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Should Elected Officials Have a Property Interest in Their Positions?

Mark R. Fitzgerald†

The Due Process Clause of the Fourteenth Amendment protects an individual's interests in life, liberty, and "property." Over the years, the definition of "property" has evolved to include more than such simple tangible interests as land or chattels. Courts now recognize new breeds of property interests, including property interests in an individual’s employment. Where the individual’s employment consists of service as an elected official, recognizing a property interest becomes problematic. Some courts, for example, have found that because states create elected offices by defining the terms of these offices in constitutions, statutes, and ordinances, entitlements comprising property interests arise from the definitions of the offices themselves. Other courts have found that merely defining the terms of an office cannot give rise to an entitlement amounting to a

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1 US Const, Amend XIV, § 1.

2 See Board of Regents of State Colleges v Roth, 408 US 564, 571-72 (1972)(noting that "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money").

3 See Perry v Sindermann, 408 US 593 (1972)(finding that a college professor may have a property interest in employment).

4 The question of whether elected officials have property interests in their positions is a question of state law. Furthermore, since most of the case law addressing this question relates to elected offices at the local level of government, this Comment focuses on cases involving county and municipal elected offices, rather than state or federal positions. The focus on county and municipal elected offices also stems from a realization that most states have granted local levels of government the authority to define local elected offices by ordinance. For example, in a 1990 survey of the states, the United States Advisory Commission on Intergovernmental Relations (“ACIR”) found that thirty-seven states had adopted, by constitution or statute, provisions that granted home rule authority to counties; forty-eight states had granted this authority to cities. ACIR, Pub No M-186, State Laws Governing Local Government Structure and Administration 20-21 (1993). See notes 54-76 and accompanying text.
property interest. These courts have reasoned that employment as an elected official is not "employment" at all; instead, an elected office involves a "position of trust" that does not give rise to a property right.\footnote{See notes 77-96 and accompanying text.}

Unfortunately, the courts confronting this issue have focused only on the semantics and not on the effects of this distinction. In other words, state courts have disputed only whether elected offices are more properly characterized as "property" or "trusts," and they have failed to address whether the distinction matters. This Comment concludes that the problem lies not in the characterization of the office as "property" or "trust," but rather in the practical effects of this characterization.\footnote{This Comment only addresses the question of whether the right to hold a public office is itself "property" under the Due Process Clause. This question arises in situations involving the questionable removal of an elected official from office and the removed official's subsequent claim for equitable relief. This Comment assumes that the denial of the salary, benefits, and other emoluments of office, as distinct from the right to hold the office itself, may give rise to a claim for monetary damages, but the Comment does not address these monetary claims. The question of whether elected offices are "property" under the Due Process Clause is also distinct from the inquiry into what actions constitute "due process of the law." This latter inquiry is beyond the scope of this Comment.}

These effects are not trivial—a "property" view of elected offices creates a federal cause of action and leads to federal jurisdiction over the procedural aspects of a state's internal political administration. The "trust" view, on the other hand, leaves review of purely internal procedural matters to the state.

A good starting point for analyzing this issue is the Supreme Court's turn-of-the-century decision in \textit{Taylor v Beckham},\footnote{178 US 548 (1900).} in which the Court held that an elected political official had no property right in his office and, accordingly, that the Fourteenth Amendment's guarantee of due process offered him no protection. Part I of this Comment describes the relevance of this landmark case and concludes that while \textit{Taylor} established a default rule of elected offices as "trusts," states may choose to create stronger interests, including interests that amount to property rights, in elected offices.

Part II of this Comment notes that the conception of "property" under the Fourteenth Amendment has evolved to include much more than the interests at stake in 1900, the year the Supreme Court decided \textit{Taylor}. Indeed, the Supreme Court's 1972 decision in \textit{Board of Regents of State Colleges v Roth},\footnote{408 US at 577.}
suggests that for Fourteenth Amendment purposes, any grant of “entitlement” under state law may constitute “property.” Part II of this Comment argues that neither Roth nor the historical evolution of the conception of property have altered the default rule in Taylor. Nevertheless, the choice of “trust” versus “property” does have at least one practical effect: the creation or negation of a federal due process claim, as opposed to a state claim.

Taylor and Roth have created confusion among the state courts, and the states have split over whether to treat elected offices as the property of the officeholder or as a public position of trust. Part III reviews this dichotomy and finds that neither side of the argument adequately addresses the practical implications of the choice.

Part IV discusses possible interpretations of the holdings in Taylor and Roth in light of the confusion in the lower courts, and suggests that the property/trust distinction is meaningful in two respects. First, the “trust” view leaves jurisdiction over state politics with the states, while the “property” view creates federal jurisdiction. Second, the “trust” view allows the state legislature to exercise control over the political process while allowing for state judicial review of abuses of power; the “property” view hinders legislative control.

The Supreme Court has left the choice of viewing elected offices as “property” or “trusts” to the states. The problem is that state courts have assumed that this choice is appropriately decided in the state judiciaries, thereby denying the state legislatures’ role in the choice. Furthermore, those states that have chosen the “property” view have created federal jurisdiction over political procedural matters that are more properly reviewed at the state level. This Comment concludes that while states may choose to recognize a property interest in an elected office, it is not in a state’s interest to do so. States that view elected offices as trusts rather than as property interests secure greater legislative control over the political process while retaining judicial review of abuses in the state, rather than federal, courts. State courts should therefore accede to the default view of elected offices as trusts and should not recognize property interests unless the state legislature has affirmatively created such interests.
I. THE DEFAULT RULE OF NONRECOGNITION OF PROPERTY RIGHTS IN ELECTED OFFICES

The issue of property rights in elected offices is not merely a matter of recent interest. Early Supreme Court decisions addressed this issue and held that elected officials do not have inherent property interests in their positions.\(^9\) In the landmark case of *Taylor v Beckham*,\(^10\) the Court held that "the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right." At issue in *Taylor* was whether an allegedly fraudulent vote recount deprived a recently elected Kentucky governor of a property interest in his office without due process of the law.\(^11\) The Court declined to assert jurisdiction because the case involved no Fourteenth Amendment property right.\(^12\) The *Taylor* Court reasoned:

> The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such . . . . Nor does the fact that a constitution may forbid the legislature from abolishing a public office or diminishing the salary thereof during the term of the incumbent change its character or make it property.\(^13\)

The Court thus refused to acknowledge a property interest in the governor’s elected position.

*Taylor*, however, did not go so far as to deny states the power to choose to create property interests in elected offices.\(^14\) Indeed, the *Taylor* Court clearly expressed its desire to leave power over political processes exclusively with the states.\(^15\) Thus, the Court’s statement in *Taylor* that "public offices are mere agencies or trusts, and not property"\(^16\) applies only as a default rule in the absence of a contrary state definition. States may choose to

\(^{9}\) See *Snowden v Hughes*, 321 US 1, 7 (1944)(finding that the right to state political office is not a right of property); *Taylor v Beckham*, 178 US 548, 577 (1900)(holding that public offices are not property interests); *Wilson v North Carolina*, 169 US 586, 595 (1898)(finding that the suspension of an elected railroad commissioner did not constitute deprivation of property without due process of law).

\(^{10}\) 178 US at 577 (footnote omitted).

\(^{11}\) See generally id at 549-70.

\(^{12}\) Id at 580.

\(^{13}\) Id at 577.

\(^{14}\) See *Errichetti v Merlino*, 188 NJ Super 309, 335-37, 457 A2d 476, 490-91 (1982)(arguing that the *Taylor* Court merely set minimum requirements that states can choose to override).

\(^{15}\) *Taylor*, 178 US at 570-71.

\(^{16}\) Id at 577.
create stronger interests, including interests that amount to property rights, in elected offices; in effect, states may treat Taylor as only a “minimum requirement.”

Unfortunately, the Taylor Court failed to specify how a state might show that it has chosen to create a property interest in an elected office. The only guidance the Court offered was that, at least in 1900, “the fact that a [state’s] constitution [prohibited] the legislature from abolishing a public office . . . during the term of the incumbent” was not enough to show that a state had chosen to create a property interest in that office. In other words, if Taylor is still good law, then a state must do more than merely define the length of the term of an elected office if the state desires to create a property interest in that office.

Although a lower court has recently questioned Taylor’s modern-day impact, the Supreme Court has never expressly overruled Taylor. However, in Fourteenth Amendment terms, “property” had a different meaning in 1900 than it does today.

II. THE DEFINITION OF “PROPERTY” HAS EVOLVED, BUT THAT EVOLUTION HAS NOT DISTURBED TAYLOR’S BASIC PROPOSITIONS

Taylor v Beckham advanced two basic propositions relevant to this discussion: (1) unless states choose otherwise, elected officials have no inherent property interests in their positions; and (2) states must do more than simply define the length of the term of an office in order to create a property interest in the
office itself. The import of these propositions clearly depends upon the definition of "property." If a state chooses to create a "property" interest, then it must know what "property" means. Although the definition of "property" has evolved since the Supreme Court's decision in Taylor, the Court's jurisprudence has remained consistent with these Taylor propositions.

Property interest arguments stem from the Due Process Clause of the Fourteenth Amendment, which provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." Before Goldberg v Kelly, the Supreme Court defined property interests in common law terms. As a result, while "traditional" property such as real estate, chattels, and money fell under the protection of procedural due process, more personal, or individual, interests such as employment, social security benefits, and welfare did not.

In Goldberg, however, the Court held that a welfare recipient's interest in his continued receipt of welfare benefits was a "statutory entitlement" amounting to "property" within the meaning of the Due Process Clause. While the Court's holding in Goldberg obviously extended the scope of "property" beyond its traditional meaning, the Court provided neither guidelines nor a precise definition of what might constitute "property."

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23 This Comment refers to these two basic premises as "the first Taylor proposition" and "the second Taylor proposition" throughout parts II, III, and IV. This Comment proposes these propositions as the most coherent interpretation of Taylor in light of later Supreme Court decisions discussed in part II.

24 US Const, Amend XIV, § 1.


27 As the Supreme Court later noted in Board of Regents of State Colleges v Roth, 408 US 564 (1972) in the post-Goldberg world "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." Id at 571-72.


29 Goldberg was one of the Supreme Court's first steps in the direction of Professor Reich's translationalist conception of property rights in a modern age. Professor Reich argued that the meaning of the word "property" in the Fourteenth Amendment has evolved along with society so that the nineteenth-century word translates to a modern-day word with broader meaning. See Charles A. Reich, The New Property, 73 Yale L J 733 (1964). This Comment accepts the Goldberg conception of "new property" as valid; however, ambiguities in Goldberg leave the elected-offices-as-property question unanswered.
Board of Regents of State Colleges v Roth\textsuperscript{30} set forth standards for determining which interests are "property" interests entitled to due process protection. The Roth Court stated:

Certain attributes of "property" interests protected by procedural due process emerge from [recent decisions like Goldberg]. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.\textsuperscript{31}

Thus, a property interest is more than a mere "unilateral expectation"; it is a "legitimate claim of entitlement," a claim that falls under the protection of the Due Process Clause of the Fourteenth Amendment.

The Roth Court also described the source of these "entitlement" claims:

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.\textsuperscript{32}

Thus, a property interest is not necessarily a natural right, but may be an entitlement explicitly created by some independent source. For instance, a property interest "can . . . be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law."\textsuperscript{33} This reasoning accords with Taylor's first

\textsuperscript{30} 408 US at 564.
\textsuperscript{31} Id at 577 (emphasis added).
\textsuperscript{32} Id.
\textsuperscript{33} Bishop v Wood, 426 US 341, 344 (1976) (footnotes omitted). The Court's statement in Bishop suggests that state law governs all definitions of "property." While this suggestion may be true for ordinances, state statutes, and contracts, Roth allows other "independent sources" to create property interests. For example, federal law is the generative
proposition that a state must choose to create a property interest in an elected office.

Since Roth, the courts have held that a variety of nontraditional property interests, including employee interests in public employment, constitute "entitlements" cognizable under the Due Process Clause. By extension, if "employment" as an elected official constitutes "public employment," then elected officials may also have property interests in their positions, if these positions are the product of the state's constitution or legislation.

As noted earlier, the Taylor Court did not deny states the power to choose to create property interests in elected offices. Furthermore, Roth does not compel a modification of Taylor's second proposition that simply defining the terms of an office will not create a property interest. Roth does not even mention Taylor or elected offices, and even the evolved "property" definition does not suggest that merely defining the terms of an office will create a cognizable property right in that office. However, some courts in the post-Roth world have abandoned Taylor's second proposition and have held that a property right exists in an elected office even where the state has only defined the office's term of service.

Roth does not justify this abandonment of Taylor's second proposition by courts recognizing property interests springing from the mere definition of elected offices' terms. To the contrary,

source for interests in intellectual property such as patents and copyrights. See US Const, Art I, § 8 (granting Congress the power to pass laws creating certain intellectual property rights).


Some state courts recognized a property interest in elected office even before Roth. See State ex rel Landis v Tedder, 106 Fla 140, 146, 143 S 148, 150 (1932)(stating that "[t]his Court is committed to the doctrine that a public officer has a property right in his tenure of office and cannot be deprived thereof without due process of law."). Taylor's first proposition—that states may affirmatively choose to recognize such property rights—supports this outcome.

See Errichetti v Merlino, 188 NJ Super 309, 335-37, 457 A2d 476, 490-91 (1982)(arguing that the Taylor Court merely set minimum requirements that states can choose to override).

See Crowe v Lucas, 595 F2d 985, 993 (6th Cir 1979)(recognizing a property interest in an elected office where the relevant statute stated: "All officers elected at the general municipal election ... shall qualify and enter upon the discharge of their duties ... and shall hold their offices for a term of four years and until their successors are duly elected and qualified"). See also Fredericks v Vartanian, 529 F Supp 264, 267 (D Mass 1981)(noting that the statute in Crowe explicitly created an entitlement to the elected office).
Roth may implicitly support Taylor's second proposition. That is, the Roth Court noted that "[p]roperty interests, of course, are not created by the Constitution."38 Although the Court made this note in reference to the Fourteenth Amendment, it could equally apply to Article II, Section 1, which states: "[T]he President of the United States of America . . . shall hold his Office during the [t]erm of four [y]ears . . . ."39 It seems odd that the Roth Court would allow recognition of a property interest in state offices defined in these terms in state constitutions, while apparently declining to recognize a property interest in analogous federal offices defined in the United States Constitution.

The Supreme Court's post-Roth holding in Harris County Commissioners Court v Moore,40 further suggests that Roth does not invalidate Taylor's second proposition that simply defining the terms of an office will not create a property interest. In Moore, a Texas redistricting plan resulted in the removal of three justices of the peace and two constables from their elected offices before the expiration of their terms.41 Because Texas courts had not yet settled the question of whether that state's constitution guaranteed the terms of these elected officials, the Supreme Court directed the dismissal of the complaint, denying the officials' Fourteenth Amendment claims.42

Although the Moore Court made no reference to Taylor or Roth and did not directly address the property-rights question, the Court's dismissal of the claim was essentially due to the lack of a clear Fourteenth Amendment property interest. The Texas Constitution defined the terms of the offices by providing that an elected justice of the peace or constable "shall hold his office for four years and until his successor shall be elected and qualified."43 The constitution further provided that these elected officials "may be removed by state district court judges for various

38 Roth, 408 US at 577.
40 420 US 77 (1975).
41 Id at 78.
42 Id at 86-89.
43 Id at 85, citing TX Const, Art V, § 18.
causes, after notice and a trial by jury."\textsuperscript{44} Despite these constitutional provisions, the redistricting plan, in combination with a Texas statute,\textsuperscript{45} resulted in the removal of the elected officials without notice and without a trial.\textsuperscript{46}

The Moore Court focused on the unsettled nature of the officials' interests in their offices.\textsuperscript{47} The mere existence of Texas constitutional provisions for terms of office and removal was not enough to settle the question of whether the elected officials had interests in remaining in office until completion of their elected terms.\textsuperscript{48} Accordingly, the Court's dismissal of the federal claim evinced a clear refusal to acknowledge Fourteenth Amendment claims where the states have only ambiguously signaled their choice of whether elected offices constitute property interests. The Court's dismissal in Moore echoes its refusal of jurisdiction in Taylor and further supports Taylor's second proposition that a state must do more than simply define an elected official's term of office if the state wishes to create a property right in that office.

III. ABSENCE OF COMPELLING REASONS FOR CHOOSING TO VIEW ELECTED POSITIONS AS EITHER "PROPERTY" OR "TRUSTS"

The Taylor v Beckham\textsuperscript{49} propositions—that states may choose to create property interests in elected offices and that merely defining the terms of offices will not suffice to create such interests—raise two questions. First, what significance does the choice of viewing elected offices as "property" or "trusts" hold? Second, given the Taylor propositions, as reinforced by Harris County Commissioners Court v Moore,\textsuperscript{50} how can states that

\textsuperscript{44} Moore, 420 US at 85, citing TX Const, Art V, § 24.
\textsuperscript{45} The statute provided, in pertinent part, that after redistricting, "[i]f more than one justice or constable resides within a precinct [altered or formed by the redistricting]... the office shall become vacant and the vacancy shall be filled as other vacancies..." Id at 79-80 n 1, citing Tex Rev Civ Stat Ann § 2351 1/2 (c) (Vernon 1971).
\textsuperscript{46} The elected officials in Moore found themselves threatened with removal by operation of the existing redistricting statute, rather than by operation of a hearing or trial. After redistricting, four justices and three constables were residents of a newly formed single precinct that allowed for only two justices and one constable. Moore, 420 US at 79-80.
\textsuperscript{47} Id at 85-88.
\textsuperscript{48} Id at 85.
\textsuperscript{49} 178 US 548 (1900).
\textsuperscript{50} 420 US 77 (1975).
choose "property" signal this choice? The courts have inadequately answered the first inquiry and completely failed to address the second.

The question of whether states should choose to view elected offices as "property" or to accept the default view of offices as "trusts" is meaningless unless the choice has a practical effect. Unfortunately, the states that have addressed this issue have not adequately explained the consequences of choosing one view or the other. A minority of the states favor the "property" view. However, these states have relied on empty precedent that offers no underlying reasoning for the preference of "property" over "trust" and no discussion of the consequences of this procedure. Similarly, states that have adopted the default "trust" view have offered no meaningful justification for adopting "trust" over "property," other than mere rhetoric that avoids any meaningful commentary on the implications of the choice.

Thus, until 1984, when the Delaware Supreme Court addressed the property/trust distinction in Slawik v State, the distinction seemed to lack import. That court suggested, however, that the distinction has at least one clear implication. Choosing "property" creates a federal due process claim and consequent federal review of those state procedures that affect elected officials. The default "trust" regime, on the other hand, leaves procedural review to the states and affords states greater latitude in local political processes. Unfortunately, apart from Slawik, the courts that have addressed the property/trust distinction have not commented on the importance of this implication.

A. "Property" States Have Relied on Empty Precedent

The state courts and those federal courts applying state law that have chosen to view elected offices as the property of the officeholder have not provided much rationale for that choice. While these courts justify the view of elected offices as "property" rather than "trusts" by applying questionable legal precedent, they fail to elucidate a guiding principle underlying the choice. A

\[\text{\textsuperscript{81}} \text{ See Slawik v State, 480 A2d 636, 644 (Del 1984) ("T\text{h}e 'majority' rule concerning the nature of public office" is that elected offices are not "property").}\]

\[\text{\textsuperscript{82}} \text{ Id.}\]

\[\text{\textsuperscript{83}} \text{ Local political procedures for removing elected officials are subject to federal review under the "property" view and state review under the "trust" view. See notes 85-96 and accompanying text.}\]
number of cases have cited either *Crowe v Lucas*\(^{54}\) or *Gordon v Leatherman*\(^{55}\) for the proposition that elected officials have property interests in their elected offices.\(^{56}\) Yet, while both *Crowe* and *Gordon* advance this proposition, neither provides a clear rationale for its application or any discussion of the implications of instead viewing elected offices as trusts.\(^{57}\) Both cases fail to explain why a "property" regime is preferable to a "trust" regime.

*Crowe*\(^{58}\) involved a sitting Mississippi alderman who lost his bid for reelection.\(^{59}\) After losing the reelection bid, the alderman asserted election fraud, and a Mississippi county court declared the election null and void.\(^{60}\) The defendants in *Crowe*, however,

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\(^{54}\) 595 F2d 985 (5th Cir 1979).
\(^{55}\) 450 F2d 562 (5th Cir 1971).

\(^{56}\) See *Brown v Perkins*, 706 F Supp 633, 634 (N D Ill 1989) citing both *Crowe v Lucas* and *Gordon v Leatherman* in noting that "lower courts in recent years have assumed" that elected officials may have property interests in their offices when state law so grants an entitlement; *Fredericks v Vartanian*, 529 F Supp 264, 267 (D Mass 1981) citing *Crowe* as an example of a state statute creating a property interest in an elected office; *City of Ludovici v Stapleton*, 258 Ga 968, 969, 375 SE2d 855, 856 (1989) citing *Crowe* in holding that a mayor had a property interest in his elected office; *Eaves v Harris*, 258 Ga 1, 3, 364 SE2d 854, 857 (1988) citing *Gordon* while recognizing that a county commissioner "has a constitutional right to hold the public office to which he has been duly elected and that he cannot be deprived of that right through state action without due process of the law"). See also *Collins v Morris*, 263 Ga 734, 735, 438 SE2d 896, 897 (1994) citing *Stapleton* in recognition of elected officials' property interests in their offices.

\(^{57}\) Other federal and state cases have advanced this proposition, but they too fail to explain the practical effects of treating elected offices as property interests rather than as trusts. See *Moore v Harris County Commissioners Court*, 378 F Supp 1006, 1007-08 (S D Tex 1974) holding that elected justices of the peace may have property interests, rev'd, 420 US at 77. *Moore's* reversal suggests one practical effect of the property/trust distinction federal courts may lack jurisdiction if a property interest is not clearly implicated. But the courts have not argued why, or if, federal jurisdiction is "better" than state jurisdiction. See also *McKinney v Kaminsky*, 340 F Supp 289, 294 (M D Ala 1972) finding that election candidate had property interest; *Gordon v Leatherman*, 325 F Supp 494, 497 (S D Fla 1971) deciding that county commissioner had property interest in his public office; *Fair v Kirk*, 317 F Supp 12, 14 (N D Fla 1970) deciding that county supervisor of elections had property interest in elected office). State courts that have recognized property interests in elected offices include: Florida, Georgia, New Jersey, and Tennessee. See *Richard v Tomlinson*, 49 S2d 798, 799 (Fla 1951) finding that councilman had property interest in elected office; *State ex rel Landis v Tedder*, 106 Fla 140, 146, 143 S 148, 150 (1932) deciding that city commissioner had property interest in his public office; *State ex rel Hatton v Joughin*, 103 Fla 877, 881, 136 S 392, 395 (1931) finding that elected sheriff had property interest in elected position; *Piver v Stallman*, 198 S2d 859, 862 (Fla App 1967) deciding that elected councilman had property interest in his office; *Stapleton*, 258 Ga at 869, 375 SE2d at 856 (finding that mayor had property interest in elected office; *Errichetti v Merlino*, 188 NJ Super 309, 335-37, 457 A2d 476, 490-91 (1982) deciding that state senator had property interest; *Butler v Cocke County*, 671 SW2d 847, 848 (Tenn App 1984) finding that elected county executive had property interest in his office).

\(^{58}\) 595 F2d at 985.
\(^{59}\) Id.
\(^{60}\) Id.
refused to allow the alderman to return to his office. The alderman argued that the defendants violated his constitutional rights by depriving him of his property interest in his office without due process. The Crowe court, without explaining its reasoning, held:

An elected city official who is entitled to hold an office under state law has a property interest in his office which can be taken from him only by procedures meeting the requirements of due process. The record here shows that the defendants acted wrongfully to deny Crowe his rights as an Alderman. The jury thus could reasonably have found that they deprived Crowe of due process of law in violation of the Fourteenth Amendment.

The Crowe court offered no explanation why Mississippi should prefer to view elected offices as “property” rather than as “trusts.” The precedent cited by the court similarly failed to provide either a rationale for this distinction or a discussion of its practical effect. The Crowe court cited Gordon for the proposition that elected officials may have property interests in their offices, but a review of the Gordon opinion offers no additional explanation of the underlying rationale or effect.

In Gordon, the Fifth Circuit first noted that the “plaintiff, as an elected official, ‘has a property right in his office which cannot be taken away except by due process of law.’” Unfortunately, the Court’s only support for this proposition was an ambiguous and equally unsupported statement:

That statement [that an elected official has a property right in his office which cannot be taken away except by due process of law] is correct so far as it goes. But it is

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61 Id.
62 Crowe, 595 F2d at 992-93.
63 Id at 993 (citations omitted)(emphasis added).
64 Id, citing Gordon, 450 F2d at 565.
65 See Gordon, 450 F2d at 565.
66 Gordon involved a “recall election” in which more than ten thousand voters in Dade County, Florida, petitioned to hold an election to recall a county commissioner from office. Id at 563. The county commissioner, Alex Gordon, argued that the recall procedure deprived him of a property right in his public office, without due process of law. Id. The district court enjoined the recall election from proceeding, and the petitioners appealed. Id.
67 Gordon, 450 F2d at 565 (citation omitted). A distinct but related inquiry asks what constitutes sufficient “due process of law” in Commissioner Gordon's case. This inquiry, while important, is beyond the scope of this Comment.
also true that an official takes his office subject to the conditions imposed by the terms and nature of the political system in which he operates.8

Thus Gordon, the case that serves as the foundation for the proposition that elected officials have property interests in their positions, provides no justification for that proposition, except that the proposition is “correct so far as it goes.”9

Still, the proposition is not entirely without support. The lower court opinion in Gordon v Leatherman10 cited a line of older Florida cases holding that elected officials have property rights cognizable under the Fourteenth Amendment.11 These cases, however, similarly failed to go beyond the bald statement that such a property right exists; no enlightened reasoning shines through any of these older decisions.12 Moreover, these decisions shed no light on why a “property” regime might be preferable to a “trust” regime.

One justification for the proposition that elected offices comprise property rights comes from a historical perspective, but the argument has limited value as a reason why states today should choose the “property” view. As the Supreme Court of Georgia noted in Edge v Holcomb,13 “a careful study . . . discloses that in the early history of the English jurisprudence the right to hold office was regarded as a property right, and many decisions were made in recognition of this principle . . . .” Thus, at least in the pre-Roth decisions,14 property rights in elected offices may be holdovers from the English feudal system of property grants to royal officers. Indeed, sixteenth-century England witnessed the purchase and sale of judicial offices;15 grants of rights to office in exchange for bribes were prevalent throughout the eighteenth century.16 However, this explanation certainly does not justify the property/trust distinction.

68 Id.
69 Id.
70 Gordon, 325 F Supp at 494.
71 Id at 497, citing Hatton, 103 Fla at 138 S 392; Landis, 106 Fla at 143 S 148; Piver, 198 S2d at 859; Fair, 317 F Supp at 12.
72 See Joughin, 103 Fla at 881, 138 S at 395; Tedder, 106 Fla at 146, 143 S at 150; Piver, 198 S2d at 862; Fair, 317 F Supp at 14.
73 135 Ga 765, 767-68, 70 SE 644, 645 (1911).
74 Board of Regents of State Colleges v Roth, 408 US 564, 577 (1972).
76 Id at 439-41.
B. "Trust" States Have Relyed on Mere Rhetoric

Most courts have either questioned or rejected the proposition that elected officials have property interests in their positions; these courts have instead adopted Taylor's default view of elected offices as "trusts."\(^7\) The reasoning underlying these courts' opinions stems from an assertion that the employment of elected officials somehow differs qualitatively from other employment. But the states proffering this view, like the states that view elected offices as "property," fail to justify the significance of the distinction. Rather than relying on empty precedent, however, these "trust" states rely on empty rhetoric.

For example, in *Rabkin v Dean*,\(^7\) a federal district court applying California law found that an elected city auditor had no protected property interest in her job and dismissed her claim with prejudice. The Court based its holding on the unsupported proposition that an elected official is not an "employee" and therefore could not have a property interest in her employment.\(^7\) Similarly, in *Sweeney v Tucker*,\(^8\) the Court held that "[i]t is questionable whether [an elected official's] interest in his office is a property interest." The Court reasoned:

An elected office is a public trust, not the private domain of the officeholder. A member of the Legislature . . . holds office for the benefit of his constituents and cannot justifiably rely on a private need or expectation in holding office . . . . The public interest in the office far outweighs any private interest of the officeholder.\(^8\)

Thus, the Court in *Sweeney* suggested that "employment" as an elected official is not really "employment" at all. The opinions in *Rabkin* and *Sweeney* suggest that an elected office, as a "position of trust" and not a position of employment, cannot comprise

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7 The majority rule is that elected offices are not "property." See Slawik, 480 A2d at 644. Both federal and state courts have followed this view, or at least questioned the merits of the opposing view. See Rabkin v Dean, 856 F Supp 543 (N D Cal 1994); Roth v Cuevas, 603 NYS2d 962 (NY Sup Ct 1993); Bartow v Harbal, 1991 WL 127565 (Ohio App); Burrage v New Hampshire Police Standards and Training Council, 127 NH 742, 506 A2d 342 (1986); Sweeney v Tucker, 473 Pa 493, 375 A2d 698 (1977). For other jurisdictions following this "majority rule," see Slawik, 480 A2d at 644 n 9.

78 856 F Supp at 549.

79 Id.

80 473 Pa at 524, 375 A2d at 713.

81 Id.
"property." But the opinions offer neither precedent nor an explanation of the implications of viewing elected offices as "trusts" rather than as "property."

These opinions echo Judge Bork's reasoning in his dissent in *Barnes v Kline.*

[T]hat elected representatives have a separate private right, akin to a property interest, in the powers of their offices . . . is a notion alien to the concept of a republican form of government. It has always been the theory, and it is more than a metaphor, that a democratic representative holds his office in trust, that he is nothing more nor less than a fiduciary of the people. Indeed, . . . the Framers of the Constitution most certainly did not intend to allow [representatives of the people to bring suit when the people themselves have no standing to sue], which means they did not conceive of the powers of elected representatives as apart from the powers of the electorate.

Although the *Barnes* majority dealt only tangentially with the property interest issue, Judge Bork's dissent in *Barnes* summarizes the issue from the perspective of the "trust" states; those who run for office should do so in pursuit of the common good, rather than in pursuit of personal interests in compensation.

Even if this reasoning is valid, it does not lead to an obvious preference for the "trust" view over the "property" view. The critical inquiry is whether the distinction has a practical effect, and the rhetoric promulgated in these "trust" cases does not respond to this query.

C. The Importance of the Property/Trust Distinction in the Context of Federal Jurisdiction over Due Process Violations

At least one "trust" state has illustrated a possible implication of the property/trust distinction, albeit through a confusing
approach with perhaps an unintended result. While in *Slawik v State*, the Delaware Supreme Court held that a public office is a position of trust and not “property” under the Fourteenth Amendment, it nonetheless reviewed the substantiability of the alleged denial of due process rights because, as the Court claimed, *Roth* had extended due process to include any loss of “entitlement.” In its struggle to provide some level of state due process protection to elected officials without acknowledging a Fourteenth Amendment property interest in their offices, the *Slawik* court revealed a practical distinction between the effects of viewing elected offices as “property” and the effects of treating them as “trusts.” If the elected office were viewed as “property,” then the federal courts would have had jurisdiction. Viewing the office as a “trust” position enabled the *Slawik* court to deny federal jurisdiction and reverse a prior award of Slawik’s attorney’s fees.

Slawik was an elected county executive who argued that the governor of Delaware had deprived him of a property right in his office without due process. Acting in accordance with the Delaware Constitution, the governor had removed Slawik from office following Slawik’s conviction for making false declarations before a federal grand jury. Slawik’s conviction was later reversed, and subsequently he filed suit against the state of Delaware, contending that he had a “property” interest in completing his full term of elected office.

After opining that *Roth* and its progeny did not displace *Taylor*, the Delaware Supreme Court held:

> [A] public officer in this State takes his position under the aegis and for the benefit of the public, subject to suspension or removal by any constitutionally permissible means. The office is in the nature of a public trust created to serve the public interest and not the private advantage of the individual officer.

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85 480 A2d at 636.
86 Id at 644-45.
87 Id at 645.
88 Id at 639, 647.
89 *Slawik*, 480 A2d at 638.
90 Id.
92 *Slawik*, 480 A2d at 638.
93 Id at 643 n 8.
94 Id at 644 (footnote omitted).
The Slawik court, however, wanted to ensure that public officials would not be summarily dismissed without reason in the future. Therefore, it suggested that although the plaintiff had no "property" interest cognizable under the Fourteenth Amendment, the plaintiff had "a legitimate claim of entitlement" that required some lesser amount of procedural due process protection. The court thus implied that Roth may have created a new Fourteenth Amendment category, that of "entitlement," which is either distinct from, or encompassing of, "life, liberty, and property." However, the court ruled that even if such an entitlement existed in Slawik's case, it did not create a "substantial" interest that warranted federal jurisdiction.

A necessary, though perhaps unintended, implication of Slawik is that viewing elected offices as "trusts" allows states to control local political processes without worrying about federal review of due process. A "trust" state may thus review elected officials' due process claims under a different standard than a federal court might use.

IV. THE LAW OF TRUSTS SUGGESTS THAT THE "TRUST" VIEW IS PREFERABLE TO THE "PROPERTY" VIEW

This Comment posited two questions at the beginning of part III: first, what significance does the choice of viewing elected offices as "property" or "trusts" hold; and second, given the Taylor v Beckham propositions, as reinforced by the result in Harris County Commissioners Court v Moore, how can states that choose "property" signal this choice? Although the courts have not answered these questions, it seems clear from Slawik v State that the choice of "property" or "trusts" will affect whether elected officials will have federal due process claims whenever they are removed from office. In response to the first question, then, the critical implications of viewing elected offices as "trusts" rather than "property" are that review of political procedural matters remains with the states, and that such procedural matters are not subject to federal standards of review. Furthermore, given Taylor's default rule that elected offices, are trusts unless a state chooses otherwise, and, as discussed below, given that the

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95 Id at 645.
96 Slawik, 480 A2d at 647.
97 178 US 548 (1900).
99 480 A2d 636 (Del 1984).
law of trusts allows state courts to review abuses of removal power, the second question might more properly be, "Why would states ever choose to signal a choice of 'property?'" Under the following analysis, states should never choose to create property interests in elected offices.

The *Slawik* decision implied that a federal court might favor the plaintiff in a due process claim, while a state court might be more interested in maintaining its control over the political process in exchange for a lower level of due process. Thus, at one level, the implication of the property/trust distinction is that the "trust" view keeps control of the political processes with the states, while the "property" view shifts ultimate control to the federal courts.

On a more local level, however, the distinction impacts upon whether control over political processes lies in the state and federal courts or in the state legislatures. This practical effect of a state's choice of "property" over "trust" surfaces from an analysis of the apparently contradictory holdings in *Taylor, Roth,* and lower court opinions like the one in *Slawik,* and from an application of the law of trusts.

*Taylor, Roth,* and the Delaware court's confusing opinion in *Slawik,* taken together, suggest at least four different views of the effects of a state's choice of "property" over "trust." While the first three views cannot be reconciled with the Supreme Court decisions, the fourth view suggests a coherent theory applying the law of trusts. The law of trusts provides a framework for deciding the property/trust question and, as will be discussed below, strongly suggests that it is never in a state's interests to choose the "property" regime.

The first view suggests that "entitlement" is a separate category protected by the Due Process Clause. *Slawik* held that while an elected office is not "property" under *Board of Regents of State*

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100 In other words, states may prefer the "trust" view to the "property" view if they fear federal review of state political procedures, such as the review of a legislature's codified procedures for removal of elected officials. But the Supreme Court's holding in *Atkins v Parker,* 472 US 115 (1985), should alleviate that fear, since the *Atkins* Court suggested that due process requirements are met whenever a legislature exercises its legislative power. Id at 129-30. Under *Atkins,* political process is due process, and therefore removal of an elected official under constitutionally or legislatively prescribed procedures will not constitute a denial of federal due process, regardless of whether that office is viewed as "property" or "trust." However, the more important effect of the property/trust distinction is the locus of political procedural control *within* the state, that is, whether the state legislature or the state courts should determine the extent of an elected official's due process rights. *Atkins* does not support this important effect.
Colleges v Roth, it nevertheless might be an "entitlement" requiring due process protection. This implies that the Roth Court created a "new" category under the Fourteenth Amendment's Due Process Clause, a category labeled "entitlement." This argument is flawed, however, because it contradicts the plain language in Roth. The Roth Court described "a legitimate claim of entitlement" as a "[c]ertain attribute[ ] of 'property' interests protected by procedural due process." Thus, "entitlement" is more a means of identifying an interest as a property right than a means of protecting an interest that carries no property right.

The second view treats elected offices as *per se* property interests. This view of the Supreme Court decisions suggests that Roth overruled Taylor's second proposition that merely defining the terms of an office is not enough to create a property interest in the office. Contrary to the second proposition, this view suggests that after Roth, states "automatically" create property interests in elected offices by merely defining the terms of the entitlement in the office. This view, however, suggests that the Supreme Court intended its decision in Roth to take away the states' power to decide questions relating to internal political processes—in particular, the power to decide what are acceptable means for removal of an elected official—without affirmatively stating its intention to do so. Unless and until the Supreme Court clearly announces its intention to supplant state authority over internal political processes, reading such an intent into Roth seems inappropriate.

The third view treats elected offices as *per se* positions of trust, the converse to the preceding view. This argument suggests that Taylor held that elected offices can never be viewed as anything but positions of trust and therefore are never cognizable as "property" under the Fourteenth Amendment. To be consistent, this view must distinguish Roth as applying only outside the context of elected office. However, this view suffers from the same failings as its counterpart above. The Supreme Court expressed no greater intention to supplant state authority over internal political processes in Taylor than it did in Roth; in fact, the Taylor Court's respect for state power in this area is apparent throughout that opinion.

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102 Id at 577.
The final view suggests an important distinction between the “property” states and the “trust” states by taking into account the law of trusts. Whereas in the “trust” states the state legislature is free to define the scope of due process control, in the “property” states that authority lies with the courts. This view looks at the property/trust distinction along a different dimension than Slawik’s implied federal/state dimension. Viewed in this light, the debate concerns state legislative authority versus state judicial control, rather than federal versus state jurisdiction. An analysis of trust law clarifies this intrastate question.

The law of trusts allows a settlor to reserve the power to remove the trustee by the terms of the trust, but requires that the exercise of such power be in accordance with the prescriptions of the trust document. Extending the “trust” analogy to elected officials suggests that in a state that views elected officials as trustees, the state legislature may reserve the power to remove an elected official, but such removal must be in accordance with legislative procedures. The legislature’s analogous “trust documents” are statutes and ordinances. Thus, if a statute or ordinance reserves the power to remove an elected official from a position of trust, any removal in accordance with this power should escape a due process claim.

Continuing the analogy, the legislature acts as settlor in creating the trust in the interests of the members of the voting public, the beneficiaries of the trust. Where the terms of the trust do not limit the settlor’s power of removal, the settlor need not show cause for removal, unless the removal affects the interests of the beneficiaries. The court’s power of review in these cases is limited to abuses of removal power. Thus, under this “trust analogy” view, state legislatures escape judicial procedural review of nonabusive removals when the statutes and ordinances do not limit removal power. State courts step in only when the removal represents an abuse of power. Thus, the court looks only at the abuse of the power rather than looking at the procedural aspects of notice and opportunity to be heard.

By contrast, in the “property” states, the authority to control political procedure lies with the courts, not the legislature. Furthermore, every removal of an elected official becomes a federal due process question. At first glance, this may not seem problem-

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104 See May v May, 167 US 310 (1897).
105 See March v Romare, 116 F 355 (6th Cir 1902).
106 Id at 357.
atic—there should be some level of protection against arbitrary or invidious removal of elected officials, just as the Fourteenth Amendment provides protection against denial of welfare benefits, social security, or civil-service employment without due process. But “trust” states provide this same protection, at least in the case of abusive removals, without extending federal property rights to elected officials. Furthermore, in the case of state and local elected officials, the benefits of office are not as personal, or individual, as the benefits protected by the Fourteenth Amendment.\textsuperscript{107}

As an illustration, consider the possible implications of redistricting, campaign-finance reform, or alternative voting regimes under both the “property” and “trust” views. An elected official might contend that such schemes affect the property interests inherent in elected offices and therefore constitute deprivations in violation of the Due Process Clause. If states choose the “property” view, the federal courts might have jurisdiction and the official might have a federal cause of action, regardless of the intent or impact of any legislation. The elected official might thereby thwart beneficial election law reform for purely self-interested reasons. On the other hand, the operative default rule under the “trust” view allows the courts to refuse jurisdiction if the legislature has not violated the terms of the “trust” or abused its removal power in enacting election reform legislation. The “trust” view thus avoids problems that may arise when an elected official’s personal interests conflict with the best interests of the state.

Under this framework, a state choosing the default “trust” regime will provide the state legislature with a great deal of latitude in controlling local political procedural matters, while maintaining state judicial review of abusive removals. Moreover, state courts will have flexibility in fashioning a state standard for abuse of removal authority. A state choosing the “property” regime, on the other hand, will allow elected officials to create a federal cause of action even where only nonmonetary and purely self-concerned interests in an office are threatened. Since the “trust” regime allows states to provide due process under state standards, and since the “property” regime removes state politi-

\textsuperscript{107} This Comment is concerned only with the nonmonetary benefits of office. See note 6.
cal procedural matters from the state forum and places them in the federal forum, it is never in a state’s interests to choose the “property” regime.

CONCLUSION

The Supreme Court’s 1900 decision in *Taylor v Beckham* advanced two basic propositions concerning property interests in elected offices. First, unless states choose otherwise, elected officials have no inherent property interests in their positions. Second, states must do more than simply define the length of the term of an office in order to create a property interest in the office itself. These two propositions have been contorted and confused in recent lower court cases, but an analysis of modern Supreme Court decisions suggests that the propositions remain valid today.

Although the lower courts almost uniformly fail to address the practical effects of viewing elected offices as “trusts” rather than “property,” one clear implication is that the “trust” view allows the locus of control over political procedural matters to remain with the states, and more particularly with the state legislatures. Furthermore, a “trust” regime allows state legislatures to define political procedures through legislation and allows state courts to fashion a flexible state due process standard for reviewing abusive removals of elected officials. Under this framework, states should never choose to create property interests in elected offices.

108 178 US 548 (1900).