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Common Callings, Hearings and Government Without Accountability: The Very Per Curiam Case of *Leis v. Flynt*

Charles H. Clarke*

I. Introduction

Hustler Magazine and its owner, Larry Flynt, have occasionally needed the assistance of counsel in preparing a defense against criminal obscenity prosecutions. Both were indicted in Hamilton County, Ohio, on February 8, 1977, for alleged violations of the Ohio Code concerning the dissemination of harmful material to minors.¹ They retained as counsel in the case two nonresident attorneys from New York who were not members of the Ohio bar.

The attorneys specialized in criminal defense and obscenity law. One had received an award as outstanding practitioner of the year by the New York State Bar Association in 1975.² The other was a graduate of the University of Toledo (Ohio) Law School and had practiced as a legal intern in the municipal prosecutor's office in Toledo while in law school.³

A *pro hac vice* admission to the bar of a state allows a nonresident attorney to be admitted to the bar for a particular case only.⁴ Ohio allowed *pro hac vice* admissions to its bar with leave from the judge presiding over the case.⁵ Further, Canon 3 of Ohio's Code of Professional Responsibility expressly disclaimed unreasonable territorial limitations upon the right of legal representation, especially in pending cases.⁶

The two attorneys retained by Flynt for defense against the February 8, 1977, indictment had represented clients in earlier criminal proceedings in Hamilton County. In the earlier cases, the nonresident attorneys had local counsel submit an appearance form indicating that they were counsel for the defendants.⁷ The form, itself, however, was neither a *pro hac vice* appearance nor did it indicate that designated counsel were not members of the Ohio bar.⁸ In any event, use of the form was customary for *pro hac vice* admissions.⁹

Although the two attorneys used this form in the case concerning the February 8, 1977, indictment, they were refused *pro hac vice* admission for the case without being given any reasons or an opportunity for a hearing.¹⁰ After being denied mandamus relief by the Ohio Supreme Court, the attorneys sued in federal district court to enjoin the state criminal prosecution until they had

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1 439 U.S. 438, 439 (1979).

2 *Id.* at 451 n.14.

3 *Id.*

4 *Pro hac vice* means for this turn or for this one particular occasion; BLACK'S LAW DICTIONARY 1091 (5th ed. 1979).

5 439 U.S. at 439 n.2.

6 *Id.* at 454 n.21.

7 *Id.* at 439-40 n.3.

8 *Id.* at 439.

9 *Id.* at 439 n.3; *Flynt v. Leis*, 434 F. Supp. 481, 483 (S.D. Ohio 1977).

10 439 U.S. at 440.

been given a hearing upon their *pro hac vice* applications.¹¹ The federal district court granted relief.¹² The Court of Appeals for the Sixth Circuit affirmed,¹³ holding that due process of law required notice of the reasons for their rejected applications and a hearing.

The Supreme Court summarily granted certiorari and reversed the court of appeals in a five to four *per curiam* opinion.¹⁴ The Court deemed *pro hac vice* admission in Ohio to be completely discretionary in the sense that admission was not governed by disclosed standards.¹⁵ Under these circumstances, the Court held that the interest of an attorney in being admitted *pro hac vice* is not an interest protected by the due process clause.

The due process clause confers protection against state deprivations of life, liberty and property.¹⁶ The clause, however, does not create the property interests which it protects.¹⁷ Further, state law created no property entitlements respecting *pro hac vice* admission in *Leis v. Flynt*,¹⁸ because state law there was deemed to make admission completely discretionary. The Court also held that there was no federal right that permitted lawyers to appear in state courts without meeting the state's bar admission requirements.¹⁹ Presumably, this meant that Ohio's disposition of the *pro hac vice* applications did not infringe any fundamental or state-created liberty interest, such as the right to follow a common calling.

The thrust of the Supreme Court ruling is that procedural due process is not much of a safeguard against arbitrary denial of the *pro hac vice* application of a nonresident attorney. Procedural due process leaves the state free to grant some *pro hac vice* applications while denying others. Further, it also seems that constitutional equal protection guarantees²⁰ would ordinarily be inapplicable to this kind of discrimination unless they somehow mandate protection which procedural due process withholds.

As a result, the position of a nonresident *pro hac vice* attorney is comparable to that of a nontenured state employee whose lack of entitlement to a job results in almost no protection from an arbitrary discharge.²¹ A reason for rejecting the attorney or state employee is unchallengeable if it is facially valid.²² In fact, the reason for rejection need not be disclosed.²³

Of course, relief is theoretically available to either the nonresident attorney or nontenured state employee if the state violates some fundamental substantive right, such as freedom of speech,²⁴ or discriminates on narrow in-

11 *Id.* at 440-41.

12 *Id.* at 441; *Flynt v. Leis*, 434 F. Supp. 481 (S.D. Ohio 1977).

13 *Flynt v. Leis*, 574 F.2d 874, 879 (6th Cir. 1978).

14 439 U.S. 438, 445 (1979). Justices Stevens, Brennan and Marshall dissented on the merits. Justice White wanted to grant certiorari and set the case for oral argument.

15 *Id.* at 442-43, 444 n.5.

16 "... [N]or shall any State deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1.

17 439 U.S. at 441.

18 *Id.* at 441, 444 n.5.

19 *Id.* at 443.

20 See notes 108-10 *infra*.

21 *Board of Regents v. Roth*, 408 U.S. 564 (1972).

22 *Bishop v. Wood*, 426 U.S. 341, 343, 347 (1976).

23 439 U.S. at 446-47 n.3 (Stevens, J., dissenting).

24 *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972).

vidious grounds like race or sex.²⁵ It is difficult, however, to prove cases of this description.²⁶

Thus, *Flynt* generally allows a state to exercise facially standardless, discriminatory civil licensing or other regulatory power without accountability. A state that is free to discriminate in this manner without giving reasons is free to discriminate secretly against nonresident attorneys merely to protect its local bar from out-of-state competition. This kind of discrimination is ordinarily forbidden by the commerce clause²⁷ and the interstate privileges and immunities clause²⁸ in the Constitution.

Further, the equal protection clause²⁹ of the fourteenth amendment ordinarily requires at least a rational basis for the justification of substantial harm resulting from a state's differential treatment.³⁰ It is impossible, however, to determine whether a rational basis for this kind of treatment exists when no hearing to make the determination is available.

Therefore, it seems that equal protection and procedural due process do not presently forbid a state from inflicting substantial harm without accountability when it governs the private sector, provided there is no invidious discrimination or no injury to a fundamental substantive right or nonfundamental state-created entitlement. This formulation allows a state too much power without accountability. There are, of course, precedents that arguably permit the state to make some irrational uses of its contract and property powers.³¹ These precedents should be rejected. Moreover, they should be replaced with a construction of the due process and equal protection clauses which compels the state to rationalize the use of its power. This construction would require the state to declare rules or reasons and grant appropriate hearings unless the state could justify governing without them whenever it inflicted substantial harm.

Finally, *Flynt* is difficult to reconcile with the Supreme Court's recent suggestions that the right to engage in a common calling is a fundamental right. This part of *Flynt* will be discussed in the following section. *Flynt* and its authorization of government without accountability in the private sector will be discussed later.

II. *Leis v. Flynt* and the Common Calling as a Fundamental Substantive Right

The fundamental substantive right to engage in a common calling was

25 *Compare* *Schwartz v. Bd. of Bar Examiners*, 352 U.S. 232, 239 (1957).

26 See text accompanying notes 147-50 *infra*.

27 "The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8.

28 "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2.

29 "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

30 *Johnson v. Robison*, 415 U.S. 361, 374, 381-82 (1974); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 994-97 (1978 ed.).

31 *Bishop v. Wood*, 426 U.S. 341 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445-52 (1977).

once a star of the first magnitude in the now-forgotten constitutional firmament of laissez-faire.³² The right was part of a large freedom of contract and protection of private property.³³ The right was also part of a system of constitutional government which authorized the Supreme Court to determine the permissible ends and means of government.

The power to determine the permissible ends of government included, of course, the power to decide what constituted an adequate basis for concluding that a law actually furthered a permissible end. This power was necessary to prevent a legislature from furthering an impermissible end by enacting a law that only ostensibly promoted a permissible end.

Thus, in *Lochner v. New York*,³⁴ the legislature enacted an employee health law which forbade bakers from working more than ten hours a day or sixty hours a week. The legislature hoped to ameliorate illness and premature death associated with overwork, especially under trying conditions.³⁵ In striking down the law, however, the Supreme Court decided that hard work and long hours in the ordinary common callings did not create any appreciable health risks.³⁶

This judicial power to oversee legislative judgments was deemed necessary to confine the legislature to its appropriate sphere of action.³⁷ Naturally, the state could provide protection against health risks caused by employment. The *Lochner* opinion mentioned examples of proper employee health laws.³⁸ The *Lochner* Court, however, thought that the hours law in question was not a health law.

Hours laws in that period were actually suspect as an illegitimate attempt to give employees more benefits from the owners and customers of the industrial system than they could get by contract.³⁹ This kind of interference with private property and contract rights was unconstitutional. As the Court said in *Coppage v. Kansas*,⁴⁰ "since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights."⁴¹ Clearly, redistribution of economic benefits or wealth allocated by the free market was an impermissible end of government.

Fundamental substantive rights usually required the price of labor,⁴² ser-

32 *Adams v. Tanner*, 244 U.S. 590, 594 (1917); compare *Lochner v. New York*, 198 U.S. 45, 56 (1905).

33 *Adkins v. Children's Hosp.*, 261 U.S. 525, 567-68, 570-71 (1922) (Holmes, J., dissenting), *overruled* by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1931); *Lochner v. New York*, 198 U.S. 45, 74-76 (Holmes, J., dissenting); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); compare R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 53, 294, 319 (1941).

34 198 U.S. 45 (1905).

35 *Id.* at 70-71.

36 *Id.* at 59, 64.

37 *Id.* at 64.

38 *Id.* at 61, 62.

39 *Id.* at 64.

40 236 U.S. 1 (1915).

41 *Id.* at 17.

42 *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), *overruled* by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

vices⁴³ and goods⁴⁴ to be set by the free market rather than by the legislature. Judicial protection of these fundamental rights required more than the power to review the factual basis of the legislature's determination that a harm within the reach of government existed.⁴⁵ Protection was also needed against legislative means which excessively intruded upon a fundamental right in the interest of correcting an existing harm within the legislature's admitted constitutional power. The Supreme Court provided this protection.

The right to engage in a common calling was a recipient of this kind of protection. The operation of an employment agency, for example, was a common calling.⁴⁶ Further, the state was forbidden from setting the price which employment agencies could charge for their services although the state merely wanted to stop some agencies from committing extortion, fraud, imposition and discrimination.⁴⁷ Naturally, the abolition of these evils was within the state's power, but this meant simply that the state could impose punishment when such evils occurred.⁴⁸ Moreover, it was immaterial that an unregulated price may have been the primary cause of these undesirable practices.⁴⁹ Price control was ordinarily beyond the power of the state.

Similarly, the state had tried earlier without success in *Adams v. Tanner*⁵⁰ to end abuses frequently committed by employment agencies by forbidding these agencies from accepting fees from persons seeking work while allowing them from employers.⁵¹ This was deemed a partial abolition of a common calling.⁵² It was declared unconstitutional notwithstanding the conceded existence of serious abuses.

The fundamental right to engage in a common calling also received other protection customarily associated with freedom of contract. *Smith v. Texas*,⁵³ for example, prohibited a state from restricting desirable jobs to certain groups of employees when freedom of contract would have allowed other qualified employees to obtain them from the employer. In *Smith*, the state tried to close the job of railroad conductor to qualified experienced railroad employees, such as engineers, unless they had previously performed as conductor or brakeman. Further, it could be claimed that under the principles of *Adkins v. Children's Hospital*,⁵⁴ the right to engage in a common calling made an employee free to bargain for the highest possible wages for his labor. Further, under the *Lochner* principles he was also free to work more than ten hours a day or sixty hours a week if he decided that his circumstances or those of his family warranted it.⁵⁵

The creation of this kind of fundamental law did not occur without dis-

43 *Ribnik v. McBride*, 277 U.S. 350 (1928).

44 *Williams v. Standard Oil Co. of La.*, 278 U.S. 235 (1929).

45 198 U.S. at 59-61, 64.

46 *Adams v. Tanner*, 244 U.S. 590, 594 (1917).

47 *Ribnik v. McBride*, 277 U.S. 350, 358 (1927).

48 *Id.* at 358.

49 *Id.* at 364-65, 374.

50 244 U.S. 590 (1917).

51 *Id.* at 593.

52 *Id.*

53 233 U.S. 630 (1914).

54 261 U.S. 525, 561 (1922), *overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

55 198 U.S. at 52-53, 59.

sent. Chief Justice Taft, dissenting in *Adkins*, intimated that the court had invalidated minimum wage laws because of its belief that they expressed a policy which was economically unsound.⁵⁶ He suggested that the Court's majority in *Adkins* believed that minimum wage laws would make the underpaid employees' situation worse.⁵⁷

Justice Holmes, also dissenting in *Adkins*, agreed with this criticism. He said that the only issue raised by a minimum wage law or similar economic and social legislation was whether the law's anticipated benefits were worth the price it would necessarily exact.⁵⁸ Justice Holmes thought that the resolution of this question was committed by the Constitution to the popularly elected branches of government.⁵⁹ Similarly, Justice Holmes, dissenting earlier in *Lochner*, had said that due process of law did not enact Spencer's *Social Statics*, paternalism, laissez-faire or any particular economic theory.⁶⁰

Freedom of contract and all that it meant were nowhere to be found in the Constitution.⁶¹ Moreover, freedom of contract did seem to take the basic economic issues arising in a democracy out of the democratic processes. Some believed that this removal was its purpose and that this purpose was unacceptable.⁶²

Eventually, seats on the Supreme Court were occupied by justices who did not accept freedom of contract as a fundamental substantive right. The result was predictable. Freedom of contract yielded to the exigencies of the great depression of the 1930's. Recognition of the state's power to legislate a minimum price for goods came first.⁶³ The power of the state to establish a minimum wage for labor followed soon afterwards.⁶⁴ Ultimately, the right to engage in a common calling and the rest of freedom of contract disappeared, at least for a time.⁶⁵

The termination of these rights occurred in *Ferguson v. Skrupa*.⁶⁶ In *Ferguson*, Kansas was allowed to abolish the debt adjustment business. The common calling case of *Adams*, which involved the partial destruction of the employment agency business, and other freedom of contract cases were expressly repudiated.⁶⁷ The Court specially emphasized that the wisdom, need or appropriateness of economic legislation was to be determined exclusively by the legislature.⁶⁸ Mr. Justice Harlan concurred for a reason which the Court held to be irrelevant. He thought a rational basis for the legislation existed.⁶⁹

56 261 U.S. at 562 (Taft, C.J., dissenting).

57 *Id.*

58 *Id.* at 571 (Holmes, J., dissenting).

59 *Id.* at 567, 571.

60 198 U.S. at 75-76 (Holmes, J., dissenting).

61 261 U.S. at 568 (Holmes, J., dissenting), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

62 R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 182, 185-87, 317-22 (1941); *compare* *Lochner v. New York*, 198 U.S. 45, 74-77 (1905); *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).

63 *Nebbia v. New York*, 291 U.S. 502, 537-39 (1934).

64 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937), *overruling* *Adkins v. Children's Hosp.*, 261 U.S. 525 (1922).

65 *Ferguson v. Skrupa*, 372 U.S. 726, 728-32 (1963).

66 *Id.*

67 372 U.S. at 728-32.

68 *Id.*

69 *Id.* at 733 (Harlan, J., concurring).

Ferguson also condemned use of the "vague contours" of the due process clause to create rights that were not conferred by specific constitutional provisions.⁷⁰ Two years later, the Supreme Court in *Griswold v. Connecticut*⁷¹ suggested that fundamental substantive rights would be limited to rights expressed or implied by specific constitutional provisions.⁷² *Griswold* held that forbidding married couples the use of contraceptives violated the fundamental right of marital privacy. A "penumbra" rationale accounted for the existence of this fundamental right which is not expressly mentioned in the Constitution. Provisions in the Bill of Rights and elsewhere in the Constitution project emanations, shadows or penumbras.⁷³ One of these shadows is a right of marital privacy.⁷⁴ Five justices accepted the penumbra rationale.⁷⁵ Five justices also indicated a willingness to find unwritten fundamental substantive rights although they were not penumbras, but these justices could not agree upon a common rationale.⁷⁶

The penumbra rationale denies fundamental rights status to substantive rights associated with freedom of contract because these rights are not expressed or implied by any specific provisions of the Constitution. In *Board of Regents v. Roth*,⁷⁷ nevertheless, which was decided seven years after *Griswold*, while the penumbra rationale was still intact, the Court quoted the following language from *Meyer v. Nebraska*⁷⁸ about fundamental rights, including freedom to contract and to follow a common calling:

While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment] . . . it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy the privileges long recognized . . . as essential to the orderly pursuit of happiness of free men.⁷⁹

Properly understood in context, however, this language did not affirm that freedom of contract, including the right to follow a common calling, was a fundamental, substantive right.

Instead, the *Roth* court ruled that a state-created right to contract for employment is a liberty interest entitled to the procedural protection of the due process clause. The Court in *Roth* held that a nontenured state teacher was entitled to a hearing to try to clear his name when the state inflicted a stigma upon him which seriously curtailed his employment opportunities.⁸⁰ The Court then mentioned that the right to work for the state⁸¹ is a right created by state law. It

70 372 U.S. at 731.

71 381 U.S. 479 (1965).

72 *Id.* at 484.

73 *Id.*

74 *Id.* at 485-86.

75 *Id.* at 486.

76 *Id.* at 486, 499, 502.

77 408 U.S. 564 (1972).

78 262 U.S. 390 (1923).

79 *Id.* at 399.

80 408 U.S. 564, 573 (1972).

81 *Id.* at 573.

also referred to state-regulated professional employment,⁸² citing *Schwartz v. Board of Bar Examiners*,⁸³ a case where the right to practice law was regarded as a "grant of permission by the state."⁸⁴ Thus, *Roth* dealt with employment opportunities created by state law⁸⁵ rather than fundamental rights when it spoke of employment opportunities which can be curtailed by a stigma imposed upon a discharged state employee.

Other precedents after *Griswold*, however, suggest that the fundamental substantive right of freedom to contract and to follow a common calling may be due for revival. The penumbra rationale, which is inconsistent with such fundamental substantive rights, was very weakly endorsed in *Roe v. Wade*,⁸⁶ which concerned the fundamental right to an abortion. Later, *Whalen v. Roe*,⁸⁷ which upheld a computer data storage program for dangerous prescription drugs, expressly rejected the penumbra rationale, but not the fundamental substantive right of privacy.⁸⁸ The disappearance of the penumbra rationale removed any doctrinal impediment to restoration of the right to follow a common calling as a fundamental substantive right.

Subsequently, a step toward restoration was taken in *Exxon Corp. v. Governor of Maryland*.⁸⁹ There the Court had little difficulty in upholding a state law which foreclosed oil producers and refiners from the retail gasoline sales business against a substantive due process challenge. Notably absent from the opinion, however, was the language in *Ferguson* stating that the wisdom, need and appropriateness of such legislation were not matters for the federal judiciary to decide. Instead, the Court said that the law had "a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market, and we reject appellants' due process claim."⁹⁰

Another common calling case came to the Supreme Court in its next term after *Exxon*. *New Motor Vehicle Board v. Orrin W. Fox Co.*⁹¹ upheld a statute which prohibited an automobile manufacturer from adding dealers in the territory of existing dealers without cause. The restriction became effective upon dealer protest and notice by the board without any kind of preliminary hearing. It was held, however, that the availability of a hearing afterwards to determine whether there was cause to continue the restriction satisfied procedural due process requirements.

The complaining automobile manufacturer said that the statute deprived him of the liberty to pursue a lawful occupation without due process of law. The manufacturer claimed a "due process protected interest right to franchise at will—which asserted right survived the passage of the California Automobile

82 *Id.* at 574.

83 353 U.S. 232 (1957).

84 *Id.* at 239 n.5.

85 Compare *Paul v. Davis*, 424 U.S. 693, 709-10 n.5 (1976).

86 410 U.S. 113, 152-53 (1973); *Whalen v. Roe*, 429 U.S. 589, 598 n.23 (1977); but see *Paul v. Davis*, 424 U.S. 693, 712-13 (1976).

87 429 U.S. 589 (1977).

88 *Id.* at 598 n.23.

89 437 U.S. 117 (1978).

90 437 U.S. at 125.

91 439 U.S. 96 (1978).

Franchise Act."⁹² The Court answered that this right was subject to reasonable regulation if it existed.⁹³ The due process clause, of course, requires reasonable regulation only of rights which the clause protects. Justices Blackmun and Powell, speaking for themselves in a concurring opinion, said that *Meyer* defined "liberty" to include "the right to engage" in any of the "common occupations of life."⁹⁴ Seemingly forgotten in all of this is *Ferguson* which killed the common calling as a fundamental right. It may be that some fundamental rights are more enduring than old soldiers. They neither die nor fade away, but appear, disappear and reappear as the needs of the times require.

Since the Supreme Court seems willing to consider whether the right to follow a common calling is a fundamental substantive right, and probably to decide that it has this status, *Flynt* would have been a suitable occasion for the right's resurrection. Surprisingly, the majority decided *Flynt* without mentioning the issue, thereby neither affirming nor disaffirming fundamental substantive right status for the common calling. Instead, in speaking of nonresident attorneys, the majority said, "[f]urther, there is no right of federal origin that permits such lawyers to appear in state courts without meeting that state's bar admission requirements."⁹⁵

This statement itself seems irrelevant to any issue in the case. The nonresident attorneys in *Flynt* did not claim that their out-of-state attorneys' licenses overrode any requirements of the regulating state. In fact, they wanted to know what its *pro hac vice* requirements were in order to establish compliance with them, but were informed by the Supreme Court that they did not have the right to know what these requirements were. In any event, none of the precedents cited in support of the majority's statement involved the assertion that the right to follow a common calling is a fundamental substantive right.

In *Brown v. Supreme Court of Virginia*,⁹⁶ for example, the state was allowed to deny reciprocity admission to its bar without examination to attorneys who did not intend to practice law there on a full-time basis. Further, *Ginsburg v. Kovrak*⁹⁷ permitted a state to forbid an attorney from conducting a so-called federal law practice from an office there without being admitted to its bar. A third case, *Norfolk & Western Railway Co. v. Beatty*,⁹⁸ allowed a state to restrict the participation of *pro hac vice* attorneys to a consulting or advisory role in Federal Employers Liability Act and Jones Act defense litigation.

92 *Id.* at 106.

93 *Id.* at 106-07.

94 439 U.S. at 113; *cf.* *Andrus v. Allard*, 100 S. Ct. 318, 328, n.25 (1979). *Andrus* held constitutional a law which protects certain endangered birds by prohibiting sale of the birds and related bird parts, including those lawfully acquired before the prohibition became effective. After rejecting a claim that the law was an unconstitutional taking of property, the court in footnote 25 of the opinion also said:

Appellees also briefly argue that the regulation in this case interferes with their right to engage in a lawful occupation. Even if we were inclined to exhumate this variant of the theory of substantive due process, it would not be applicable here. Appellees may still sell artifacts that do not consist in part of protected bird products.

95 439 U.S. at 443. The Court's preceding sentence also said that an attorney's interest in appearing *pro hac vice* does not have its source in federal law. It does not seem that this sentence affirms anything more than the power of a state to abolish *pro hac vice* practice if it so desires. The Court expressly affirmed this power later. 439 U.S. 438, 444 n.5. See text accompanying note 117 *infra*.

96 359 F. Supp. 549 (E.D. Va.), *aff'd mem.*, 414 U.S. 1034 (1973).

97 392 Pa. 143, 139 A.2d 889, *appeal dismissed*, 358 U.S. 52 (1958) (dismissed for want of substantial federal question).

98 400 F. Supp. 234 (S.D. Ill.), *aff'd mem.*, 423 U.S. 1009 (1975).

In the third case, the lower court observed that there was no constitutional basis which compelled the admission of nonresidents to the professions within a state.⁹⁹ This court also remarked that it could not create a limited "national bar and impose it upon the states."¹⁰⁰ The court, nevertheless, neglected to mention what constitutional right was asserted there in behalf of *pro hac vice* practitioners. It did state, however, that primary reliance was placed upon *Spanos v. Skouras Theatres Corp.*¹⁰¹ which held that the national citizenship clause¹⁰² protected *pro hac vice* practitioners in matters of federal law.¹⁰³

Subsequently in *Norfolk & Western* the Supreme Court limited the holding in *Skouras*. The former case, however, was decided in 1975, before the Supreme Court suggested that the right to follow a common calling might be restored to fundamental substantive right status. Moreover, neither *Norfolk & Western* nor *Flynt* itself expressly disposed of any constitutional claim predicated upon fundamental substantive right status for the common calling.

Flynt, nevertheless, allows a state to reject a nonresident attorney's *pro hac vice* application without giving a reason or any requirement which an attorney might or might not be able to satisfy in a particular case. This power over *pro hac vice* admissions is clearly inconsistent with fundamental substantive right status for the common calling. A state, of course, could justifiably maintain that the only workable, certain indicium of an attorney's competence is a passing score on the state's bar examination.¹⁰⁴ Further, generally requiring bar admission by examination would not violate any fundamental substantive right to engage in a common calling.¹⁰⁵

This power over bar admissions, however, cannot explain *Flynt*. The state did not claim that passing its bar examination was the only reliable indicator of attorney competence. Instead, the state allowed *pro hac vice* admissions, which suggests the state believed that some nonresident attorneys were competent to try a particular case in its courts. Consequently, *Flynt* allows a state to deny *pro hac vice* admission to nonresident attorneys who could satisfy its *pro hac vice* admission requirements. A fundamental substantive right to engage in a common calling could not be dispatched so arbitrarily.

Further, it would be difficult to explain *Flynt* as a case in which only a trivial intrusion was made upon a common calling. In any event, the majority opinion recognized the importance of multi-state law practice.¹⁰⁶ Thus, although the Supreme Court has recently shown some inclination to protect the right to engage in a common calling by requiring minimum rationality for restrictions of this right, the Court in *Flynt* permitted a serious restriction of this right without even calling for disclosure of the reasons.

Fundamental substantive rights did not help the complaining lawyers in *Flynt*. Similarly, they had no state-created rights or entitlements because state

99 *Id.* at 237.

100 *Id.*

101 364 F.2d 161 (2d Cir. 1966).

102 "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

103 364 F.2d 161, 170 (2d Cir. 1966).

104 See text accompanying note 117 *infra*.

105 *Brown v. Supreme Court of Va.*, 359 F. Supp. 549, 555 (E.D. Va.), *aff'd mem.*, 414 U.S. 1034 (1973).

106 439 U.S. at 442.

law conferred nothing upon the out-of-state attorneys. Consequently, they lost the case.

III. Equal Protection

The clauses of the Constitution which forbid impermissible discrimination were not invoked in *Flynt*. Perhaps they should have been relied upon. These clauses protect interests which are not substantive rights or entitlements under any law.¹⁰⁷ Nobody, for example, would contend that blacks can be racially barred from the state employment which is terminable at will. A nonresident attorney submitting a *pro hac vice* application would have the same protection although his interest in *pro hac vice* practice is not a right.

The equal protection clause¹⁰⁸ of the fourteenth amendment is the most general, but not the only clause in the Constitution which provides protection against impermissible state discrimination. This clause does protect all persons, including nonresidents, from impermissible state discrimination. On the other hand, the commerce clause¹⁰⁹ and the interstate privileges and immunities clause¹¹⁰ of the Constitution provide a limited measure of equal protection. These clauses give nonresidents special protection against hostile state discrimination.

Flynt permits a state to grant some *pro hac vice* applications of nonresident attorneys and to deny others entirely without explanation. This power to engage in unexplained discrimination permits a state to exclude qualified nonresident attorneys from cases which are coveted by the local bar. The commerce clause and the interstate privileges and immunities clause, however, forbid state discrimination whose only purpose is to protect a local economic interest from out-of-state competition.¹¹¹

Numerous cases have held that in the private sector, the commerce clause requires a state to share its economic resources and opportunities with citizens of other states. A state, for example, cannot satisfy its energy needs by denying citizens of other states an opportunity to purchase energy produced within its territory.¹¹² Similarly, a state which legislates higher prices for its own products in its own market cannot close its market to cheaper products from other states.¹¹³

Moreover, the interstate privileges and immunities clause gives nonresidents comparable protection against state discrimination. *Toomer v.*

107 So-called privileges as well as rights are protected by the equal protection clause. *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 238-39 n.5 (1957).

108 "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

109 "The Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the States, and with the Indian Tribes." U.S. CONST. art. I, § 8.

110 "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2.

111 *Edwards v. California*, 314 U.S. 160 (1941) (commerce clause); *Baldwin v. Seelig*, 294 U.S. 511 (1935) (commerce clause); *Oklahoma v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (commerce clause); *Toomer v. Witsell*, 334 U.S. 385 (1948) (interstate privileges and immunities clause); compare *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (interstate privileges and immunities clause).

112 *Oklahoma v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911); but see *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

113 *Baldwin v. Seelig*, 294 U.S. 511 (1935).

Witsell,¹¹⁴ for example, forbade a state from excluding nonresident fishermen from its commercial fishery in the marginal sea. Therefore, it is certain that the commerce clause and the interstate privileges and immunities clause preclude a state from selectively discriminating against nonresident attorneys whom the state would concede to be qualified merely to give the local bar preferential access to the state's law business.¹¹⁵

Since *Flynt* does not require a state to explain discrimination among *pro hac vice* applicants, the state is free to deny applications only for law business desired by its bar. On the other hand, the state can grant applications for business requiring a nonresident specialist and for controversial matters which the local bar might prefer to leave to outsiders.¹¹⁶ The only effective way to prevent this kind of discrimination is to insist upon both a legitimate reason for discrimination in *pro hac vice* practice and a hearing to determine whether there is a basis in fact for applying this reason. *Flynt*, however, excuses the state from this obligation.

It is true that a state might choose to abolish *pro hac vice* practice altogether if it cannot regulate the practice in complete subservience to the economic interests of its own bar. A state can abolish *pro hac vice* practice in the interest of insuring high professional standards without violating any constitutional safeguard.¹¹⁷ Moreover, this power over *pro hac vice* practice premised upon quality control would, in effect, permit a state to abolish the practice for solely economic purposes. This possibility, however, should not influence the answer to the question of whether a state should be allowed to avowedly regulate *pro hac vice* practice for such purposes.

In the abstract, it might seem that some *pro hac vice* practice would be preferable to none. On the other hand, there is a possibility that only a small amount would exist under anticompetitive conditions conducive to the prosperity of a particular state bar association. Consequently, it is doubtful whether the gain would be worth the erosion of constitutional doctrine which generally forbids the states from engaging in economic protectionism.

Further, even if some *pro hac vice* practice were preferable to none, it seems questionable whether this observation is, in fact, relevant to state regulation of this practice. A state that is presently self-sufficient in legal services has no strong economic incentive to permit *pro hac vice* practice. Most of a state's attorneys undoubtedly are local practitioners. Apart from interstate convenience, their economic well-being would be increased to some extent if *pro hac vice* practice were abolished. Moreover, nothing now prevents its abolition in the interest of enhanced professional standards.

It would seem, therefore, that *pro hac vice* practice might be allowed presently because there is a genuine need for it. In other words, most states may not be self-sufficient in legal services. Such states could not afford to abolish *pro hac vice* practice if they could not regulate it to maximize the well-

114 334 U.S. 385 (1948).

115 But see *Sanders v. Russell*, 401 F.2d 241, 246 (5th Cir. 1969); *McKenzie v. Burris*, 255 Ark. 330, 344, 500 S.W.2d 357, 366 (1973); see Rubin, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461, 1472 n.62 (1979).

116 See Rubin, *supra* note 115, at 1475 n.84.

117 *Leis v. Flynt*, 439 U.S. at 444 n.5; *Brown v. Supreme Court of Va.*, 359 F. Supp. at 555.

being of their local bar associations. Under these circumstances, there would be little chance that *pro hac vice* practice would be abolished if manipulating it for local advantage were expressly declared unconstitutional.

Although *Flynt* did not expressly decide whether a state can discriminate against nonresident *pro hac vice* attorneys when they would take desirable business from the local bar, it discussed with approval a case which would appear to allow such a practice. Once again, however, constitutional provisions against discrimination apparently were not invoked in that case. Thus, in *Norfolk & Western*, a federal district court held that nonresident *pro hac vice* defense attorneys could be strictly confined to the role of mere advisers in Federal Employers' Liability Act and Jones Act litigation. The Supreme Court summarily affirmed the district court's judgment on appeal.¹¹⁸

In this case, the lower court gave general approval to the state's *pro hac vice* practice, including full participation by nonresident attorneys only on a case-by-case determination.¹¹⁹ Consequently, the lower court might have thought that a state does not have to abolish *pro hac vice* practice altogether if it wants to assure that the local bar gets its share of desirable business. The narrow rule of the case, however, seemed to be merely that the national citizenship clause does not preclude severe limitations upon *pro hac vice* counsel's role in a lawsuit.¹²⁰

Further, it is true that *Flynt* did not expressly raise the issue of whether the state can manipulate *pro hac vice* practice in the interest of protecting the prosperity of its own bar. Similarly, the equal protection clauses of the Constitution were not invoked in the case. The procedure authorized by *Flynt*, however, would permit a state to regulate *pro hac vice* practice to further the economic interests of the local bar. Therefore, *Flynt* was seriously defective for appearing to permit this kind of manipulation by default.

Flynt also has another defect. The case permits civil government without accountability. This result exposes all persons to unjustifiable discrimination from which there is no protection, a basic flaw far more serious than simple disregard of special protection which nonresidents have against state discrimination. For, a regime of civil government without rules or reasons allows a state to discriminate or to treat some persons differently than others with very little possibility that it can be called to account. Further, equal protection usually requires differential treatment to be explained. Consequently, assertion of the power to discriminate without having to explain would seemingly violate equal protection. This would appear to be true of a facially standardless largely unchallengeable licensing power over *pro hac vice* admissions or any other civil regulatory power.

Unlike the due process clause, the guarantees of the equal protection clause do not depend upon fundamental or state-created entitlements.¹²¹ The minimum protection provided by the equal protection clause is simply the requirement that there must be a rational basis for state discrimination.¹²² This

118 423 U.S. 1009.

119 400 F. Supp. at 237.

120 See note 104 *supra*.

121 *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 238-39 n.5 (1957).

122 See L. TRIBE, *supra* note 30, at 994-97.

rational basis requirement provides two kinds of protection. The reason for state discrimination must have some rational relationship to a valid governmental objective;¹²³ further, there must be a basis in fact for placing the recipient of differential treatment in the class which receives it.¹²⁴

The equal protection clause requires state disclosure of the reason for discrimination and a hearing to test its rational adequacy and factual applicability. A state, for example, cannot rationally deny the *pro hac vice* applications of nonresident attorneys who have red hair and green eyes because these physical characteristics have no rational relationship to attorney competence and fitness to try a particular case. Even if the hypothetical disqualifying rule were rational, however, some kind of hearing would be required to make sure that it was not applied to an applicant with brown hair and gray eyes.

Admittedly, an equal protection challenge to a facially standardless grant of state regulatory power does not seem to be a common occurrence. Perhaps a reason for this may be that facially standardless power is usually administered pursuant to actual standards or reasons and some kind of hearing. Thus, *Crowley v. Christensen*¹²⁵ seemed to suggest that equal protection forbade use of an uncontrolled discretionary licensing power arbitrarily to deny a person what was customarily granted to other persons similarly situated. The case did permit the use of a facially standardless power to license retail liquor establishments. The mere grant or use of such a power, however, did not violate equal protection. Further, a hearing was available to persons whose liquor applications were denied.¹²⁶

Similarly, the Court in *Kotch v. Board of River Pilot Commissioners*¹²⁷ did not automatically exempt a facially standardless¹²⁸ power to license river pilots from the requirements of the equal protection clause. It is true that nepotism in administering the power was permitted.¹²⁹ The Court, nevertheless, said that general grants of administrative power are tested by the way they are actually administered.¹³⁰ It was immaterial that river pilots who were state officers were few in number.¹³¹

Of course, facially standardless, largely unreviewable regulatory power can occasionally be justified. Subjective criteria, for example, may frequently be important in some positions of employment involving close personal relationships.¹³² Similarly, the Supreme Court has observed that effective prison security, safety and welfare permit prison administrators to make intuitive subjective judgments in transferring a prisoner from a moderate to a harsh facility.¹³³ Further, prison administrators can make such a transfer without a

123 Johnson v. Robison, 415 U.S. 361, 374, 381-82 (1974).

124 Schwere v. Bd. of Bar Examiners, 353 U.S. 232, 239 (1957); Tussman & Tenbroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344-45 (1949). Compare Rabin, *Some Thoughts on the Relationship Between Fundamental Values and Procedural Safeguards in Constitutional Right to Hearing Cases*, 16 SAN DIEGO L. REV. 301, 302-03 (1979).

125 137 U.S. 86 (1890).

126 *Id.* at 87-88, 94.

127 330 U.S. 552 (1947).

128 *Id.* at 554 n.3.

129 *Id.* at 563.

130 *Id.* at 557.

131 *Id.* at 554 nn.2 & 3.

132 Davis v. Passman, 99 S.Ct. 2264, 2279 (1979) (Burger, C.J., dissenting).

133 Meachum v. Fano, 427 U.S. 215, 225 (1976).

hearing when state law makes the transfer decision completely discretionary.¹³⁴ The primary reason given for this power, however, is that a convicted prisoner has no liberty interest for procedural due process to protect when state law does not prescribe any conditions which preclude a transfer.¹³⁵ In other words, the state's infliction of substantial or grievous harm alone does not invoke the protection of procedural due process.¹³⁶ The Court's analysis of the nature of the transfer decision would, nevertheless, arguably allow a transfer without a hearing if substantial or grievous harm alone activated the protection of procedural due process.

Moreover, the nature of a particular subject may make it intractable to the rule of law as ordinarily conceived. Thus, the death penalty was once administered with only the most general guidance,¹³⁷ albeit with serious objections about the lack of specific standards.¹³⁸ These objections were, of course, ultimately accepted.¹³⁹ Until they were, however, the prevailing thought was that it was impossible for any words to express or explain the factors which should be considered in deciding whether to spare or take human life.¹⁴⁰ Under such circumstances, the possibility of different treatment in the matter of life or death for persons who were similarly situated was great.¹⁴¹ Differential treatment was tolerated for a long time because more specific criteria seemed unlikely to bring more evenhanded results.

The matter of *pro hac vice* admissions is, however, amenable to declared rules and standards. Subjective considerations and judgments are almost completely immaterial. Admission to try a particular case, after all, is not a rare privilege reserved for the distinguished scholars and statesmen of the trial bar. Further, the state has the greatest power conceivable to protect the public from attorneys who are not members of its bar.

Moreover, there comes a time in any profession when experience makes a practitioner qualified to do what he or she has successfully done on many prior occasions. Each state can decide the amount and kind of experience required for *pro hac vice* admission, and it can prescribe enough to assure as much competence as can be provided by rule alone. Exceptions for some who could not meet the declared standard could be allowed for good cause.¹⁴² Character and fitness can be established by affidavits or unsworn statements as in ordinary bar admissions. Compliance with local rules of practice and procedure can be obtained by requiring local counsel to associate with the *pro hac vice* attorney.¹⁴³ Consequently, *pro hac vice* admissions seem susceptible to stated rules with objective criteria if the purpose of regulation is to assure the competence and fitness of those specially admitted.

134 *Id.* at 228.

135 *Id.* at 226-27.

136 *Id.* at 224.

137 *McGautha v. California*, 402 U.S. 183, 185-90, 191-95, 207-08 (1971).

138 *Id.* at 257-65 (Brennan, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 306, 309-10 (1972) (Stewart, J., concurring).

139 *Gregg v. Georgia*, 428 U.S. 153, 158, 197 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (mandatory death penalty for first-degree murder was invalidated).

140 *McGautha v. California*, 402 U.S. at 208.

141 *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

142 *Cf. Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 123 (1926) (case involved rules for admission to practice before the tax court including a discretionary power to deny admission).

143 *Martin v. Walton*, 368 U.S. 25 (1961).

Of course, adequate but fair standards for *pro hac vice* admissions sometimes might result in repeated appearances by those who would be more welcome as rare visitors. This should arouse the apprehension only of those who do not care for interstate competition. Repeated appearances by a nonresident attorney may be the best proof of his competence.

Thus, it is easy enough to make a case for the proposition that a facially standardless, largely unchallengeable licensing power violates equal protection. A state desiring to engage in discrimination which inflicts substantial harm without disclosing the reasons for its action asks for more trust than it deserves. Occasionally, there may be no reason for the discrimination which renders it baseless and a violation of equal protection. Further, the reasons may be inadequate or lack any basis in fact for their application in a particular case.

Although it is easy enough to argue that a facially standardless, largely unreviewable regulatory power violates equal protection, the Supreme Court is not likely to agree with this formulation. In fact, the Court has already approved the use of this kind of power. The Court has held that procedural due process does not usually prohibit a state from discharging its nontenured employees without a disclosure of the reasons or any kind of hearing.¹⁴⁴ *Flynt* extended this management power over state functions to civil governance of the private sector.

Admittedly, the equal protection clause was not asserted either in the state employee discharge cases or *Flynt*, but the Supreme Court is not likely to uphold a procedure challenged for lack of due process that it must ultimately reject in the interest of equal protection. Further, the issue is not one of mere pleading or discovery. In other words, the discharged state employee or rejected *pro hac vice* attorney cannot, as a practical matter, improve his position simply by alleging a general or specific equal protection violation and then invoking discovery to learn the reason for the unfavorable state action against him.¹⁴⁵ Such an approach differs only in form from that in *Flynt* where the plaintiff sued to learn the reason for the rejection of his *pro hac vice* application and a hearing to test its validity.¹⁴⁶

As a result, there is ordinarily no relief from an unconstitutional use of a facially standardless, largely unreviewable state licensing power. Exceptions exist when a state cannot conceal or inadvertently admits action that is patently unconstitutional,¹⁴⁷ such as discrimination on the ground of race, religion or association.¹⁴⁸ This kind of discrimination, however, will usually remain undetected unless it is extensive enough to constitute a pattern or practice. The same is true of discrimination on other arbitrary or irrational grounds.

The state simply does not have to explain a use of its licensing power unless the injured party can establish a *prima facie* case without the state's cooperation. A state, for example, can tell a discharged, nontenured, state

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

145 But see Comment, *Entitlement, Enjoyment and Due Process of Law*, 1974 DUKE L. J. 89, 100 n.52.

146 *Flynt v. Leis*, 574 F.2d 874, 879 (1978), *rev'd per curiam*, 439 U.S. 438 (1979).

147 See Van Alstyne, *supra* note 31, at 449; *Cafeteria and Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886, 897-98 (1961).

148 *Schwartz v. Board of Bar Examiners*, 353 U.S. at 239.

employee the reasons for his discharge with impunity provided they are facially valid.¹⁴⁹ Similarly, a black who believes that he or she is the victim of a racial use of the state's licensing power will remain helpless if all that can be proven are the matters of race injury. The state simply does not have to give an account of what it has done. Of course, disclosure of the reason and an appropriate hearing to test its rational adequacy and the factual basis for its application would not be onerous. It seems that this procedure should ordinarily be mandated by procedural due process of law as well as equal protection of the laws.

IV. Procedural Due Process and Civil Government Without Accountability¹⁵⁰

The state employee discharge cases establish that procedural due process does not prohibit facially standardless, unreviewable state civil power.¹⁵¹ These cases suggest that such a use of state power does not necessarily destroy life, liberty or property which are the only interests protected by the due process clause.¹⁵² The discharge of a nontenured state employee, for example, without a hearing or disclosure of the reasons may rarely invade a fundamental substantive liberty interest, such as freedom of speech.¹⁵³ Similarly, the discharge does not necessarily harm any of the employee's nonfundamental liberty interests created by state law, such as other employment opportunities. In other words, the discharge does not ordinarily stigmatize the employee in a way that effectively precludes other employment.¹⁵⁴ Moreover, the discharge does not deprive the employee of any property interests. Property interests protected by due process are not created by the due process clause itself but depend upon statutory or common law, usually state law.¹⁵⁵ A nontenured state employee does not have a property interest in the state job because there is no contractual or statutory entitlement to continued employment.¹⁵⁶

The state's refusal to contract with an employee by offering him continued employment, however, does bar him from activity that he would be free to pursue if he had the state's permission. Consequently, it does seem that the mere refusal of the state to make a contract does curtail the employee's liberty in a practical sense. Mr. Justice Marshall, for example, dissenting in *Board of Regents*, said that everyone has a right to contract with the state unless there is a reason for the state's refusal to make a contract.¹⁵⁷ The Supreme Court held, nevertheless, that the mere refusal by a state to make a contract does not curtail a liberty interest.

Admittedly, the reasonableness or rationality of a contract's provisions is something that is ordinarily left to the contracting parties. But this explanation

149 *Bishop v. Wood*, 426 U.S. 341, 343, 347 (1976).

150 Procedural due process is supposed to ensure government with accountability. Rabin, *supra* note 124, at 303.

151 *Board of Regents v. Roth*, 408 U.S. 564 (1972); compare *Bishop v. Wood*, 426 U.S. 341 (1976).

152 *Board of Regents v. Roth*, 408 U.S. at 569-70.

153 Compare *id.* at 575 n.14.

154 See *id.* at 573.

155 *Id.* at 577.

156 *Id.* at 578.

157 *Id.* at 588-89.

seems inadequate in view of *Massachusetts Board of Retirement v. Murgia*,¹⁵⁸ an equal protection case. In *Murgia*, mandatory retirement of state policemen at age 50, including those well able to do the job, was explained on rational basis grounds.¹⁵⁹ Surprisingly, no one argued that the opportunity of the state to make the best possible bargain for itself was enough justification for what it wanted to do. The only apparent difference between *Murgia* and a case involving use of a nonreviewable, standardless contractual or licensing power is that the reasons for the state's action in *Murgia* were known.

Further, excusing the state from observing rationality requirements when it makes contracts hardly justifies civil governance of the private sector without rules, reasons or hearings. This observation is ignored, nevertheless, in state license revocation cases. Instead, in these cases, the Supreme Court usually takes special pains¹⁶⁰ to emphasize that recognition of the right to a procedural due process hearing occurs only because the license is a state-created entitlement revocable for cause rather than merely terminable at the will of the state. Then, there is *Flynt*, itself. The case authorizes a state to exercise a licensing power which is invulnerable to a mere rationality challenge.

A standardless, ordinarily unchallengeable state licensing power is obviously exempt from the rationality requirements of substantive due process of the law and equal protection of the laws. Fundamental substantive protection for the right to engage in a common calling, for example, would require rationality of any substantive regulations of the right.¹⁶¹ Similarly, a rational basis for differential treatment is the minimum demand of the equal protection clause.¹⁶² As *Flynt* shows, however, these rationality requirements are overlooked when a state decides to exercise a standardless licensing power. Excusing standardless government from being rational does more than shelter the validity of substantive policies from judicial review. It also immunizes mistaken or biased administration of a policy from judicial scrutiny.

This indulgence of irrational government does not occur, however, when a state uses its licensing power to create entitlements rather than standardless regulation. A state-created entitlement appears to be simply a right which cannot be curtailed except for cause. In short, it seems to be nothing more than a declared substantive right whose validity and application is willingly submitted by the state to judicial review. Consequently, a state is allowed to escape or submit to the rationality requirements of substantive due process and equal protection as it pleases.¹⁶³ The reasons for giving the state this option are neither revealed nor apparent.

The Supreme Court, of course, has explained that the Constitution usually does not create the substantive rights which are protected by the due process

158 427 U.S. 307 (1976).

159 *Id.* at 311-12, 315.

160 *Barry v. Barchi*, 99 S.Ct. 2642, 2649 n.11 (1979) (harness horse trainer's license); *Mackey v. Montrym*, 99 S.Ct. 2612, 2617 n.7 (1979); cf. *Board of Curators v. Horowitz*, 435 U.S. 78, 82-85 (1978) (interest of a final-year medical student in graduating may not be a liberty or property interest).

161 *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 125 (1978).

162 See L. TRIBE, *supra* note 30, at 994-97.

163 This matter is very clearly set forth in Justice White's concurring and dissenting opinion in *Arnett v. Kennedy*, 416 U.S. 134, 181, 184-85 (1974); compare *Bishop v. Wood*, 426 U.S. 341, 347 (1976).

clause.¹⁶⁴ Property rights are created exclusively by other sources of law.¹⁶⁵ The same is also true of most liberty rights.¹⁶⁶ Obviously, the Supreme Court is unwilling to give the due process and equal protection clauses a construction which would create many substantive rights against the state without its consent. On the other hand, requiring the state to reveal the reasons for its restrictions and to subject them to judicial review would in effect force the state to pass laws creating multitudinous substantive rights against itself. Generally, one would have the right, for example, to drive a car, use a firearm, practice law or do anything else unless he were restricted for a disclosed reason. It might seem strange that a fourteenth amendment which creates only a few fundamental substantive rights would in effect mandate a complete civil code.

This apparent inconsistency, however, cannot explain why the Supreme Court tolerates standardless, largely unchallengeable government. The reason is that the inconsistency is only apparent rather than real. The few fundamental substantive rights which have been recognized make a small number of individual decisions autonomous or free from state interference. This is true of the abortion decision,¹⁶⁷ for example. Merely requiring the state to disclose the reasons for its restrictions and to submit them to judicial review, however, would not ordinarily restrict a state's policy choices. Only an invasion of a fundamental substantive right or a violation of equal protection or similar constitutional provision can do that. Consequently, requiring a state to disclose its laws and to expose them and their application to judicial review cannot impermissibly shackle the state.

Whatever may be said in its behalf, unchallengeable government has serious faults. It permits unconstitutional state decisions to be wrapped in a protective mantle of inscrutability. *Flynt*, for example, would appear to allow a state to protect its bar from competition by out-of-state attorneys whose competence the state would willingly concede provided the state hides what it does. The power to do this, however, should be forthrightly affirmed or disaffirmed rather than concealed in a web of obscurity.

Disapproval of standardless, largely unreviewable state power would ordinarily compel the state to provide a reason and a hearing when its actions cause harm. One reason often mentioned for not mandating a general constitutional right to a hearing whenever the state causes harm is that some kind of hearing might also be required before the harm occurs. In *Board of Regents*, for example, the Court said that a nontenured state employee would ordinarily be entitled to a hearing before being discharged¹⁶⁸ if due process generally gave him a right to a hearing with respect to the discharge.

Admittedly, a general duty to hold a hearing before harm might seriously curtail desirable state action or induce a state to forego it altogether. The problems presented by a hearing before harm are not intractable, however. One response would be to establish rules respecting when such a hearing would be necessary. This might require a course of constitutional litigation which would

164 Paul v. Davis, 424 U.S. 693, 710 n.5 (1976).

165 Leis v. Flynt, 439 U.S. at 441.

166 Paul v. Davis, 424 U.S. at 710 n.5.

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

168 408 U.S. at 570 n.7.

involve considerable weighing and balancing.¹⁶⁹ A better response might be generally to mandate an abbreviated prior hearing which would consist of an informal give-and-take confrontation instead of a mini-trial.¹⁷⁰ It might even be desirable to limit prior trial-type hearings to cases of severe exigency, such as welfare termination cases.

The Supreme Court may be moving in this direction. The Court, for example, seems willing to relax its position about mandating prior hearings. Although a tenured state employee was once apparently entitled to a hearing before discharge,¹⁷¹ it now may be that a hearing afterwards will suffice.¹⁷² In any event, the drawbacks of a hearing before harm are not a real justification for completely doing away with a hearing after harm.

Naturally, there are arguments for committing the right to a hearing after harm by the state to the exclusive protection of the legislature. Hearings can be expensive. Further, the right does concern most of the state's people in one way or another. Neither of these matters, however, deserves serious consideration in deciding whether the right to a hearing after harm by the state deserves constitutional status.

This is true because fair administrative law systems can minimize the need and expense for hearings. Conversely, the greater the demand for hearings, the greater is the likelihood of unfairness and the need to correct it.¹⁷³ The plea that the state is too poor to be fair should not be easily accepted.

Another reason is given for tolerating standardless, largely unreviewable, state power. This argument suggests that the opposite position might permit all challenged uses of a state's property, contract and licensing powers to end up as arguable constitutional cases in federal court. This end cannot result, however, as long as standardless government is permissible.

Ordinarily, the state's exercise of standardless civil power does not now violate anyone's constitutional rights. As a corollary, a person who is subject to the state's standardless civil powers acquires only those rights that the state decides to confer. Naturally, procedural due process must be observed when the state confers entitlements, but compliance with this requirement does not seem particularly onerous, and it does allow the state to keep state property, contract and licensing cases in its own courts. Compliance assures that there will usually be no procedural due process violation of state-created substantive rights which the state could have withheld.

The situation would be different, however, if due process or equal protection required the state to have a basis in fact for refusing use of its property, a contract, a license or other permission for private conduct. Theoretically, at least, an enormous expansion of federal court jurisdiction would be possible. On the other hand, only a small increase in federal court cases could occur. The matter would depend upon the scope of the state's obligation to have a basis in fact for inflicting deliberate harm.¹⁷⁴

169 See Comment, *Entitlement, Enjoyment and Due Process of Law*, 1974 DUKE L.J. 89, 119.

170 Davis, *The Goss Principle*, 16 SAN DIEGO L. REV. 289, 292-94 (1979).

171 See note 168 *supra*.

172 *Boehning v. Indiana State Employees Ass'n., Inc.*, 423 U.S. 6, 7 n.3 (1975) (per curiam).

173 *Board of Regents v. Roth*, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting).

174 Compare Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 428-29 (1977).

A person who was deliberately harmed by the state, for example, could in theory sue in federal court on the ground that the factual premises for the state's action were simply mistaken although the relevant evidence was conflicting. Further, pendent jurisdiction could¹⁷⁵ permit the federal court to hear any integral state law claims regardless of how generous a state's hearings and entitlements law might be. It would be possible for all deliberate, harmful state action to be challenged in federal court.

These consequences, of course, show only the extreme possibilities of theoretical extravagance. On the other hand, the essential element of a state's constitutional obligation to have a basis in fact for inflicting deliberate harm could be realistic and limited. It could consist simply of the state's willingness to give a reason for the harm and to permit its factual and rational adequacy to be tested in an appropriate hearing.

This scope of the state's basis in fact obligation would not permit a federal lawsuit for state-inflicted harm unless the state wanted to exercise power without accountability. Consequently, a groundless complaint that the state inflicted harm without a reason and an opportunity for a hearing could be dismissed upon the pleadings or after an appropriate jurisdictional hearing.¹⁷⁶ In any event, the gravamen of the injured party's complaint would be that the state harmed him and was unwilling to provide a reason and any kind of hearing. There would be no basis for federal judicial intervention if the state were willing to provide a reason and a hearing. In rare situations, when a state can act, arguably without having to give a reason or a hearing, the federal court could hear the case.

Of course, the idea of giving any court a say in the administration of state property, the discharge of state employees or control over state licenses may seem unwise and alien to some persons. Perhaps the nation's traditions give the executive and legislative branches of government essentially a free hand in these matters. It is possible, nevertheless, to apply the Constitution to these matters in a way that leaves this free hand largely intact. The state could be allowed to prevail if there were a basis in fact for what it did. A nontenured state employee, for example, could be discharged if the state could make some showing that the employee was undesirable and that his undesirability was the reason for the discharge. The burden of persuasion could be cast upon the complaining party.¹⁷⁷ His prospects of prevailing could be made difficult enough to discourage frivolous lawsuits while leaving redress available for the party who might deserve it. A constitutional right to a hearing after harm should not in theory or in practice hobble the state.

The due process and equal protection clauses would support a construction which requires an appropriate hearing whenever the state commits a substantial harm. Justice Frankfurter believed procedural due process required a hearing whenever the state committed grievous harm.¹⁷⁸ Any difference between grievous and substantial harm would seem to be a matter of degree.

175 13 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* 443-48 (1975).

176 Cf. *id.* at 444, 451-54 (if federal claim is too insubstantial to be the basis of federal question jurisdiction, there will be no pendent jurisdiction of the state claim).

177 *LaVine v. Milne*, 424 U.S. 577, 585 n.10 (1976).

178 *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1950) (Frankfurter, J., dissent-

Life, liberty and property effectively comprise all interests of concern to the people.¹⁷⁹ It seems unnatural to say, as the Court said in *Roth*, that expansive as these words are, they must have some limits.¹⁸⁰ Admittedly, the idea that a state can impair liberty merely by inflicting harm or by refusing to make a contract, to permit a use of its property or even to grant property is not readily accepted. The difficulty arises from the conception of liberty as primarily freedom from restrictions enforceable by the coercive power of the state.¹⁸¹ This conception of liberty declares that a person is free to use his talents and property and to persuade others willingly to contract with him. Obviously, this kind of freedom is antagonistic to the idea that a person can insist that the state or anyone else enter into a contract or other advantageous relationship with him.

Consequently, liberty has rested upon a foundation of property, contract and consent. However suitable this conception of liberty might be in a world of laissez-faire, it hardly seems appropriate to an extensively regulated and administered post-industrial state. A laissez-faire conception of liberty posits that a person is on his own and is not entitled to ask for any government largess, whether it be a job, welfare or a *cost plus* government contract. This idea of liberty, however, has been rejected largely in fact and partly in theory for some time.

It was once true, for example, that a state could discharge its employees because of their affiliations.¹⁸² Now, however, a government employee cannot be discharged merely because he is a communist.¹⁸³ In fact, he cannot be ousted from a government job which he owes to the spoils system after his political party loses the election.¹⁸⁴

Naturally, freedom of speech is the fundamental interest at stake in these cases. A laissez-faire conception of liberty, however, does not easily require the state to adapt its power over government jobs to the political beliefs of its work force.¹⁸⁵ Therefore, liberty which protects state employment from political reprisal could also give protection against irrational manipulation.

Standardless, unreviewable state action would not be suffered much longer than the next election if most of the people were frequently exposed to it. A legislature that voted to make social security benefits or driver's licenses terminable at the will of the bureaucracy probably would be voted into early retirement in return. The fiefdoms of most bureaucracies, however, include

ing); compare *Goldberg v. Kelly*, 397 U.S. 262, 263 (1970); but cf. *Monaghan*, *supra* note 168 at 421 n.112. The Supreme Court, of course, has rejected this proposition. *Meachum v. Fano*, 427 U.S. 215, 224 (1976); compare *Greenholtz v. Inmates of the Neb. Penal and Correctional Complex*, 99 S.Ct. 2100, 2104 (1979).

179 *Civil Rights Cases*, 109 U.S. 3, 13 (1883).

180 *Board of Regents v. Roth*, 408 U.S. at 572.

181 See *Monaghan*, *supra* note 174, at 414 n.62.

182 See note 185 *infra*.

183 *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elfrandt v. Russell*, 384 U.S. 11 (1966).

184 *Elrod v. Burns*, 427 U.S. 347 (1976).

185 In explaining why a policeman could be discharged for political speech, Justice Oliver Wendell Holmes, Jr. said in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892):

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on terms which are offered to him.

only a relatively small number of people. It is not easy to see why they should have to endure something which a majority of the people would never accept for themselves.

Construing the due process clause to mandate a hearing after the state commits substantial harm would not be inconsistent with any other uses which the Supreme Court has had in mind for the clause. In fact, the failure to mandate such a hearing is anomalous with some of the uses of due process which the Court seems to have in mind. Exxon, General Motors and large corporate entities, for example, apparently will be allowed to do business free from unreasonable restrictions.¹⁸⁶ Like everyone else, of course, they deserve due process protection. How much they need as a practical matter, however, is another question. These entities seem able to take care of themselves. Moreover, they have a lot of natural protection which has nothing to do with their power of the purse. Any serious unjustified harm inflicted upon them by government regulation can be immediately passed on to the public. This ability virtually assures that such a harm will not occur. The power to pass on the cost of government regulation to the voters and being indispensable to their welfare are perhaps the best protection against arbitrary government that there is.

With all of their natural protection, corporate giants also have the formidable protection, both substantive and procedural, of the due process clause. On the other hand, a nontenured state employee receives no protection from an arbitrary discharge by his government. The contrast suggests that due process is for the powerful whereas the defenseless are left to their own defenses. The contrast is disturbing and remains unexplained. Hopefully, it someday may also become unacceptable.

¹⁸⁶ Exxon Corp. v. Governor of Md., 437 U.S. 117, 125 (1978); compare New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106-07 (1978); Friedman v. Rodgers, 440 U.S. 1, 18 n.19 (1978).