughout other circuits: only those public contracts involving "extreme dependence" or "permanence" give rise to protected status.49 The court distinguished between "ordinary commercial

41 See id. at 1405–06.
42 Id. at 1409.
43 Id.
44 Id. at 1409–10 (citations omitted).
45 See id. at 1407–08.
46 See id. at 1409 ("[W]e do not suggest that employment contracts are the only kind that may be entitled to Fourteenth Amendment protection."). Yet the court also apparently felt that its very consideration of the matter was sufficient to require explanation: "Our decision not to affirm summarily on the ground that this case is at bottom one for breach of contract does not mean that we minimize the danger of federalizing state contract law." Id. at 1408 n.3.
47 Id. at 1409.
48 844 F.2d 962 (2d Cir. 1988).
contract[s]," and those forms of property previously recognized as protected. Due process, the court noted, is implicated only in "connection with a state's revocation of a status, an estate within the public sphere. . . ." Thus, according to the court, the city contractor had no property interest because its contract with the government "[did] not provide it with entitlements within the traditional understanding of Roth."52

Although one could read the court's ruling in S & D Maintenance narrowly to preclude only those claims resting on contracts terminable at will,53 subsequent decisions have instead focused equally on dependence and permanence as indicia of protected status.54 Thus, when analyzing an employee's alleged property interest in a specific employment position, one court has stated that a court must weigh "the importance to the holder of the right" to determine which interests are protected.55 Further, in Vartan v. Nix,56 the court held that an agreement terminable only for cause did not establish the type of permanence conceived of in S & D Maintenance.57 Likewise, in Rite Aid of Pennsylvania, Inc. v. Houstan,58 the court rejected a corporation's alleged property interest in a state prescription drug program that was secured by a contract assumed to be terminable only for cause.59 In doing so, the court stated that "this commercial contract between the Commonwealth and a nationwide corporation does not involve the 'extreme dependence' necessary to support a due process claim."60

Similar considerations have reigned in other circuits, which, while not directly following either the Ninth Circuit's formal approach in San Bernardino or the Second Circuit's formulation in S & D Maintenance, reached substantially similar results. For example, the Seventh Circuit, which has repeatedly faced the public contracts dilemma, has applied an arguably more expansive notion of property in


51 Id. (footnote omitted).
52 Id. at 967.
53 That is, the narrow reading of the court's holding is that S & D had no legitimate entitlement because its contract did not provide only for-cause termination. See id. at 967–68. In that way, S & D's entitlement was akin to Roth's, but not to to Sindermann's. See supra notes 30–31 and accompanying text.
55 Ezekwo, 940 F.2d at 783 (quoting Brown v. Brienen, 772 F.2d 360, 364 (7th Cir. 1983)) (internal quotation marks omitted).
57 Id. at 140–41 ("We disagree with plaintiff that a right to procedural due process exists simply because the public entity may not abrogate the contract at will.").
59 See id. at 530.
60 Id. at 531 (citing Vartan v. Nix, 980 F. Supp. 139, 140–41 (E.D. Pa. 1997)).
conducting its due process analysis.\textsuperscript{61} In particular, the Seventh Circuit has been willing to expand due process protection to fixed-term employment contracts, rather than limiting protection only to long-term contracts akin to tenure.\textsuperscript{62} Accordingly, in \textit{Vail v. Board of Education},\textsuperscript{63} the court held that a premature termination of a two-year employment contract was a deprivation of a constitutionally cognizable property interest.\textsuperscript{64} Stating that due process "protects the individual from arbitrary and capricious conduct and legitimizes governmental action when exercised through proper channels,"\textsuperscript{65} the court concluded that no distinction could be drawn between the situations presented in \textit{Vail} and \textit{Sindermann}.\textsuperscript{66}

Yet the Seventh Circuit's approach, which remains firmly linked to notions of individual employment, assures that service contractors and corporations will have difficulty stating a due process claim because "[w]hether an interest is . . . substantial [enough to warrant protection] depends on the security with which it is held . . . and its importance to the holder."\textsuperscript{67} As such, claims by service contractors, whose employment relationship generally will be accorded less solicitude, may appear to "have nothing to do with civil rights as ordinarily understood."\textsuperscript{68}

Most lower courts, then, have had trouble applying \textit{Roth}'s entitlement analysis in the sphere of public contracts. Although the doctrine has gradually expanded beyond the confines of tenure, the results have been inconsistent. Because public contractors often do not present the same reliance concerns that due process traditionally protects, courts more easily reach the conclusion that these claimants have no entitlement.\textsuperscript{69} This is also due in part to the judiciary's understandable desire to check the federalization of state contract disputes\textsuperscript{70} and its conviction that the "Constitution must not be

\begin{itemize}
\item[\textsuperscript{61} See Mid-Am. Waste Sys., Inc. v. City of Gary, 49 F.3d 286, 289–90 (7th Cir. 1995) (comparing various approaches within the circuits and noting that the Seventh Circuit has defined property as anything that is "securely and durably yours" (citation omitted)).
\item[\textsuperscript{62} See, e.g., Hostrop v. Bd. of Junior Coll. Dist. No. 515, 471 F.2d 488, 494 (7th Cir. 1972).
\item[\textsuperscript{63} 706 F.2d 1435 (7th Cir. 1983).
\item[\textsuperscript{64} See id. at 1438.
\item[\textsuperscript{65} Id.
\item[\textsuperscript{66} See id. at 1437–38.
\item[\textsuperscript{67} Brown v. Brienen, 722 F.2d 360, 364 (7th Cir. 1983).
\item[\textsuperscript{68} Id. at 362–63.
\item[\textsuperscript{69} These reliance concerns are not unimportant, but they are misplaced. Indeed, reliance is an appropriate consideration in the overall due process analysis, but it speaks to the "weight" of the interest, not to its "nature." See supra note 37 (noting that courts should look to the nature of the interest in determining whether or not due process protections apply in the first place).
trivialized by being dragged into every personnel dispute in state and local government.\textsuperscript{71} However, because such concerns are not properly part of Roth's entitlement analysis,\textsuperscript{72} they serve only to compound the inconsistency the courts have already exhibited in their treatment of due process claims.

B. Determining What Process is Due

Although determining the existence of a constitutionally protected interest is an important threshold matter,\textsuperscript{73} the question of what process is due is of greater consequence. Certainly this has been the case in the breach of public contract context, as most courts, hesitant to accord the status of constitutional property to nonemployment contracts, have nevertheless attempted to resolve the issue by assuming that a property interest is at stake, but that the availability of a breach of contract claim is itself sufficient process.\textsuperscript{74}

In \textit{Mathews v. Eldridge},\textsuperscript{75} the Supreme Court outlined a tripartite balancing test for weighing the competing interests at stake in the course of determining what process the government must afford a property holder before deprivation. Under this framework, a court must consider (1) the private interest impacted, (2) the risk of an erroneous determination under current procedures and the added benefit of any additional process, and (3) the government's interest, including the increased administrative burden.\textsuperscript{76} A property holder must receive some form of predeprivation process where the private interest outweighs the government's interest.\textsuperscript{77} Otherwise, some form of postdeprivation process—including only the mere possibility of a remedy in court—will be constitutionally sufficient.\textsuperscript{78} Importantly,

\textsuperscript{71} San Bernardino Physicians' Servs. Med. Group, Inc. v. County of San Bernardino, 825 F.2d 1404, 1408 (9th Cir. 1987) ("It is neither workable nor within the intent of [§] 1983 to convert every breach of contract claim against a state into a federal claim."); \textit{Brown}, 722 F.2d at 364 ("[W]e must bear in mind that the Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts."). For discussion of the merits of the federalization concern, see infra Part III.C.

\textsuperscript{72} \textit{Brown}, 722 F.2d at 365.

\textsuperscript{73} See supra notes 23–37 and accompanying text (discussing the Roth entitlement analysis).

\textsuperscript{74} See e.g., \textit{Mid-Am. Waste Sys., Inc. v. City of Gary}, 49 F.3d 286, 289 (7th Cir. 1995).


\textsuperscript{76} 424 U.S. 319 (1976).

\textsuperscript{77} See \textit{id.} at 335.

\textsuperscript{78} See \textit{Mathews}, 424 U.S. at 348–49.
the determination as to what process is due must be "flexible,"\textsuperscript{79} and "the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved."\textsuperscript{80}

Accordingly, in the public contracts context, not all breaches require predeprivation process. In those cases where postdeprivation process is sufficient, the \textit{Mathews} balancing test remains crucial in determining what form of postdeprivation process is due.\textsuperscript{81} Frequently, for example, a postdeprivation hearing may be all that is warranted where the government has a strong interest in immediate action, such as when an emergent situation threatens public safety.\textsuperscript{82} Such instances, however, are relatively rare: "We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'"\textsuperscript{83}

Not all deprivations, however, are amenable to the orderly requirements of due process. Indeed, where the government's action is not deliberate, requiring process would be an impossibility.\textsuperscript{84} And where the deprivation has already occurred, providing notice and an opportunity for a hearing would be merely an empty formality.\textsuperscript{85} Thus, in a series of cases the Supreme Court has responded to these realities by outlining when a postdeprivation remedy in court will itself

\textsuperscript{79} Id. at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

\textsuperscript{80} Goss v. Lopez, 419 U.S. 565, 579 (1975) (citation omitted).


\textsuperscript{84} See, e.g., Daniels v. Williams, 474 U.S. 327, 333 (1986) (holding that due process was not implicated where the state acted unintentionally); Hudson v. Palmer, 468 U.S. 517, 532-33 (1984) (holding that intentional deprivation of property did not require predeprivation process where the act was "random" and "unauthorized").

\textsuperscript{85} See Parratt v. Taylor, 451 U.S. 527, 540-41 (1981) (holding that accidental loss of a prisoner's property did not implicate predeprivation process), overruled by Daniels v. Williams, 474 U.S. 327 (1986); Ingraham v. Wright, 430 U.S. 651, 676-78 (1977) (holding that public schools could inflict corporal punishment on children without predeprivation process, and, where the punishment was unjustified, a subsequent tort remedy was all the process due to an injured child).
serve as sufficient process. In *Parratt v. Taylor* the Court emphasized that remedial or compensatory schemes may appropriately satisfy due process: "We may reasonably conclude . . . that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment." State remedies, then, may negate the existence of a civil rights claim because they provide a form of postdeprivation process.

Although developed for application to unauthorized government-caused torts, courts have consistently applied the logic of *Parratt* to intentional breaches of contract in the course of determining what process is due to those with whom the government contracts. Some have done so explicitly, while others have nominally distinguished *Parratt* as a rule that applies only to accidental deprivations, but have nevertheless applied its holding. Because the nature of the property interest at stake arises from a contractual agreement, courts have defined the issue not as a lack of process, but rather as "a simple action for breach of contract for which the state provides a complete and adequate remedy." Moreover, because the root issue is a pecuniary deprivation (as compared, for example, to a physical deprivation), courts have minimized the importance of providing process before the deprivation, and have been comforted by the availability of an eventual monetary remedy: "The interest here is monetary—and, unlike the circumstances of the welfare recipients in *Goldberg v. Kelly*, . . . no one is at risk of starvation. . . ."

II

*Lujan v. G & G Fire Sprinklers, Inc.*

The Supreme Court has infrequently spoken on the issue of what process government contracts should receive. Although the 1970s saw

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88 Id. at 542 (quoting Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975)) (internal quotation marks omitted).
89 See, e.g., supra note 85 and accompanying text (discussing two civil rights cases where a state court remedy was all the process that was due).
91 See, e.g., Mid-Am. Waste Sys., Inc. v. City of Gary, 49 F.3d 286, 291 (7th Cir. 1995).
92 Casey v. Depetrillo, 697 F.2d 22, 23 (1st Cir. 1983).
93 Mid-Am. Waste, 49 F.3d at 292 (citation omitted).
a tremendous flood of due process cases through the Court, the doctrine has largely stabilized in the decades since, with only "occasional squabbles . . . about the margins of the doctrine and sporadic disagreements over its specific application."94 The Court's last opportunity to speak clearly on the subject, nearly twenty years ago in Board of Education v. Vail,95 resulted in a short per curiam affirmance of the Seventh Circuit by a divided court.96 However, the Court's most recent decision, Lujan v. G & G Fire Sprinklers, Inc.,97 coupled with the decisions of the lower courts, provides an opportunity to reflect on the manner in which government contracts are accorded due process and to suggest some tentative solutions to the problems encountered.

A. California's Prevailing Wage Law

California, like many jurisdictions, requires that all contractors employed on public projects pay their employees a state-determined prevailing wage.98 A contractor's failure to abide by the California Code's provisions may result in the state assessing penalties and withholding payments due on the contract.99

G & G Fire Sprinklers was a California contractor engaged in the installation of fire sprinkler systems, primarily for public works projects.100 At issue in the case was a series of projects for which G & G served as a subcontractor installing fire suppression systems.101 In 1995, California's Division of Labor Standards Enforcement (DLSE) issued withholding notices to the prime contractors, totaling over $120,000, regarding three projects in which they believed G & G violated prevailing wage laws.102 In turn, the prime contractors withheld

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95 466 U.S. 377 (1984), affg by an equally divided Court 706 F.2d 1435 (7th Cir. 1983).
96 See id.
98 See CAL. LAB. CODE § 1770 (West 2003). Workers must be paid "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed . . . ." Id. § 1771. Similar provisions are enforced, for example, in New York. See N.Y. LAB. LAW § 220 (McKinney 2002). Federal contractors are also required to pay employees a predetermined prevailing wage under the Davis-Bacon Act. See 40 U.S.C. § 276a (2000). The federal statute, however, provides for more thorough postdeprivation process than the California statute. See Ames Constr. Co. v. Dole, 727 F. Supp. 502, 508-09 (D. Minn. 1989) (holding that reimbursement procedures under the Davis-Bacon Act are in accordance with due process); see also G & G Fire Sprinklers, Inc. v. Bradshaw, 156 F.3d 893, 904 & n.11 (9th Cir. 1998) (comparing the statutes and the procedures required and noting that the federal statute provides "an extensive hearing and appeal structure"), vacated by 526 U.S. 1061 (1999).
99 See CAL. LAB. CODE § 1775. California has since amended its Code to provide more comprehensive hearing procedures subsequent to a withholding. See Lujan, 532 U.S. at 193 n.3.
100 See G & G Fire Sprinklers, 156 F.3d at 898.
101 See id. at 898-99.
102 See id.
the requisite amounts from payments due to G & G for work already performed.\textsuperscript{103}

g & G received no notice of the planned withholding, nor was it given an opportunity, either before or after the decision, to contest the DLSE’s determination.\textsuperscript{104} However, even with such an opportunity, G & G would have had difficulty challenging the determination because the withholding notices did not clearly articulate the reasons for the DLSE’s conclusion.\textsuperscript{105} Although the factual basis for the DLSE’s determination remains unclear,\textsuperscript{106} at a minimum the record shows that the DLSE believed G & G had improperly classified employees for the purpose of obtaining lower wage determinations.\textsuperscript{107} G & G, however, maintained that it had not violated the wage laws and that it was being treated unfairly as a result of its nonunion status.\textsuperscript{108} Regardless of which party was correct, G & G’s only remedy under the statutory scheme was to seek compensation through a suit for breach of contract.\textsuperscript{109}

B. Ninth Circuit and Supreme Court Decisions

Because the DLSE’s action had a “substantial detrimental effect on G & G’s ability to do business,”\textsuperscript{110} and presumably because G & G anticipated further withholdings, G & G sought immediate declaratory and injunctive relief.\textsuperscript{111} In its complaint, G & G alleged that the withholding, absent an opportunity for a hearing, was a violation of due process.\textsuperscript{112} The district court granted summary judgment in favor of G & G, holding the withholding provisions unconstitutional and enjoining their enforcement.\textsuperscript{113}

On appeal, a divided Ninth Circuit affirmed the lower court’s ruling.\textsuperscript{114} According to the majority, G & G had a property interest “in being paid in full for the construction work it [had] completed.”\textsuperscript{115} The court acknowledged that not all property interests arising from government contracts are encompassed by the protections of due pro-

\begin{footnotes}
\item[103] Id. at 899.
\item[104] See id. at 898, 904.
\item[105] See id. at 899.
\item[106] See id.
\item[107] See Joint Appendix 214aa.
\item[109] For a discussion of the California Labor Code, see supra notes 98–99 and accompanying text.
\item[110] G & G Fire Sprinklers, 156 F.3d at 899.
\item[111] See id.
\item[112] See id.
\item[113] See id.
\item[114] See id. at 908.
\item[115] Id. at 901.
\end{footnotes}
cess, and that a contrary proposition would "result in the 'federaliza-

tion' of state contract law . . . ."116 But, after conceding that the

withholding itself was not a breach of contract,117 the court neverthe-

less attempted to distinguish a mere contractual dispute from a dis-

pute over the manner in which a state exercises its regulatory

power.118 The California Labor Code's withholding provision violated
due process not because it authorized a summary withholding, but

rather because it offered no later opportunity to contest the decision

or to be "heard at a meaningful time [and] in a meaningful man-

ner."119 Importantly, the court rejected the argument that due pro-

cess may be satisfied by a suit in contract: "[W]e apply Parratt and

Hudson only when the state administrative machinery did not and

could not have learned of the deprivation until after it occurred, not

when state officials acted pursuant to state policy and followed state

procedures . . . ."120 Thus, although the state's interests were suffi-

ciently important to allow for a summary withholding,121 due process

required the state to provide a "reasonably prompt hearing of some

sort" after the deprivation.122

On appeal, the Supreme Court vacated the Ninth Circuit's hold-

ing and remanded for further consideration123 in light of the Court's

recent decision in American Manufacturers Mutual Insurance Co. v. Sulli-

van.124 At issue in Sullivan was a Pennsylvania worker's compensation

provision authorizing private insurers to withhold payments pending
determinations as to whether medical treatments were "reasonable"

and "necessary."125 Although the Court eventually dismissed the Sulli-

van due process claim by rejecting the respondent's argument that a

statutory authorization to withhold provided an adequate nexus for

finding state action,126 Chief Justice Rehnquist's opinion went on to
discuss the nature of the alleged property interest at stake, which, the

116 Id. at 902.
117 Id.
118 See id.
119 Id. at 904.
120 Id. at 904 n.9 (quoting Knudson v. City of Ellensburg, 832 F.2d 1142, 1149 (9th Cir. 1987)) (internal quotation marks omitted). In the case of G & G, this argument was fur-

ther bolstered by the fact that as a subcontractor, G & G could not directly sue the state. Subcontractors may only seek assignment from the prime contractor, see id. at 898, or sue the prime contractor directly for breach of the covenant of good faith and fair dealing or under the theory of equitable subrogation. See id. at 904 n.9.
121 See id. at 903-904 (balancing the competing interests in accordance with Mathews v. Eldridge, 424 U.S. 319 (1976)).
122 Id. at 904.
125 Id. at 43.
126 See id. at 52 ("Action taken by private entities with the mere approval or acquies-

cence of the State is not state action." (citations omitted)).
Court stated, the lower court had “fundamentally misapprehended.” Unlike Goldberg or Mathews, the claimants in Sullivan had not established their entitlement to continued payments, but rather only to those payments eventually found to be reasonable and necessary. Until such a determination was made, they had no constitutionally protected property interest in the payments.

The decision further noted a potential distinction between the “property interest in [the respondents’] claims for payment, as distinct from the payments themselves . . . .” Due process would only require that the state afford some procedural protections before finally rejecting such claims. Although this distinction was not actually presented in Sullivan, its importance is highlighted by the opinions of the concurring Justices who sought to clarify—and perhaps limit—the Court’s holding. For example, Justice Ginsburg noted that the Court’s discussion was limited to the specific circumstances presented and affirmed that due process would generally require fair procedures for the settlement of claims. Justice Breyer, joined by Justice Souter, added further qualification by stressing that in certain circumstances, prior receipt of payments may be sufficient to create an entitlement to future payments. Finally, Justice Stevens emphasized that a claimant’s right, “whether described as a ‘claim’ for payment or a ‘cause of action’ . . . is unquestionably a species of property protected by the Due Process Clause of the Fourteenth Amendment.”

Notwithstanding the decision in Sullivan, G & G was successful again on remand to the Ninth Circuit, which distinguished Sullivan and again held California’s statute unconstitutional. Noting that the “definition of a protected property interest often includes a temporal component,” the court emphasized that its prior opinion did not support G & G’s claim for immediate payment pending a determination of the dispute. Rather, the court’s previous holding only required that the state provide G & G with a procedure for resolving

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127 Id. at 58.
128 See id. at 60.
129 See id. at 61.
130 Id. at 61 n.13.
131 See id.
132 The challengers of the statutory scheme had not alleged a property interest in their claims for payment, but only in the payments themselves. See id.
133 See PIERCE ET AL., supra note 33, § 9.4.
135 See id. at 63 (Breyer, J., concurring in part and concurring in the judgment).
136 Id. at 63 (Stevens, J., concurring in part and dissenting in part) (citation omitted).
138 Id. at 944 n.1.
139 See id. at 943.
the dispute.\textsuperscript{140} As such, the court believed that its prior opinion "fit[ ] comfortably within the analytic framework set forth in \textit{Sullivan}."\textsuperscript{141} In dissent, Judge Kozinski wrote that "\textit{Sullivan} fits the majority's rationale about as comfortably as Cinderella's slipper on the wicked step-sister's foot."\textsuperscript{142}

On appeal, a unanimous Supreme Court agreed with Judge Kozinski's characterization, and reversed.\textsuperscript{143} As a threshold matter, the Court assumed, but did not decide, that G & G did have a property interest in its claim for payment.\textsuperscript{144} The Court then considered whether a breach of contract claim in state court, as mandated by the statutory scheme, was sufficient to protect that interest.\textsuperscript{145} According to the Court, prior decisions outlining when a prompt postdeprivation hearing would be required,\textsuperscript{146} upon which the Court of Appeals relied, were inapposite because in those cases the entitlement had already vested.\textsuperscript{147} The Court explained: "In each of these cases, the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation. Unlike those claimants, [G & G] has not been denied any present entitlement."\textsuperscript{148}

Accordingly, like the complainants in \textit{Sullivan}, the withholding of payments here did not deprive G & G of any property to which it was constitutionally entitled. Furthermore, any process due G & G for the settlement of its claims, which the Court assumed to be a constitutionally protected property interest, could be readily had in the state courts. Thus, the Court stated: "We hold that if California makes ordinary judicial process available to respondent for resolving its contractual dispute, that process is due process."\textsuperscript{149}

\textsuperscript{140} See id.
\textsuperscript{141} Id. at 944. Further, the court emphasized that "[its] opinion adopt[ed] the approach explicitly preserved by the \textit{Sullivan} majority and unequivocally adopted in Justice Ginsburg's concurrence." Id. at 943.
\textsuperscript{142} Id. at 944 (Kozinski, J., dissenting).
\textsuperscript{143} See \textit{Lujan}, 532 U.S. 189.
\textsuperscript{144} See id. at 195 (citing \textit{Logan v. Zimmerman Brush Co.}, 455 U.S. 422 (1982)).
\textsuperscript{145} See \textit{id.} at 197-99.
\textsuperscript{147} See \textit{Lujan}, 532 U.S. at 195–96.
\textsuperscript{148} Id. at 196.
\textsuperscript{149} Id. at 197.
A. The Problems with $G \& G$ Fire Sprinklers

Ultimately, the Supreme Court's analysis in $G \& G$ Fire Sprinklers is disappointing. Presented with the opportunity to clarify the status of public contracts within the due process framework, the Court chose instead to avoid the doctrinal inconsistencies that have plagued the lower courts. Although it assumed that $G \& G$ had a property interest in its claim for payment, the Court resolved the due process claim not by holding that $G \& G$ had received sufficient postdeprivation process, but rather by holding that no deprivation had yet occurred.\textsuperscript{150} This logic is unsettling because it too easily allows the courts to avoid considering what due process requires. Indeed, it is perhaps telling that under the Court's due process analysis, it need not apply, nor even mention, the \textit{Mathews} balancing test.\textsuperscript{151}

The Ninth Circuit's resolution is preferable because it eschewed conceiving of $G \& G$'s property interest in the Blackstonian terms of occupation or dominion.\textsuperscript{152} Instead, it recognized that $G \& G$ had a property interest in its claim for payment that it could pursue either through administrative or judicial procedures.\textsuperscript{153} As such, the Ninth Circuit's decision was fully in accordance with the fundamental teachings of Roth that "property interests protected by procedural due process extend well beyond actual ownership ... ."\textsuperscript{154} After determining that $G \& G$ had a protected property interest, the court appropriately applied the \textit{Mathews} balancing test.\textsuperscript{155} Using that approach, the court determined that under these circumstances due process required some form of prompt postdeprivation process—some meaningful opportunity to be heard before $G \& G$ would be forced to sue for breach of contract.\textsuperscript{156}

The Supreme Court's resolution regarding $G \& G$'s property interest has potentially far-reaching effects. Construed broadly, the

\begin{itemize}
\item \textsuperscript{150} \textit{See id.} at 196 (noting that "[G & G] has not been denied any present entitlement ... .")
\item \textsuperscript{151} \textit{See id.} at 195–99.
\item \textsuperscript{152} \textit{Compare} $G \& G$ Fire Sprinklers, Inc. v. Bradshaw, 204 F.3d 941, 944 n.1 (9th Cir. 2000) ("[T]he definition of a protected property interest often includes a temporal component." (citation omitted)), \textit{rev'd sub nom.} Lujan v. $G \& G$ Fire Sprinklers, Inc., 532 U.S. 189 (2001), \textit{with Lujan}, 532 U.S. at 196 ("[C]laimant ... [is not] presently entitled ... to exercise ownership dominion.").
\item \textsuperscript{153} \textit{See} $G \& G$ Fire Sprinklers, Inc. v. Bradshaw, 156 F.3d 893, 901–03 (9th Cir. 1998), \textit{vacated by} 506 U.S. 1061 (1999); \textit{see also} $G \& G$ Fire Sprinklers, 204 F.3d at 943–44 (reinstating the court's prior decision and implicitly finding that $G \& G$ had a property interest in its claim for payment).
\item \textsuperscript{154} Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571–72 (1972).
\item \textsuperscript{155} \textit{See} $G \& G$ Fire Sprinklers, 156 F.3d at 903–04.
\item \textsuperscript{156} \textit{Id.} at 904.
\end{itemize}
holding encroaches on the Roth-Mathews entitlement-process framework. What distinction can logically be drawn between the position of a government employee and a public works contractor who have each been allegedly terminated without cause? Under the traditional rubric, a valid distinction lies in the process that is due. The employee, who exhibits greater reliance, will be accorded greater process, including at least some minimal predeprivation notice or informal hearing, perhaps coupled with a more substantial and prompt postdeprivation procedure. The contractor, on the other hand, who presumably exhibits less extreme dependence, is entitled only to prompt postdeprivation procedures or a compensatory suit for breach of contract in state court.

Of course, this analysis only applies where the subjects have a valid property interest (i.e., arising from a present entitlement), and the Supreme Court found that contractors like G & G do not have such an interest. The Court's opinion nevertheless attempts to maintain the traditional Mathews-type framework by arguing that, unlike the contractor, the employee exercises a "present entitlement." However, the logic of this argument is equally applicable against the employee: just as G & G has a property interest only in its claim for payment, so too may the government employee's interest be reduced to merely a claim for payment.

The Court's ruling is also problematic because it creates a de facto exhaustion requirement. To be sure, there may be instances in which a contractor, and perhaps even an employee, may see its claim extinguished prior to seeking a judicial remedy. In such cases, exhaustion would not be an issue. Nonetheless, by defining the prop-

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158 See supra Part I.A.
159 See, e.g., G & G Fire Sprinklers, 156 F.3d at 904.
161 See Lujan v. G & G Fire Sprinklers, 532 U.S. 189, 196 (2001) (assuming only that G & G had a property interest in its claim for payment).
162 See id.
163 The Court's approach, which emphasizes the conditional nature of a contractor's property interest, seems to be in tension with its own settled principles. For example, although a customer's right to continued utility service depends upon payment of the charges properly due, "[t]he Fourteenth Amendment's protection of 'property'[ ] . . . has never been interpreted to safeguard only the rights of undisputed ownership." Fuentes v. Shevin, 407 U.S. 67, 86 (1972).
164 See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 436–37 (1982) (holding that the state's failure to schedule an administrative hearing within the statute of limitations was a deprivation of property without due process); see also Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 64–65 (1999) (Stevens, J., concurring in part and dissenting in part) (suggesting that exhaustion is not required where employees were not notified that a request for utilization review would suspend the employee's ability to present her case).
erty interest as a claim for payment, and by requiring a final adjudication of the claim before a deprivation can be said to exist, the Court's ruling would seem to contravene, at least in spirit, the principle of *Monroe v. Pape* that state remedies "need not be first sought and refused before the federal one is invoked." While the legal framework does not technically require exhaustion, the *G & G Fire Sprinklers* doctrine nevertheless serves to similarly restrict the availability of § 1983 actions for contractors.

**B. The Problems Beyond *G & G Fire Sprinklers***

The Supreme Court's decision in *G & G Fire Sprinklers* is emblematic of the tension inherent in the *Roth* entitlement framework. While all entitlements enforceable at state law are arguably constitutionally protected property, the federal courts understandably have been uncomfortable with this unbounded principle. Therefore, they have sought to limit public contractors' uses of civil rights claims for breach of contracts in two ways. First, many courts have hesitated to give constitutional status to "mere contracts," even though the distinction separating employment and service contracts is tenuous. Courts have attempted to use various notions of reliance, dependence, status, or permanence as a means of differentiation. In doing so, however, they conflate the *Roth* entitlement analysis with *Mathews* balancing—and the results have ranged from marked inconsistency to logical absurdity.

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165 365 U.S. 167, 183 (1961); see also *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982) (holding that exhaustion of state remedies is not required before an individual may seek federal relief under § 1983). For a discussion of the relevant law prior to *G & G Sprinklers*, see Smolla, supra note 86.

166 An almost identical argument played at least some part in the court's decision in *Vail v. Board of Education*: "[U]nder [the dissent's] analysis[,] Vail still would not be 'deprived' of property until the state courts 'refused' [his claim] .... If that is not requiring exhaustion of state remedies, I do not know what would be an exhaustion requirement." 706 F.2d 1435, 1445-46 (7th Cir. 1983) (Eschbach, J., concurring).

167 See Merrill, supra note 33, at 931-32 (discussing the problem of too much property under *Roth*’s positivism).

168 See, e.g., *Brown v. Brienen*, 722 F.2d 360, 362 (7th Cir. 1983) (noting, with some consternation, that breach of employment contract due process suits "have become an important part of the business of the federal courts"); supra notes 70-71 and accompanying text.

169 See supra Part I.A.

170 See supra Part I.A.

171 Compare *Vail*, 706 F.2d at 1439-40 (holding that a state employee was entitled to continued employment for the period of fixed-term contract), with *DeBoer v. Pennington*, 287 F.3d 748, 750 (9th Cir. 2002) (holding that sole employee of service company was not entitled to continue employment for period of fixed-term contract).

172 One such absurdity is that the existence of due process may depend on the number of employees working under a public contractor. See, e.g., *DeBoer v. Pennington*, 206 F.3d 857, 868-71 (9th Cir. 2000) (suggesting that plaintiff would be entitled to due process protection if his contract with the City were for only his own services, rather than for the
Second, courts have attempted to limit the process due by finding that a compensatory, postdeprivation breach of contract suit is adequate process. Given that many contractors will not depend solely on one government contract for their livelihood, it is not surprising that they will be accorded less process than individual employees. Still, courts should seek to apply Mathews in a flexible manner, considering the interests at stake rather than the category of contract in state court. By resting on the notion that contractors’ disputes may simply receive adequate process through a breach of contract claim, they conflate Mathews interest balancing with the Roth entitlement analysis. It is hardly surprising, therefore, that their results have been similarly inconsistent.

C. The Current Justifications and Suggested Guidelines

Although the current procedural due process doctrine results in inconsistencies, this doctrinal development has not been without a strong rationale. Indeed, courts faced with these issues have been remarkably consistent in their reasoning, if not their outcomes. Ultimately, however, these justifications alone are unpersuasive.

First, courts have primarily considered the proper role of the federal courts, emphasizing that the “Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts.” For example, in G & G Fire Sprinklers, the Supreme Court’s opinion conceived of the issue as a “standard breach-of-contract suit under California law.” Likewise, both the majority and dissenting opinions of the Ninth Circuit discussed the problem of federalizing state contract law as a central issue.

Such concerns are appropriate. The courts should certainly seek to “prevent the escalation of every grievance against state and local government into a constitutional claim.” However, these concerns

services of others), vacated sub nom. City of Bellingham v. DeBoer, 532 U.S. 992 (2001); San Bernardino Physicians’ Servs. Med. Group v. County of San Bernardino, 825 F.2d 1404, 1409 n.5 (9th Cir. 1987) (noting that some professional corporations may be the “alter ego” of an individual independently contracting with a public agency, and contrasting the independent individual’s contract with a professional corporation’s contract with a public agency).

173 See supra Part I.B.


175 See supra Part I.

176 Brown v. Brienen, 722 F.2d 360, 364 (7th Cir. 1983); see also supra notes 70–71 and accompanying text (discussing the proper role of the federal courts).


178 See G & G Fire Sprinklers, Inc. v. Bradshaw, 156 F.3d 893, 901–02, vacated by 526 U.S. 1061 (1999); id. at 908–09 (Kozinski, J., dissenting).

179 Monaghan, supra note 29, at 408 (footnote omitted).
may currently be given too much weight. Apprehension over the sheer volume of cases may be unwarranted, and state remedies may still properly resolve a majority of cases. Further, the current approach confuses the Mathews balancing framework because it fails to explain where such federalization concerns should lie. If they accrue to the government's interest, then surely Mathews balancing will rarely counsel significant predeprivation process. And if they remain outside of the Mathews framework, yet still relevant, then that may account for recent doctrinal inconsistencies. Going forward, courts should acknowledge the role that these considerations play and should fashion an appropriate framework accordingly.

Second, although an important consideration, the volume of cases should not be the courts' primary concern. It may be far more important to ask why such cases are in federal court seeking vindication of a civil right. As most courts have framed the issue in these cases as a breach of contract, rather than a breach of process, a common refrain from those courts that have rejected public contractors' due process claims is that "contracting parties . . . [should not be] governed by the Due Process Clause merely because one of the parties happens to be a state." The logic is that due process is less relevant when the government participates in the marketplace as a consumer, because external pressures will adequately constrain arbitrary government action. This notion is particularly apparent in Judge Kozinski's Ninth Circuit dissent. After noting that "[n]o one is forced to comply [with the regulations] unless he agrees to do business with the state," Judge Kozinski proclaimed: "We can't always expect the government to act with unbounded compassion, patience and generosity. Indeed, when the government is acting as a commercial entity, taxpayers cajole it to act with all the ferociousness the marketplace demands." Yet this notion may only hold true when the government

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180 See Minette, supra note 36, at 915-17 (discussing the probable number of cases involved and concluding that the number would be small).


182 G & G Fire Sprinklers, Inc. v. Bradshaw, 204 F.3d 941, 944 (9th Cir. 2000) (Kozinski, J., dissenting) (citation omitted), rev'd sub nom. Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189 (2001); see also id. at 946 (Kozinski, J., dissenting) ("The majority has not explained why working on a government contract heightens one's interest in receiving prompt payment so as to require procedural safeguards not available to other parties that have a disputed claim under a contract.").

183 See Timothy P. Terrell, "Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis, 70 Geo. L.J. 861, 901-05 (1982); see also Brief of Amici Curiae Port of Oakland and 54 California Cities at 7 & n.4, Lujan, 532 U.S. 189 (No. 00-152).

184 G & G Fire Sprinklers, Inc. v. Bradshaw, 156 F.3d 893, 909 n.1 (9th Cir. 1998) (Kozinski, J., dissenting).

185 Id. at 910 n.2.
functions solely as a proprietor, rather than equally as an enforcer of public policy. After all, the government is no ordinary consumer and it may be appropriately subject to unique restrictions, even when it participates in the ordinary marketplace.

Moreover, because the underlying dispute sounds in contract, courts may too easily undervalue the importance of providing substantial process. Although it is true that common contract disputes should not be governed by due process, ending the analysis on this principle is mere tautology. Courts must go further and endeavor to distinguish claims that represent a simple breach of contract from those that represent a breach of process. For example, it may be appropriate for courts to resolve disputes relating to bargained-for performance through traditional contract remedies. However, disputes regarding the enforcement of a public policy or the existence of an entitlement may more likely require the procedural safeguards of due process. To be sure, "one cannot have a property interest in mere procedures." Still, it cannot be doubted that it is property that ultimately guarantees such procedures. Accordingly, courts should not be troubled that a property-related dispute may give rise to a constitutional claim when the state fails to act in a manner consistent with due process.

See, e.g., Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 227 (1993) (noting a "distinction between government as regulator and government as proprietor"). But see Morris R. Cohen, Property and Sovereignty, 13 CORNELL L.Q. 8 (1927) (arguing that both government uses of property are coercive). See Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 290 (1986) ("[G]overnment occupies a unique position of power in our society, and its conduct . . . is rightly subject to special restraints."). For example, because wage laws are regulatory rather than proprietary, see Dillingham Constr. N. Am., Inc. v. County of Sonoma, 190 F.3d 1034, 1038 (9th Cir. 1999), application of the California statute at issue in G & G Fire Sprinklers would require procedural guarantees.

Judge Easterbrook suggests that process is indicated where the dispute relates to whether a condition of entitlement exists. See id. Thus, while a premature termination could be resolved through breach of contract remedies, a dispute over an entitlement (e.g., whether Goldberg is entitled to statutory benefits, or whether G & G is in violation of California's wage provision law) should be resolved through an appropriate administrative hearing. Under our current entitlement doctrine, property is defined by the nature of the interest rather than the dispute. See supra Part I. But such considerations could be incorporated under the Mathews calculus.

See Mid-Am. Waste Sys., Inc. v. City of Gary, 49 F.3d 286, 290 (7th Cir. 1995). Judge Easterbrook suggests that process is indicated where the dispute relates to whether a condition of entitlement exists. See id. Thus, while a premature termination could be resolved through breach of contract remedies, a dispute over an entitlement (e.g., whether Goldberg is entitled to statutory benefits, or whether G & G is in violation of California's wage provision law) should be resolved through an appropriate administrative hearing. Under our current entitlement doctrine, property is defined by the nature of the interest rather than the dispute. See supra Part I. But such considerations could be incorporated under the Mathews calculus.

process. As Judge Eschbach noted in his Vail concurrence, due process is intended to govern the relationship between state and citizen, and to assure that the government does not treat individuals in an arbitrary fashion:

A civil rights action based on the deprivation of due process and a contract action to recover damages for a breach are independent remedies. The civil rights action based on deprivation of a property interest established by the contract seeks vindication for the arbitrary manner in which the contract was breached.

Conceived of in this manner, such property-based claims have everything "to do with civil rights as ordinarily understood."

Conclusion

Our current due process approach to public contracts is problematic. Appropriate concerns for the fundamental scope of due process and the role of the federal courts have inappropriately resulted in the development of an inconsistent doctrine and the exclusion of meritorious claims. To address this problem, the courts should endeavor to fashion a remedy that scrutinizes public contracts with a more nuanced eye and, ultimately, with less trepidation.

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193 If one accepts this argument, the criticism and concern that civil rights claims may award a greater remedy than a simple contract action, see Kreynin, supra note 33, at 1100, becomes unpersuasive.
195 Id. (Eschbach, J., concurring) (quoting Hostrop v. Bd. of Junior Coll. Dist. No. 515, 471 F.2d 488, 494 n.15 (7th Cir. 1972)).