TEDDER'S NOT DEAD: WHAT PROCESS IS DUE TO SUSPENDED ELECTED OFFICIALS IN FLORIDA?

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INTRODUCTION

"It is an illegal, unconstitutional attack on democracy and the rule of law."[1] This phrase was used by a suspended state attorney to describe Florida Governor Ron DeSantis's exercise of his power to suspend an elected official from office.[2] In stark contrast, then Florida Attorney General Ashley Moody characterized DeSantis's suspensions as "democracy in action."[3] These opposite reactions beg the question: are suspensions of elected officials actually undermining democracy and the rule of law in the Sunshine State? While many commentators have offered *political* opinions on this topic, the question deserves a *legal* answer. A thorough examination of the constitutional rights possessed by and owed to elected officials reveals the current removal system in Florida runs afoul of constitutional principles of procedural due process.

Florida law explicitly grants its governor the power to suspend elected or appointed municipal officials for "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, [or] permanent inability to perform official duties."[4] Once an official is suspended by the governor, the state senate holds a hearing and votes on whether to permanently remove the official from office.[5] First enshrined in the 1885 Florida Constitution and again appearing in the 1968 Florida Constitution, this express executive power allows for an efficient and effective remedy to serious wrongdoing among public

1. Andrew Warren, *Ron DeSantis Cancelled an Elected Official, Just Like He Did to Me*, DAILY BEAST (Aug. 10, 2023, 8:43 AM), https://www.thedailybeast.com/ron-desantis-is-an-enemy-of-democracy-and-the-rule-of-law [https://perma.cc/8YT2-L3CP].

2. *Id.*

3. Madison Hall, *Florida's Attorney General Says DeSantis Suspending an Elected State Attorney Is 'Democracy in Action,'* BUS. INSIDER (Aug. 10, 2023, 12:07 PM), https://www.businessinsider.com/florida-ag-praised-desantis-for-suspending-an-elected-state-attorney-2023-8 [https://perma.cc/PU4J-TJRD].

4. FLA. CONST. art. IV, § 7; FLA. STAT. § 112.51(1) (2023) ("By executive order stating the grounds for the suspension and filed with the Secretary of State, the Governor may suspend from office any elected or appointed municipal official for malfeasance, misfeasance, neglect of duty, habitual drunkenness, incompetence, or permanent inability to perform official duties.").

5. FLA. CONST. art. IV, § 7.

officers.[6] Although this authority has been in place for well over a century, it has garnered unprecedented media attention during the governorship of Ron DeSantis.

In his first five years as the state's chief executive, DeSantis suspended over twenty elected officials, including mayors, school board members, state prosecutors, and a sheriff.[7] While previous governors exercised their suspension power, DeSantis has exercised it more frequently than his recent predecessors.[8] But it is not simply the frequency of suspensions under DeSantis's watch that has come under scrutiny. Critics of DeSantis argue that his suspensions have been more politically motivated than suspensions by previous governors.[9] It is true that nearly all of the officials removed by DeSantis, a Republican, have been either Democrats or aligned with the Democratic Party.[10] Some observers argue that this is not merely a coincidence but rather that the governor is improperly suspending officials on the sole basis of political disagreements in order to score political points.[11]

One of DeSantis's most politically controversial exercises of removal power came on August 4, 2022, when he suspended Andrew Warren, an elected prosecutor from Hillsborough County.[12] Warren, who was elected in 2016 and re-elected in 2020, was known as a "progressive prosecutor[ ]" and supporter of criminal justice

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6. *See* Malcolm B. Parsons, *The Suspension and Removal of Florida Public Officers by the Governor*, *1945-1960*, 15 U. FLA. L. REV. 400, 400 (1962); William M. Barr & Frederick B. Karl, *Executive Suspension and Removal of Public Officers Under the 1968 Florida Constitution*, 23 U. FLA. L. REV. 635, 635 (1971).

7. *See* Warren, *supra* note 1; Tristan Wood, *Democracy on Hold: Gov. Ron DeSantis' Six Most Noteworthy Suspensions of Florida Elected Officials*, CITY & STATE FLA. (Aug. 9, 2023), https://www.cityandstatefl.com/policy/2023/08/democracy-hold-gov-ron-desantis-five-most-noteworthy-suspensions-florida-elected-officials/387889/ [https://perma.cc/Y6ZC-KUT2].

8. Mary Ellen Klas, *State Attorney Is Latest Example of DeSantis' Use of Power to Suspend Elected Officials*, TAMPA BAY TIMES (Aug. 9, 2023), https://www.tampabay.com/news/florida-politics/2023/08/09/state-attorney-is-latest-example-desantis-use-power-suspend-elected-officials/ [https://perma.cc/93Z8-XJ4K] ("Bush suspended at least 17 elected officials during his eight years in office, Crist removed at least 13 officials from office—all of whom were charged with crimes—during his four years and Scott suspended at least 15 elected officials from office—14 of whom committed crimes—during his eight years as governor.").

9. *See id.*

10. Wood, *supra* note 7.

11. *See* Klas, *supra* note 8.

12. *See* Fla. Exec. Order No. 22-176 (Aug. 4, 2022).

reform.[13] After the *Dobbs* decision overturned *Roe v. Wade* in 2021, Warren joined over ninety other prosecutors in signing a public statement pledging to "exercise our well-settled discretion and refrain from prosecuting those who seek, provide or support abortions."[14] In his executive order suspending Warren, DeSantis referenced the pledge as evidence of Warren's "neglect of duty" and "incompetence."[15] DeSantis argued that Warren's pledge, in addition to his views on gender identity and other issues, amounted to an unacceptable refusal to enforce the law.[16] Critics of DeSantis argue that Warren's alleged neglect of duty is actually nothing more than a policy preference concerning prosecutorial discretion.[17] Warren's suspension, along with several others, fueled allegations that DeSantis had abused his suspension power as pretext to remove officials with whom he disagrees politically.[18]

Suspended elected officials, like Warren, who believe they are the victims of partisan removals might naturally wonder about the possibility of legal recourse. Numerous elected officials have challenged the legality of their removals, but they have been largely unsuccessful. Warren himself brought a First Amendment claim, alleging that DeSantis improperly removed him for mere speech instead of actual policies.[19] Although the U.S. Court of Appeals for the Eleventh Circuit agreed that DeSantis did, in fact, act outside of his authority by basing a suspension solely on political ideology, the court found that it lacked jurisdiction to reinstate the official.[20] Mary Beth Jackson, a suspended public school district superintendent, alleged that the governor improperly based her suspension on

13. Alexandra Berzon & Ken Bensinger, *Inside Ron DeSantis's Politicized Removal of an Elected Prosecutor*, N.Y. TIMES (Mar. 11, 2023), https://www.nytimes.com/2023/03/11/us/politics/desantis-andrew-warren-liberal-prosecutor.html?searchResultPosition=2[https://perma.cc/HE7J-8RFW].

14. *Id.*

15. Fla. Exec. Order No. 22-176 (Aug. 4, 2022).

16. *See id.*

17. *See* Berzon & Bensinger, *supra* note 13.

18. *See id.*

19. *See generally* Warren v. DeSantis, 90 F.4th 1115 (11th Cir. 2024).

20. *Id.* at 1137 ("The First Amendment prevents DeSantis from identifying a reform prosecutor and then suspending him to garner political benefit."); *see* Patricia Mazzei & Alexandra Glorioso, *Judge Rules DeSantis Was Wrong, but Lets Prosecutor's Suspension Stand*, N.Y. TIMES (Jan. 22, 2023), https://www.nytimes.com/2023/01/20/us/desantis-prosecutor-suspended-warren.html [https://perma.cc/MG95-SXQF].

actions from a prior term.[21] The Supreme Court of Florida rejected this argument.[22] Susan Bucher, a suspended elections supervisor removed by DeSantis, did not mount a challenge to her suspension at all, believing that it would be a futile effort in such a partisan environment.[23]

One high-profile suspended elected official pursued a particularly noteworthy legal recourse: a federal procedural due process claim. After the senate removed him by a 25-15 vote,[24] Scott Israel, the former sheriff of Broward County, claimed that he was deprived of liberty and property without sufficient due process of law.[25] Israel was ultimately unsuccessful, but the court's due process analysis only concerned the potential deprivation of a *liberty* interest because the court found that the public official had no *property* interest whatsoever in serving his full term.[26] However, a closer look at the court's legal reasoning casts doubt on whether it was correct to find no property interest in elected office.[27] This potential error is material to due process claims because whether a property interest is under threat of deprivation influences the extent to which process is due to an individual.[28] If representatives have a federally protected right to serve out their entire term of office without an arbitrary or capricious premature termination, then the constitutional sufficiency of existing removal procedures is called into question. Both leaders and voters deserve to know the extent to which federal procedural due process protections are guaranteed to Florida's elected officials.

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21. Jackson v. DeSantis, 268 So. 3d 662, 662 (Fla. 2019).

22. *Id.* at 663.

23. George Bennett, *Bucher Resigns as Elections Supervisor, Calls Removal Process Unfair*, PALM BEACH POST (Jan. 28, 2019, 6:53 PM), https://www.palmbeachpost.com/story/news/politics/2019/01/28/bucher-resigns-as-elections-supervisor-claims-gop-bias/6168397007/ [https://perma.cc/FML4-AHV4].

24. *Vote on Removal of Scott Israel*, 2019 Leg., 1st Spec. Sess. (Fla. 2019), https://www.flsenate.gov/usercontent/session/executivesuspensions/israel_scott/20191023/20191023Vote.pdf [https://perma.cc/GTT3-KFLV].

25. Israel v. DeSantis, No. 4:19cv576-MW/MAF, 2020 WL 2129450, at *2 (N.D. Fla. May 5, 2020). Separately, Scott Israel filed a petition for writ of quo warranto in state court and was ultimately unsuccessful in the Supreme Court of Florida. *See* Israel v. DeSantis, 269 So. 3d 491 (Fla. 2019).

26. *Israel*, 2020 WL 2129450, at *9-16.

27. *See* Appellant's Reply Brief at 21-23, McGraw v. Banko, 2023 WL 7039511 (11th Cir. Oct. 26, 2023) (No. 22-12987-HH) (outlining the flaws in the *Israel* court's reasoning).

28. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

This Note argues that a proper interpretation of Florida law recognizes property interests in elected office as an integral factor to be considered when assessing what process is due to suspended elected officials. Part I provides an overview of the theoretical underpinnings and modern evolution of procedural due process and property interests, particularly as they relate to public employment and elected office. Part II contrasts historical case law in Florida where property rights were recognized with a curious line of emerging case law that finds no such rights. Part III investigates and refutes the flawed reasoning behind recent opinions that have rejected the argument that property interests exist in public office. Finally, Part IV considers what process is due to suspended elected officials in Florida and highlights the need to safeguard against the potential politicization of that process. Ultimately, this Note warns that without ensuring authentically quasi-judicial removal hearings, Florida risks depriving elected officials of their constitutionally protected property rights without affording them adequate due process of law.

I. HISTORICAL BACKGROUND

A. Procedural Due Process, Generally

At its core, procedural due process aims to protect individual rights from abuses of power. As a fundamental check on governmental authority, the right to due process is enshrined in the Constitution. Both the Fifth and Fourteenth Amendments guarantee that no person shall be "deprived of life, liberty, or property, without due process of law."[29] This language means that when government action threatens an individual's interest in life, liberty, or property, that person is constitutionally entitled to both notice and an opportunity to be heard.[30] These two safeguards of procedural due process theoretically help to prevent the government (or an entity

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29. U.S. CONST. amend. V. The Fourteenth Amendment incorporated the right to due process to the states. *Id.* amend. XIV, § 1.

30. *See, e.g.*, Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."); *Mathews*, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965))).

acting under the color of law) from taking away a person's rights in an arbitrary or capricious manner.

Whether an individual's right to procedural due process has been violated is highly dependent on the circumstances of each given situation.[31] The process due to a particular individual differs based on the degree of interests (both individual and public) at stake.[32] In the 1970s, the *Mathews v. Eldridge* test emerged as the leading guidance for how to assess the context of a procedural due process claim.[33] This three-factor balancing test calls for a comprehensive analysis of the following considerations:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[34]

As implied by the first criterion of the *Mathews* test, a prerequisite to any analysis of these three factors is the existence of a private interest. More specifically, government action must threaten an individual's interest in life, liberty, or property. In contrast to the Declaration of Independence, which famously identified "Life, Liberty, and the pursuit of Happiness" as inalienable rights, the text of the Constitution replaced the phrase "pursuit of happiness" with "property."[35] One's right to property has always been constitutionally protected. But beginning in the 1970s, courts dramatically

31. *Mathews*, 424 U.S. at 334 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (alteration in original) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972))).

32. *Id.* ("[R]esolution of the issue whether the administrative procedures provided ... are constitutionally sufficient requires analysis of the governmental and private interests that are affected."); *see, e.g.*, Nash v. Auburn Univ., 812 F.2d 655, 660 (11th Cir. 1987) ("The adequacy of the notice and the nature of the hearing vary according to an 'appropriate accommodation of the competing interests involved.'" (quoting Goss v. Lopez, 419 U.S. 565, 579 (1975))).

33. *See* 32 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 8139 (2d ed. 2024) ("Since Mathews [sic], courts have deployed its three-factor framework in thousands of cases across a wide variety of substantive domains.").

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

35. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see* U.S. CONST. amend. V.

broadened the definition of property.[36] By expanding the types of property interests that are worthy of constitutional protections, courts spurred what has been referred to as the due process "[r]evolution" or "explosion."[37]

B. The Evolving Nature of Property Interests

Before analyzing whether one has been deprived of property without procedural due process, a court must first confirm that a private property interest exists. Property, for the purposes of procedural due process, can take many forms. In addition to traditional types of property like real estate, chattels, and intellectual property, it is now widely accepted that individuals may possess personal property interests in government-granted benefits.[38]

The position that one can enjoy private property rights in one's public entitlements reflects a major shift in thinking that occurred around a half century ago. In his 1964 seminal article, *The New Property*, Charles Reich analyzed the legal implications of government-created wealth such as welfare benefits, licenses, contracts, and even jobs.[39] Reich posited that individual wealth increasingly took "the form of rights or status rather than of tangible goods," a new element of private property in the modern age.[40] Reich observed that the typical American inclination to protect property from government intrusion is weaker when the property itself was created and conferred by the government in the first place.[41] It is generally acceptable to regulate government-created property in furtherance of a legitimate public policy that serves the public interest.[42] But Reich rejected such a rigid distinction between traditional private property and government-created private property. Reich argued that "[i]n the regulation of government

36. 32 WRIGHT & MILLER, *supra* note 33, § 8132.
37. *Id.*
38. *See, e.g.*, Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576 (1972).
39. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733-35 (1964).
40. *Id.* at 738.
41. *Id.* at 749 ("When an individual or a business uses public money or enjoys a government privilege or occupies part of the public domain, it is easier to argue for a degree of regulation which might not be accepted if applied to businesses or individuals generally.").
42. *See id.* at 749, 774.

largess, achievement of specific policy goals may undermine the independence of the individual."[43]

As one of the most-cited law review articles in history, *The New Property* contributed to a major paradigm shift in terms of how individual property rights were perceived, both in the public consciousness and the rule of law.[44] In the years following the article's publication, the law developed rapidly to safeguard against the wrongful deprivation of benefits granted to individuals by the government.[45] The first major decision that advanced the "new property" framework of property was *Goldberg v. Kelly*, in which the U.S. Supreme Court held that an individual's welfare benefits could not be terminated without due process of law.[46] Under this new regime, one's entitlement to government-granted benefits constitutes a personal property right.[47] Once a form of property is deemed a right instead of a mere privilege, that property cannot be taken away by the government without proper procedural due process.[48]

C. Public Employment as Property

Due process protections for government-created benefits and entitlements extends to public employment.[49] In 1972—less than a decade after the publication of *The New Property*—the U.S. Supreme Court ruled on two cases related to the topic of whether due process protected public employment. In *Board of Regents of State Colleges v. Roth*, the Court considered the property interest of a nontenured professor at a public university who claimed that he was arbitrarily deprived of his public employment without due process.[50] The Court

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43. *Id.* at 774.

44. *See* Harold Hongju Koh, *Charles Reich: Due Process in the Eye of the Receiver*, 36 TOURO L. REV. 771, 779 (2020).

45. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Paul R. Verkuil, *Revisiting* The New Property *After Twenty-Five Years*, 31 WM. & MARY L. REV. 365, 367 (1990) ("In *Goldberg v. Kelly*, the majority opinion virtually adopted *The New Property* for its analytical framework." (footnote omitted)).

46. 397 U.S. at 264.

47. *Id.* at 264; *see also* Bell v. Burson, 402 U.S. 535, 542-43 (1975) (finding a property interest in one's entitlement to possession of a driver's license).

48. *See* U.S. CONST. amend. V; *id.* amend. XIV, § 1.

49. *See* Bettye S. Kitch, Note, *A Constitutional Interest in Public Employment: The Last Hurrah?*—Bishop v. Wood, 26 DEPAUL L. REV. 631, 632, 633 n.10, 646 (1977).

50. 408 U.S. 564, 566-69 (1972).

held that although the Constitution did not itself grant property interests in public employment at the federal level, independent sources—such as state laws, policies, or customs—could create such property interests.[51] In *Perry v. Sindermann*, the Court reiterated that "rules or mutually explicit understandings" can support an individual's claim to entitlement to public employment.[52] There, another nontenured professor at a public college successfully argued that general guidelines at the school conferred an expectation of continued employment, despite the professor's lack of tenure.[53] The Court agreed and held that standard practices at a workplace may qualify as the basis of a property interest for due process protection even without the existence of an explicit contract.[54] These decisions affirmed the emerging legal theory that property interests can be found in entitlement to continued employment. This theory posits that a termination of employment deprives an individual of property in the form of expected future payments and benefits.[55]

The standard for a property interest in one's job to trigger due process protections is not mere reliance on continued employment or even a general expectation of it. Procedural due process protects only against the deprivation of a property right to which an individual has a "legitimate claim of entitlement."[56] Still, *Roth* and *Perry* held that the basis for a public employee's legitimate claim of entitlement can come in many forms, including personnel codes,

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51. *Id.* at 577 ("[Property interests] 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.").

52. 408 U.S. 593, 601 (1972).

53. *See id.* at 599-603.

54. *See id.* at 601-03.

55. *See Roth*, 408 U.S. at 576-78. With the widespread demise of at-will employment, employees in the *private* sector might also possess protectable property interests in expected future wages. *See generally* Deborah L. Markowitz, *The Demise of At-Will Employment and the Public Employee Conundrum*, 27 URB. LAW. 305 (1995) (describing changes by state courts to the employment at-will doctrine and their impact on employment rights). An employee terminated by a private employer could have a procedural due process claim since many states have passed laws that grant for-cause protections for employees in the private sector. Karen Dimond, *Due Process Rights of Public Employees upon Termination*, PUB. LAW., Winter 2021, at 6, 7-8.

56. *Roth*, 408 U.S. at 577 ("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.").

handbooks, or contracts.[57] It follows that determining whether a public employee truly has a legitimate claim of entitlement to their position is a circumstantial inquiry based on the specific job.

D. Elected Office: Property or Trust?

Today, it is well established that public employment may entail a property interest. The question of whether public employment protections include elected offices, however, adds a layer of complication. In a democratic republic, such as the United States, whether ownership of an elected office belongs to the officeholder or to the people is not entirely intuitive.[58] Do elected officials have legitimate claims of entitlement to the positions they hold? This simple question does not elicit a straightforward legal answer.[59] Although literature focused on this specific subset of public employment protections is scarce, two conflicting perspectives have emerged in response to this issue.[60] One school of thought advances the idea that elected officials enjoy property interests in their positions just as other employees in the public sector might possess legitimate claims of entitlement in continued employment.[61] Others reject the seemingly undemocratic notion that an elected official is entitled to continued service in public office.[62] This alternative perspective asserts that when an individual is elected to office, the official

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57. *See* Dimond, *supra* note 55, at 7-9, 11 n.9.

58. *See generally* Mark R. Fitzgerald, Comment, *Should Elected Officials Have a Property Interest in Their Positions?*, 1995 U. CHI. LEGAL F. 365 (explaining the differences between the "property" and "trust" characterizations of public office).

59. *See id.*

60. *See* 16D C.J.S. *Constitutional Law* § 2118 (2024) ("In some instance[s], elected public officers have been found to possess either a property interest or an otherwise sufficiently recognizable interest in their positions to require compliance with the fundamental requirements of due process. However, it has also been held that a state officer's interest in an elected post is not property and that the suspension of an elected public official without a prior hearing does not violate due process of law." (footnotes omitted)); 63C AM. JUR. 2D *Public Officers and Employees* § 13 (2024).

61. 63C AM. JUR. 2D, *supra* note 60.

62. *Id.*; *see, e.g.*, Barnes v. Kline, 759 F.2d 21, 50 (D.C. Cir. 1984) ("[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.").

simply holds that position *in a public trust* on behalf of the voters.[63] In general, property held in trust is "held by a person who is not the owner but who is a trustee or an agent."[64] A *public* trust is typically "created to promote public welfare and not for the needs of any single individual."[65] Philosophical and legal tension exists between the notions of holding elected office as employment for oneself and holding elected office as a duty on behalf of others.

It is often overlooked that the difference between the property interest and public trust frameworks is far from a mere semantic preference, but rather a substantive and consequential distinction.[66] As such, there is considerable debate as to which of these models is preferable, from both legal and public policy perspectives.[67] Regarding the distinct impacts of each model, a 1995 Comment in the *University of Chicago Law Review* observed: "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."[68] Whether there are property rights in elected office greatly influences an individual's right to due process because "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved."[69] Finding a property interest in public office would grant federal courts jurisdiction over an officeholder's Fourteenth Amendment claim, and guarantee constitutional due process protections beyond procedures promulgated by the state.[70] Theoretically, the existence of a property interest could make the difference as to whether an elected official can be prematurely removed from office.

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63. *See* Fitzgerald, *supra* note 58, at 365-66, 375, 379-80.

64. *Held in Trust*, L. DICTIONARY, https://thelawdictionary.org/held-in-trust/ [https://perma.cc/EA2T-2ULA].

65. *Public Trust*, L. DICTIONARY, https://thelawdictionary.org/public-trust/ [https://perma.cc/L4GL-FWXD].

66. *See* Fitzgerald, *supra* note 58, at 366 ("Unfortunately, the courts confronting this issue have focused only on the semantics and not on the effects of this distinction.... [A]nd they have failed to address whether the distinction matters.").

67. *See, e.g.*, *id.* at 366-67.

68. *Id.* at 366.

69. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 570 n.8 (1972) (quoting Boddie v. Connecticut, 401 U.S. 371, 378 (1971)).

70. *See* Fitzgerald, *supra* note 58, at 366, 375.

Historically, the United States has not recognized private property interests in public office. Instead, the federal government has favored the public trust approach to elected office. As early as the mid-1800s, the Supreme Court held that public employment should be considered a privilege, not a right.[71] In its 1900 decision *Taylor v. Beckham*, the U.S. Supreme Court reinforced this principle in holding that the U.S. Constitution does not grant public officials a property interest for the purposes of procedural due process.[72] Nearly half a century later, the default rule against property rights was reaffirmed in *Snowden v. Hughes*.[73] However, *Taylor* and *Snowden* did not close the door on property rights at the state level.

As public employees, elected officials should be subject to the consequential 1972 holding of *Roth*: that state laws and other general rules or guidelines can create property interests in public employment.[74] Courts will not find property rights in public employment by looking to federal law,[75] but their analysis cannot end there; courts must turn to state law to determine whether there exists a property interest in the position of any given public official, including elected ones. If a state-granted property right in elected office is deprived, the federal judiciary has jurisdiction over a Fourteenth Amendment procedural due process claim.[76] In what has been referred to as "[t]he public employee conundrum," only *federal* law dictates the procedure necessary to protect property interests that only *state* law can create.[77] When property rights are at stake,

71. *Roth*, 408 U.S. at 571 n.9.

72. 178 U.S. 548, 577 (1900) ("[P]ublic offices are mere agencies or trusts, and not property as such.... [G]enerally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right.").

73. 321 U.S. 1, 7 (1944) ("[A]n unlawful denial by state action of a right to state political office is not a denial of a right of property ... secured by the due process clause.").

74. *See Roth*, 408 U.S. at 576-79. *But see* Velez v. Levy, 401 F.3d 75, 86-87 (2d Cir. 2005) (holding that elected officials lack cognizable property rights in their public employment because the *Roth* court did not explicitly indicate an intention to overturn *Taylor* or *Snowden*).

75. *Roth*, 408 U.S. at 577 ("Property interests, of course, are not created by the Constitution.").

76. *See* Israel v. DeSantis, No. 4:19cv576-MW/MAF, 2020 WL 2129450, at *6 (N.D. Fla. May 5, 2020) ("[T]he government taking a person's life, liberty, or property without due process of law is such a ghastly wrong that the injured party can seek relief in federal court, even though the party is a state official who has been removed from office through a state-law procedure.").

77. Markowitz, *supra* note 55, at 323-24, 330 ("[A] local government that is faced with a lawsuit for wrongful termination must consult the standards of state law to determine

state procedures to protect those interests must meet federal due process standards because "the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures."[78] Therefore, whether Florida's existing removal process affords adequate due process to suspended elected officials may turn on whether they possess federally protected property interests in their positions.

In Florida, if public officials look to state law to determine whether they possess a federally protected property interest in their public employment, they will likely find a contradictory body of law on the issue. In particular, they will come across a direct conflict between a 2019 advisory opinion by Florida's attorney general that recognized property rights in public office and a 2020 opinion by a federal district court that found no such rights.[79] The ambiguity concerning property rights in elected office in Florida leaves suspended officials (and others facing premature removal from office for any reason) without clear guidance as to whether they have a valid federal procedural due process claim. This Note investigates the source of confusion regarding the question of whether elected officials in Florida are entitled to federal procedural due process protections when removed from their position prior to the completion of their term. Ultimately, this Note argues that elected officials *do* have property rights in their positions under Florida law, and that these property interests must be an integral factor in federal procedural due process analyses.

II. PROPERTY VS. TRUST IN FLORIDA

As articulated in *Roth*, the determination of whether public officials possess property rights in their positions varies from state

whether the at-will relationship has been altered; and if so, the municipality must then look to federal law to see if it has satisfied the constitutional requirements."); *Israel*, 2020 WL 2129450, at *6.

78. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). Florida's distinction between gubernatorial suspension and senatorial removal is consistent with the holding in *Loudermill* that public employees are entitled to a pretermination hearing. *See Israel*, 2020 WL 2129450, at *4.

79. *Compare* Fla. AGO 2019-01, 2019 WL 1122404, at *1-5 (Jan. 8, 2019), *with Israel*, 2020 WL 2129450, at *9-10.

to state.[80] In Florida, there is a storied jurisprudence regarding whether there exist property rights in public office for the purposes of due process. Florida initially adopted a public trust regime when, in 1892, the Supreme Court of Florida considered the governor's removal of an elected official in *State ex rel. Lamar v. Johnson*.[81] The *Johnson* court gave consideration to the question of an elected official's property rights, ultimately deciding that an elected official "is a public agent or servant, and has no such title to his office."[82] Over time, though, the court abandoned its public trust precedent in *Johnson*. Four decades after the *Johnson* decision, the Supreme Court of Florida ushered in a new era by firmly establishing a regime that recognizes federally protected property interests in elected office.[83] This era, though, may have recently come to an abrupt end.

A. Establishing Property Rights in Elected Office in Florida

By 1931, the Supreme Court of Florida had changed its tune on the issue of property rights in public office. In *State ex rel. Hatton v. Joughin*, the Supreme Court of Florida reviewed a gubernatorial suspension yet again.[84] The court made clear that the law grants the governor vast discretion to decide to suspend public officials, noting that "so long as the Governor acts within his jurisdiction as charted by organic law, his action will not be reviewed by the courts."[85] The decision to suspend an official is an executive, not legislative or judicial, function.[86] But similar to any executive order, it must not strip people of their rights in an unlawful manner, even when the senate consents to removal. The court qualified the seemingly vast gubernatorial power to remove by holding that "the jurisdictional facts, in other words the matters and things on which the executive grounds his cause of removal, may be inquired into by the courts."[87]

80. *See Roth*, 408 U.S. at 577.
81. *See generally* 11 So. 845 (Fla. 1892).
82. *Id.* at 852.
83. *See infra* notes 91-96 and accompanying text.
84. 138 So. 392, 396 (Fla. 1931).
85. *Id.* at 394.
86. *Id.*
87. *Id.* at 394-95.

On the issue of whether an officeholder possesses property rights, the *Joughin* court held that "[o]ne's right to office and the emoluments thereof is protected by the Fourteenth Amendment."[88] It further described the interest of an elected official as "a species of property which the law will protect and will also redress if he is wrongly deprived of it."[89] This embrace of federally protected property rights in public office reflected a marked departure from the *Johnson* court's outright rejection of property rights decades earlier.[90]

The year following its decision in *Joughin*, the Supreme Court of Florida's landmark ruling in *State ex rel. Landis v. Tedder* solidified the state's recognition of property rights in public office.[91] In that case, the court considered the extent to which due process was owed to a public official facing a recall election petition.[92] The public official, a city commissioner in Hollywood, Florida, sought injunctive relief to halt the recall proceeding, claiming that the process was not compliant with relevant statutory law.[93] Before the Florida Supreme Court was the question of whether the city commissioner had a right to legally challenge the recall in a court of equity.[94] The court concluded that the public official was entitled to a judicial determination of whether the recall process was sufficient.[95] In its decision, the Florida Supreme Court affirmed that it was "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."[96]

Given the explicit declaration that public officials enjoy individual property interests in their positions, it might seem to follow that *Tedder* rejected the idea that public office is held in public trust. But the court in *Tedder* did not choose property rights over public trusts. Rather, the court rejected the very premise of a binary choice

88. *Id.* at 395 (referring to "the legal right to exercise and enjoy the title to the office brought in question").

89. *Id.* The *Joughin* court found that the senate hearing satisfied constitutional due process. *Id.* at 396.

90. *See* State *ex rel.* Lamar v. Johnson, 11 So. 845, 852 (Fla. 1892).

91. *See* 143 So. 148, 149-50 (Fla. 1932).

92. *Id.* at 148-49.

93. *Id.*

94. *Id.* at 149.

95. *Id.* at 150.

96. *Id.*

between property rights and public trusts.[97] Advancing somewhat nuanced reasoning, the court held that "[a] public office is a public trust, but the incumbent has to some extent a recognizable property right in it."[98] Even after plainly characterizing public office as a public trust, the *Tedder* court maintained yet again that "[t]he right to hold an office ... is a property right in a broad sense, and subject to judicial protection."[99] Under the logic of *Tedder*, it is possible for an individual to hold property in public trust on behalf of the people while simultaneously possessing personal property interests in the office. The court's hybrid model of property rights might be likened to the modern "bundle of sticks" conception of ownership in which multiple individuals may possess several types of interests in the same property at the same time.[100] Thus, the significance of *Tedder* is Florida's adoption of the legal theory that public trusts and property rights are not mutually exclusive.[101] Rather, public trusts and property rights uniquely coexist in the context of ownership of elected office.

Over the years, the *Tedder* precedent has been upheld by the Florida Supreme Court multiple times and followed by various lower courts.[102] In 2019, Florida Attorney General Pam Bondi (who would later go on to become U.S. Attorney General under President Trump) cited *Tedder* in an advisory opinion.[103] There, Marion County decided to change the office of superintendent from elected

97. *See id.*

98. *Id.*

99. *Id.*

100. *See* Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 871, 877-78 (2013).

101. *See Tedder*, 143 So. at 150.

102. *See, e.g.*, Du Bose v. Kelly, 181 So. 11, 17 (Fla. 1938) ("The right to possess and enjoy the emoluments or the profits of an office is one clearly subject to judicial protection."); Richard v. Tomlinson, 49 So. 2d 798, 799 (Fla. 1951) ("The petitioner had a property right in the office to which the people had elected him, and he could not be forced into a recall election to determine whether he should be ousted ... in the absence of a substantial compliance with the law prescribing the procedure for such drastic action." (citation omtited)); Fair v. Kirk, 317 F. Supp. 12, 14 (N.D. Fla. 1970) ("[W]e may assume, as the Supreme Court of Florida has declared, that a public officeholder has a property right in his office and that this right may not be unlawfully taken away or illegally infringed."); Gilbert v. Morrow, 277 So. 2d 812, 813-14 (Fla. Dist. Ct. App. 1973) ("An officeholder has a property right in his office and this right may not be unlawfully taken away or illegally infringed upon."); Piver v. Stallman, 198 So. 2d 859, 862 (Fla. Dist. Ct. App. 1967).

103. *See* Fla. AGO 2019-01, 2019 WL 1122404, at *5 n.7 (Jan. 8, 2019).

to appointed.[104] At the time of this change, the incumbent superintendent was in the middle of serving a four-year term of office.[105] The School Board asked the attorney general whether the incumbent superintendent was entitled to complete the term to which she was elected.[106] Citing both *Tedder* and *Joughin*, Bondi opined that "a public officer has a property right to serve out his or her tenure of office and to receive the emoluments of such office."[107] Bondi proceeded to note that "[w]hen the Constitution creates the office, it can be shortened only by a constitutional provision clearly expressing such effect."[108] Bondi made no mention of the phrase "public trust."[109] Compared to its pronouncement of recognized individual property rights, the *Tedder* court's accompanying embrace of the public trust model is more easily overlooked.[110] The failure to acknowledge the unique hybrid model of ownership expressed in *Tedder* has caused newfound confusion as to whether elected officeholders possess any property rights in their positions. Because of this ambiguity, the extent to which process is due to suspended officials lacks clarity.

B. A Sudden Turn Toward Public Trusts

In recent years, *Tedder* has suddenly been cast into doubt. In 2020, a federal district court held in *Israel v. DeSantis* that elected officials in Florida did not possess any property rights in their positions.[111] The court's opinion took on *Tedder* directly and ruled that the eighty-eight-year precedent was null and void.[112] In fact, the court opined that *Tedder* had been dead for nearly fifty years despite the fact it has never been expressly overruled.[113] In 2023, a separate federal district court in Florida arrived at the same

104. *Id.* at *1.
105. *Id.*
106. *Id.*
107. *Id.* at *5.
108. *Id.*
109. *See generally id.*
110. *See* State *ex rel.* Landis v. Tedder, 143 So. 148, 150 (Fla. 1932).
111. No. 4:19cv576-MW/MAF, 2020 WL 2129450, at *9 (N.D. Fla. May 5, 2020).
112. *See id.* at *9-10.
113. *See id.* at *10.

conclusion.[114] Given Attorney General Bondi's 2019 endorsement of *Tedder* as good law, the state of property rights in public office in Florida is unclear, and the frequency of gubernatorial removals demands prompt clarification.

Israel involved one of DeSantis's most high-profile suspensions. In his first month in office, DeSantis fulfilled a campaign promise to suspend Scott Israel, the Broward County Sheriff who faced criticism over law enforcement's response to the 2018 mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida.[115] The Republican governor justified the invocation of his suspension powers by citing Israel's "neglect of duty" and "incompetence."[116] Israel, a Democrat, alleged that the suspension was politically motivated.[117] As part of his legal course of action, Israel claimed that the suspension was unlawful because it deprived him of both property and liberty interests without sufficient process.[118] He filed a Fourteenth Amendment federal due process claim in the Northern District of Florida.[119]

In determining whether Israel possessed a property interest in his office, the court first analyzed federal law.[120] The court accurately described *Taylor* as holding that federal law does not recognize property interests in public offices.[121] However, the court also rightly pointed out that a property interest in public office can

114. *See* Coker v. Warren, 660 F. Supp. 3d 1308, 1334-35 (M.D. Fla. 2023).

115. *See* Patricia Mazzei, *Florida Governor Suspends Sheriff over Parkland Shooting*, N.Y. TIMES (Jan. 9, 2019), https://www.nytimes.com/2019/01/09/us/parkland-shooting-desantis-scott-israel.html [https://perma.cc/2WSU-HGWY].

116. *Id.*

117. *Id.*

118. Complaint for Declaratory and Injunctive Relief at 2, 25, Israel v. DeSantis, 2020 WL 2129450 (N.D. Fla. May 5, 2020) (No. 4:19cv576-MW/MAF) ("Sheriff Israel has been denied the fundamental guarantee of fairness and due process in his suspension and removal from office in the absence of an ability (1) to know of the allegations and evidence against him, (2) to confront and challenge that evidence, and (3) to have a reinstatement/removal decision based on the evidence."). Discussion of liberty interests is beyond the scope of this Note. For background information regarding how the reputational harm of removal from public office might deprive one of a liberty interest, see generally Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

119. Complaint for Declaratory and Injunctive Relief, *supra* note 118, at 1.

120. *See Israel*, 2020 WL 2129450, at *9.

121. *Id.* (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).

exist "to the extent state law recognizes one."[122] The court then pivoted to a particularly intriguing analysis of state law.

The court began its overview of state law by highlighting *Tedder* and acknowledging that Florida has recognized property rights in elected office "[i]n the past."[123] The court proceeded to hold that Florida no longer recognizes these property rights.[124] To support this holding, the court cited the Florida Constitution.[125] The court pointed to a 1976 constitutional amendment that states, "[a] public office is a public trust."[126] The *Israel* court identified the 1976 amendment as a historic turning point, asserting that the Supreme Court of Florida has rejected the notion of property rights in public office ever since the amendment's adoption.[127] The court then highlighted two cases in which the Supreme Court of Florida seemingly held that "elected officials have no property rights to the office to which they have been elected."[128]

Although the court conceded that the Supreme Court of Florida never expressly overruled *Tedder*, it claimed that "the intervening amendment to the Florida Constitution removed any need for the Supreme Court of Florida to do so."[129] The court reasoned that since the state constitution governs the Supreme Court of Florida's jurisdiction, constitutional amendments do not need explicit affirmation from the state's highest court.[130] Identifying a direct conflict between a 1932 Supreme Court of Florida opinion and a 1976 Florida constitutional amendment, the *Israel* court sided with the constitution.[131] Accordingly, the court ruled that Israel failed to state a federal procedural due process claim on the basis of a property right.[132]

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122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* (alteration in original) (quoting FLA. CONST. art. II, § 8).
127. *Id.*
128. *Id.* (first quoting *In re* Senate Joint Resol. of Legis. Apportionment 1176, 83 So. 3d 597, 662 (Fla. 2012); and then quoting *In re* Apportionment L.-1982, 414 So. 2d 1040, 1046 (Fla. 1982)).
129. *Id.* at *10.
130. *Id.*
131. *See id.*
132. *Id.*

The *Israel* decision was a political victory for Ron DeSantis, but even more importantly, the hidden holdings of the decision carried ramifications for all elected officials in Florida moving forward. The *Israel* court announced that elected officials do not have any property interests in serving out their full terms.[133] This ruling stood in direct contrast to Attorney General Pam Bondi's interpretation of the law just a year earlier.[134] With its decision, the *Israel* court not only declared an end to the *Tedder* era in Florida but also claimed that the *Tedder* era had been over since the adoption of the Sunshine Amendment nearly a half-century ago. This Note suggests that the reports of *Tedder*'s death are greatly exaggerated.

III. INVESTIGATING THE *ISRAEL* REASONING

To arrive at its conclusion that Florida no longer recognizes property interests in public office, the *Israel* court relied on (1) a 1976 amendment to the Florida Constitution and (2) two subsequent opinions from the Supreme Court of Florida. The *Israel* decision posited that these sources render *Tedder* outdated law with no lasting authority.[135] In a separate case in 2022, a court in the Northern District of Florida reiterated that elected office is "not a property interest the Florida Supreme Court recognizes."[136] On appeal to the Eleventh Circuit, attorney Richard Keith Alan II filed a brief that directly refuted the line of reasoning relied upon in *Israel* (although it did not cite the *Israel* opinion).[137] In his analysis of the sources cited in *Israel*, Alan concluded that "*Tedder* is still controlling law in Florida."[138] The Eleventh Circuit did not explicitly address the topic of property interests in elected office in its § 1983 analysis.[139] The argument in Alan's brief deserves close attention

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133. *Id.*

134. *Compare Israel*, 2020 WL 2129450, at *10 (finding no property interest in holding office), *with* Fla. AGO 2019-01, 2019 WL 1122404, at *5 (Jan. 8, 2019) (finding a property interest in holding office).

135. *See Israel*, 2020 WL 2129450, at *9.

136. McGraw v. Banko, No. 1:21-cv-163-AW-MAF, 2022 WL 19333345, at *2 (N.D. Fla. Aug. 12, 2022).

137. *See generally* Appellant's Reply Brief, McGraw v. Banko, 2023 WL 7039511 (11th Cir. Oct. 26, 2023) (No. 22-12987-HH).

138. *Id.* at *22.

139. *See generally McGraw*, 2023 WL 7039511.

because of the vast implications it would carry for elected officials, if accurate. A thorough investigation into the sources cited in *Israel* affirms Alan's assertion that *Tedder* is, in fact, good law.

A. The Florida Constitution's Sunshine Amendment

The *Israel* court cited article II, section 8 of the Florida Constitution as definitive evidence that a public office is a public trust.[140] The court's logic was no mystery: the language of the 1976 amendment plainly states "[a] public office is a public trust."[141] But the court ignored crucial context. By neglecting to consider the historical, schematic, and legal context of the constitutional text, the *Israel* court misread the true meaning of the amendment. The *Israel* court's interpretation of article II, section 8 of the Florida Constitution is incorrect for three reasons: (1) the provision as a whole exclusively relates to ethics and the avoidance of financial conflicts of interest; (2) as part of the provision's preamble, the phrase "[a] public office is a public trust" is not operative law; and (3) the provision is not inconsistent with the holding in *Tedder*.

First, the *Israel* court did not adequately consider the historical context that reveals the specific purpose of the relevant constitutional provision. Article II, section 8 of the Florida Constitution was passed in 1976 by means of a ballot initiative.[142] Its passage was historic in that it was the first time Floridians voted to enshrine a new amendment in their state constitution by means of initiative petition.[143] Known as the "Sunshine Amendment," this successful ballot initiative aimed to ensure that politicians were kept accountable to a uniform code of ethics.[144] It does not appear that the original intent for the language of this constitutional provision was

140. *Israel*, 2020 WL 2129450, at *9.

141. FLA. CONST. art. II, § 8.

142. *See* FLORIDA COMMISSION ON ETHICS, GUIDE TO THE SUNSHINE AMENDMENT AND CODE OF ETHICS FOR PUBLIC OFFICERS AND EMPLOYEES 1 (2024), https://ethics.state.fl.us/Documents/Publications/GuideBookletInternet.pdf [https://perma.cc/UYX8-VGLR].

143. *See id.*

144. *Id.* ("Florida's first successful constitutional initiative resulted in the adoption of the Sunshine Amendment in 1976, providing additional constitutional guarantees concerning ethics in government. In the area of enforcement, [it] requires that there be an independent commission ... to investigate complaints concerning breaches of public trust by public officers.").

to do anything more than merely reflect the ethical duties of elected officials. The rights of elected officials for the purpose of procedural due process are far beyond the anticipated purview of the ballot initiative. The Sunshine Amendment's narrow scope should not be interpreted to have overturned *Tedder*.

There are modern indications that the insertion of the phrase "public trust" in the Florida Constitution was rooted in establishing ethical norms rather than defining property ownership. The website for the Florida Commission on Ethics prominently displays the tagline "A Public Office is a Public Trust."[145] As noted in its "History" section, the Commission itself was created by the Sunshine Amendment.[146] It notes Florida's commitment to "establishing ethics standards for public officials and recognizing the right of her people to protect the public trust against abuse."[147] Once again, the phrase "public trust" is used within an entirely different context from one that concerns property rights, removal, or procedural due process.

In addition to overlooking the purpose of the amendment, the *Israel* court also failed to consider the schematic context of the phrase upon which it so heavily relied. The court referred to the amendment as reading simply, "[a] public office is a public trust."[148] But the full text of this section reads as follows: "A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse."[149] The text then goes on to read, "[t]o assure this right" followed by a list of the many ways by which public officials must be transparent to the people.[150] Section 8 of article II of the Florida Constitution is entitled "Ethics in government."[151] Most provisions discuss disclosures of financial interests to prevent elected officials from hiding conflicts of interest.[152] Given the schematic organization of the text, the phrase "[a] public office is a public trust" (which appears before the colon) serves an

145. FLA. COMM'N ON ETHICS, https://ethics.state.fl.us/ [https://perma.cc/Y4X4-QMT5].

146. *History*, FLA. COMM'N ON ETHICS, https://ethics.state.fl.us/AboutUs/History.aspx [https://perma.cc/6NB4-4B45].

147. *Id.*

148. Israel v. DeSantis, No. 4:19cv576-MW/MAF, 2020 WL 2129450, at *9 (N.D. Fla. May 5, 2020).

149. FLA. CONST. art. II, § 8.

150. *Id.*

151. *Id.*

152. *See id.*

introductory function and should be properly understood as a preamble to the operative provisions.[153]

Any court that analyzes introductory text in its interpretation of the law enters somewhat treacherous territory. Crucially, "[a] preamble is not part of a statute itself" and "has no substantive legal force."[154] Furthermore, "[p]reambles are not controlling of a statute or rule's terms but are simply a useful aid for interpreting them when there is ambiguity."[155] Even the Supreme Court of Florida itself articulated this principle in 2018 by holding that "[a]lthough prefatory language may aid a court to determine legislative intent when the operative terms of a provision of law are ambiguous, such language does not control interpretation of the operative terms of that provision."[156] The U.S. Supreme Court has endorsed the view that prologues should not be confused with operative law.[157]

Aside from the true meaning or operative force of the constitutional text, it cannot be overemphasized that the Sunshine Amendment would not refute the property rights argument *even if* the constitutional language of "a public office is a public trust" were on point and authoritative law. The characterization of a public office as a public trust is not inconsistent with *Tedder*. Recall that the *Tedder* opinion also insists that "[a] public office is a public trust,"[158] the *exact same phrase* used in the 1976 constitutional amendment. Logically, it does not follow that a constitutional provision stating "a public office is a public trust" could effectively invalidate a court

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153. See 48A FLA. JUR. 2D STATUTES § 56 (2d ed. 2024) ("The term 'preamble' is defined as an introductory statement in a constitution, statute, or other document generally preceding the enacting clause explaining the document's basis and objective.").

154. *Id.*

155. *Id.*

156. Dep't of State v. Fla. Greyhound Ass'n, 253 So. 3d 513, 521 (Fla. 2018) (citing Dorsey v. State, 402 So. 2d 1178, 1180 (Fla. 1981)).

157. District of Columbia v. Heller, 554 U.S. 570, 578 n.3 (2008) ("[A] court has no license to make [an inoperative clause] do what it was not designed to do.... [O]perative provisions should be given effect as operative provisions, and prologues as prologues."); *see also The U.S. Constitution: Preamble*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/us [https://perma.cc/PU4X-BFAR] ("The preamble is an introduction to the highest law of the land; it not the law. It does not define government powers or individual rights.").

158. State *ex rel.* Landis v. Tedder, 143 So. 148, 150 (Fla. 1932); *see also supra* notes 96-98 and accompanying text.

opinion that also states "[a] public office is a public trust." *Tedder* recognized property rights and public trusts within a broader theory of ownership.[159] Within the *Tedder* framework, property rights and public trusts coexist. Thus, the Sunshine Amendment's codification of the phrase "public trust" does not disrupt the *Tedder* framework.[160] The failure of the *Israel* court to appreciate the dual nature of property ownership that was so essential to the holding in *Tedder* was a glaring omission from its legal analysis.

In *Israel*, the court put forth a flawed interpretation of the Florida Constitution. The court misapplied laws narrowly pertaining to ethics in a procedural due process analysis. Moreover, the court based its ruling on the inoperative introductory phrase "[a] public office is a public trust" as if it were binding law. Most importantly, the court suggested that the Sunshine Amendment is inconsistent with *Tedder* when no conflict truly exists.

B. Post-1976 Supreme Court of Florida Opinions

According to the *Israel* court's analysis, the year 1976 was a watershed moment for the ownership rights of public office in Florida. The *Israel* court went so far as to claim that the passage of the Sunshine Amendment served as the precipitating event for Florida to no longer recognize property rights in public office.[161] It then pointed to two post-1976 cases decided by the Supreme Court of Florida that confirmed this theory.[162] More specifically, the *Israel* court cited a 2012 opinion that borrowed a direct quote from a 1982 opinion.[163] However, the court also acknowledged a major weakness

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159. *Tedder*, 143 So. at 150 ("A public office is a public trust, but the incumbent has to some extent a recognizable property right in it.").

160. This argument was made in Richard Keith Alan's aforementioned brief on behalf of Diyonne L. McGraw. Appellant's Reply Brief at 21-23, McGraw v. Banko, 2023 WL 7039511 (11th Cir. Oct. 26, 2023) (No. 22-12987-HH) ("*Tedder* is still controlling law in Florida. The additional language, 'a public office is a public trust', added to the Florida Constitution in 1976 is unavailing because the Florida Supreme Court took that into consideration when reaching its conclusion in *Landis v. Tedder*."). The Eleventh Circuit did not address it in its decision. *See generally* McGraw v. Banko, No. 22-12987, 2023 WL 7039511 (11th Cir. Oct. 26, 2023).

161. Israel v. DeSantis, No. 4:19cv576-MW/MAF, 2020 WL 2129450, at *9 (N.D. Fla. May 5, 2020).

162. *Id.*

163. *Id.*

in this reasoning: neither of the two cases cited the Sunshine Amendment.[164] More importantly, the *Israel* court should not have based its opinion on this recycled quote in the first place because the quote was mere dicta.

To support its theory that the Supreme Court of Florida no longer recognizes property interests in public office, the *Israel* court quoted a 2012 opinion, *In re Senate Joint Resolution of Legislative Apportionment 1176*, that declared "elected officials have no property rights to the office to which they have been elected."[165] At first glance, it seems irrefutable that this ruling by the Supreme Court of Florida nullifies its earlier holding in *Tedder*. But once again, context is crucial: this quote reflected the position of the state senate, not the Supreme Court of Florida.

The quote from the 2012 opinion was pulled directly from the 1982 opinion, *In re Apportionment Law-1982*. The issue in that case was whether a reapportionment of state senate districts meant that senators elected for four-year terms in 1980 needed to run again just two years later.[166] The senate contended that the state constitution did not require truncated terms upon geographic redistricting.[167] This argument was based upon the text of the state constitution specifically regarding senate terms.[168] Notably, the senators did not claim that their procedural due process rights had been violated.[169]

The only mention of "property rights" in public office appeared as the court explained the legal claim of holdover senators.[170] The passing reference to property rights was in the following sentence: "At the outset, the senate accepts the view that ... elected officials have no property rights to the office to which they have been elected."[171] When quoting this sentence in a 2012 opinion, though, the Supreme Court of Florida omitted the words "[a]t the outset, the

164. *Id.*

165. *Id.* (quoting *In re* Senate Joint Resol. of Legis. Apportionment 1176, 83 So. 3d 597, 662 (Fla. 2012)).

166. *In re* Apportionment L. Appearing as Senate Joint Resol. 1 E. 1982 Special Apportionment Session, 414 So. 2d 1040, 1045-46 (Fla. 1982) [hereinafter *In re Apportionment Law-1982*].

167. *See id.* at 1050.

168. *See id.* at 1046-50.

169. *See id.* at 1045.

170. *Id.* at 1046.

171. *Id.*

senate accepts the view that" from its opinion.[172] Read in its entirety, it becomes clear that this quote did not reflect an opinion of the Florida Supreme Court at all. Rather, the court was simply explaining that the senators were not claiming a violation of due process.[173] The court even emphasized that property interests were not an issue in the case by clarifying that "[t]he Florida Senate claims no such rights in its argument before this Court."[174] By preemptively disposing of this argument before declaring its ruling, the court acknowledged that the issue of whether there exist property rights in elected office was not even a question before the court. Accordingly, the court did not engage in any analysis on the legal issue of property rights, nor cite any precedents on the matter.[175] The ultimate narrow holding of the court was that the Florida Constitution required truncated senate terms.[176] Although it is true that the Florida Supreme Court found that senators were not entitled to serve out their full terms of office, the court's holding did not turn on recognition of a general property interest in elected office.[177] As a point inessential to its holding, the Supreme Court of Florida's brief mention of property interests in elected office in 1982 should be considered nothing more than obiter dicta.[178]

The passing mention of property rights in *In re Apportionment Law-1982* resurfaced in an opinion by the Supreme Court of Florida thirty years later.[179] The 2012 case, which also concerned state senate elections, tasked the Supreme Court of Florida with determining whether a redistricting scheme unlawfully favored incumbents.[180] Quoting directly from the 1982 opinion, the court noted,

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172. *See In re* Senate Joint Resol. of Legis. Apportionment 1176, 83 So. 3d 597, 662 (Fla. 2012).

173. *See id.*

174. *In re Apportionment Law-1982*, 404 So. 2d at 1046.

175. *See id.*

176. *Id.* at 1047-48 ("[T]he Florida Constitution, by its provisions, requires, upon reapportionment, that senate terms be truncated when a geographic change in district lines results in a change in the district's constituency.").

177. *Id.*

178. *See* 12A FLA. JUR. 2D *Courts and Judges* § 192 (2d ed. 2024) ("Obiter dicta is language in an opinion that is not essential to a decision or holding in a case and often serves to confound than to clarify jurisprudence in Florida." (footnote omitted)).

179. *See In re* Senate Joint Resol. of Legis. Apportionment 1176, 83 So. 3d 597, 662 (Fla. 2012).

180. *Id.*

"[a]s the Senate conceded in a prior reapportionment case, however, 'elected officials have no property rights to the office to which they have been elected.'"[181] In the next sentence, the court proclaimed that "[t]o the contrary, it is the voters who have the rights in the process by which their representatives are elected."[182] By fully relying on the 1982 quote to arrive at its conclusion, the court relied on mere dicta as though it were a legally binding precedent.[183] It also did not directly refute the *Tedder* court, which took no issue with voters having rights in the electoral process (alongside the rights of elected representatives).[184]

Given that the 1982 apportionment case did not result in any holding regarding property rights in elected office, the Supreme Court of Florida took the quote out of context thirty years later. And the *Israel* court continued down this path of improper reliance. The quote was relied upon again in 2022 when a court held that elected office is "not a property interest the Florida Supreme Court recognizes."[185] Some observers have lamented the fact that judges increasingly rely on dicta as authoritative sources.[186] The *Israel* opinion seems to be a prime example of the trend. The truth is that Florida law experienced no major inflection point upon the adoption of the Sunshine Amendment in 1976. This helps explain why the advisory opinion by Attorney General Bondi citing *Tedder* as controlling law came after the 1976 Sunshine Amendment, the 1982 opinion, and the 2012 opinion.[187]

Even the *Israel* court itself acknowledged its somewhat precarious reasoning in relying on a rogue quote to invalidate such a landmark decision. Quoting *Puryear v. State*, the *Israel* court recognized that "[w]here a court encounters an express holding from [the Supreme

181. *Id.* (quoting *In re Apportionment Law-1982*, 404 So. 2d at 1046).

182. *Id.*

183. *See* 12A FLA. JUR. 2D, *supra* note 178 ("Dicta has no binding legal effect and, thus, is without force as judicial precedent." (footnote omitted)).

184. *See* State *ex rel.* Landis v. Tedder, 143 So. 148, 150 (Fla. 1932).

185. McGraw v. Banko, No. 1:21-cv-163-AW-MAF, 2022 WL 19333345, at *2 (N.D. Fla. Aug. 12, 2022).

186. *See, e.g.*, Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006) ("Judges do more than put faith in [dicta]; they are often treated as binding law. The distinction between dictum and holding is more and more frequently disregarded.").

187. *See supra* notes 103-08 and accompanying text.

Court of Florida] on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply [the Supreme Court of Florida's] express holding in the former decision."[188] Despite its apparent admission to relying on dicta, the *Israel* court persisted with its consequential decision not to follow the precedent set in *Tedder*, resting its conclusion upon the Sunshine Amendment.[189] But the principle in *Puryear* explains exactly why the express holding in *Tedder* remains controlling law in Florida. Given that the Supreme Court of Florida never expressly overruled *Tedder* and that the Sunshine Amendment's use of the phrase "public trust" did not actually contradict the central holding in *Tedder*, it should remain the prevailing law in Florida that public officials possess property rights in their positions while simultaneously serving in a public trust. The *Tedder* era lives on—or at least it should.

C. Israel *as Precedent*

The *Israel* decision has already been relied upon as precedent. In the 2023 case *Coker v. Warren*, a court in the Middle District of Florida adopted the *Israel* court's legal reasoning to similarly conclude that elected officials possess no property interests in their positions.[190] There, the plaintiff claimed that she was wrongfully denied her seat on the City Council of Lake City, Florida.[191] After appointing Befaithful Coker to fill a vacancy on the council, Councilmember Jake Hill changed his mind and refused to formally install her.[192] Coker argued that since she had already taken an oath of office upon her appointment, she was entitled to the position.[193] Ultimately, the court dismissed the claim because "the purportedly wrongful deprivation of th[e] seat cannot form the basis of a procedural due process claim."[194]

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188. Israel v. DeSantis, No. 4:19cv576-MW/MAF, 2020 WL 2129450, at *10 (N.D. Fla. May 5, 2020) (alterations in original) (quoting Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002)).
189. *See id.* at *9.
190. *See* 660 F. Supp. 3d 1308, 1334-35 (M.D. Fla. 2023).
191. *See id.* at 1321-24.
192. *Id.* at 1322.
193. *Id.*
194. *Id.* at 1335.

Like the court in *Israel*, the *Coker* court incorporated both federal and state law into its reasoning.[195] Both opinions cite *Taylor* for the claim that there is no federally granted property right in public office.[196] Unlike the *Israel* court, though, the *Coker* court stopped short of acknowledging the subsequent U.S. Supreme Court finding in *Roth* that states can grant property rights unto public employees.[197] Nevertheless, the *Coker* court turned to a brief overview of state law that included two key sources: the Sunshine Amendment and the *Israel* opinion.[198]

Like *Israel*, the *Coker* court quoted the Florida Constitution as saying that "[a] public office is a public trust."[199] The *Coker* opinion then quoted *Israel* to find that "[i]n Florida law, as in federal law, public service is a privilege, not a right."[200] Notably absent from the *Coker* opinion was even a passing mention of *Tedder*.[201] Accordingly, Befaithful Coker was denied the council seat.[202]

Without an investigation into the flaws of its reasoning, the *Israel* opinion appears on its face to offer a thorough and logical analysis of property rights and public office. As such, it will be tempting for courts to cite it. When they do, the state of the law in Florida will only become more muddled and depart further from the actively binding precedent in *Tedder*. As evidenced by *Coker*'s heavy reliance on *Israel*, the dominoes have already started to fall.

IV. WHAT PROCESS IS DUE?

The presence of a property interest is only a preliminary step in a full procedural due process inquiry. Once it is established that a property interest is under threat, a court can proceed with determining what process is due given the circumstances of each situation. Ultimately, it is up to federal courts to conduct a *Mathews*

195. *See id.* at 1334-35.
196. *Id.* at 1334 (citing Taylor v. Beckham, 178 U.S. 548, 576-77 (1900)); Israel v. DeSantis, No. 4:19cv576-MW/MAF, 2020 WL 2129450, at *9 (N.D. Fla. May 5, 2020) (citing the same).
197. *Compare Israel*, 2020 WL 2129450, at *9 (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)), *with Coker*, 660 F. Supp. 3d at 1334-35 (failing to cite *Roth*).
198. *See Coker*, 660 F. Supp. 3d at 1334-35.
199. *Id.* at 1335 (quoting FLA. CONST. art. II, § 8).
200. *Id.* (quoting *Israel*, 2020 WL 2129450, at *10).
201. *See id.* at 1334-35.
202. *Id.* at 1336.

v. Eldridge analysis to answer the question of what process is due to elected state officials facing deprivation of property interests. The goal of the *Mathews* balancing test is to arrive at "a determination as to when, under our constitutional system, judicial-type procedures must be imposed ... to assure fairness."[203] Florida's removal procedures are outlined in Rule Twelve of the state senate's internal manual.[204] Codified procedures promulgated by state law or rules are not necessarily satisfactory, even where property interests are granted by the state.[205] The U.S. Supreme Court has opined that it is possible for state procedures to fall short of the procedural due process rights guaranteed by the Fourteenth Amendment.[206] If elected officials possess property rights in their positions, it is worth asking whether Florida's current handling of senate removal hearings is constitutionally sufficient.

In the years following the adoption of the 1968 Florida Constitution, an article in the *University of Florida Law Review* described the new senate removal hearing requirements as "the intended means of correcting any misuse of the power."[207] The authors added: "The senate is entrusted with the great duty and responsibility to ensure that the awesome executive power of suspension is used to achieve its constitutionally intended public purposes and to see that no officer is removed for grounds other than those provided by law."[208] The senate was constitutionally obligated to review suspensions by the governor "with scrupulous regard for the essential requirements of due process."[209] From its inception, the

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203. Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

204. FLA. SENATE, RULES AND MANUAL 2024-2026 78-82 (2024), https://www.flsenate.gov/UserContent/Publications/SenateRules/2024-2026_Rules.pdf [https://perma.cc/R9E9-KRGU].

205. Israel v. DeSantis, No. 4:19cv576-MW/MAF, 2020 WL 2129450, at *12 (N.D. Fla. May 5, 2020) ("[A]dherence to the procedures provided by state law for an invasion of a protected interest does not establish that the state provided due process.").

206. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). Prior to *Loudermill*, Chief Justice William Rehnquist touted the "bitter with the sweet" theory that posited state procedures were necessarily sufficient process to protect state-created rights. *See* Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974). The holding in *Loudermill* definitively rejected this theory. *Loudermill*, 470 U.S. at 541.

207. Barr & Karl, *supra* note 6, at 636 n.7.

208. *Id.* at 637.

209. *Id.*

senate hearing was intended to guard against abuses of power by ensuring due process.[210]

Prior to subjecting suspensions to the *Mathews* test, it should be acknowledged that the Supreme Court of Florida found in *State ex rel. Hatton v. Joughin* that a removal hearing overseen by the Florida Senate satisfied the constitutional requirements of procedural due process.[211] For some legal minds, this precedent might settle the question. But since it was decided in 1931, the *Joughin* case preceded the recognition of new property, the due process revolution, and the subsequent emergence of the standardized *Mathews* balancing test. Given modern jurisprudence, the question of whether existing removal procedures are constitutional merits reconsideration.

A. Mathews v. Eldridge *Analysis*

Mathews v. Eldridge held that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[212] The unique circumstance of suspensions can make such a heavily fact-dependent inquiry rather difficult to navigate. Prior to conducting its own *Mathews* analysis, the *Israel* court conceded that precedent was of "limited utility" because removals "do not ordinarily arise in everyday procedural due process cases."[213]

The first step in a *Mathews* due process analysis is to consider the nature and degree of potential deprivation given the particular private interest under threat.[214] Even with its rejection of a property interest, the *Israel* court still found great significance in the private interest at stake in a removal case.[215] In its discussion of an elected official's *liberty* interest, the *Israel* court acknowledged that the

210. *See id.*; Note, *The Due Process Rights of Public Employees*, 50 N.Y.U. L. REV. 310, 318 (1975) ("[U]nrestricted removal promotes abuse rather than productivity.").

211. 138 So. 392, 395 (Fla. 1931).

212. 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

213. Israel v. DeSantis, No. 4:19cv576-MW/MAF, 2020 WL 2129450, at *12 (N.D. Fla. May 5, 2020).

214. *Mathews*, 424 U.S. at 341 ("[T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process.").

215. *Israel*, 2020 WL 2129450, at *26.

private interest at stake was "connected on a deep level with the foundational functioning of our representative system of government."[216] The court also deemed the potential negative implications of an erroneous removal to "have greater dimension than they do in an ordinary case."[217] Once the significance of an elected official's *property* interest is properly taken into account, the degree of potential deprivation is even more substantial.

This Note has already established that elected officials in Florida have a legitimate claim of entitlement to their public employment and possess a private property interest in their positions. Given that the degree of potential deprivation influences procedural due process analysis, it is vital to acknowledge the import ascribed to such an interest. The U.S. Supreme Court has opined that "the significance of the private interest in retaining employment cannot be gainsaid," adding that it has "frequently recognized the severity of depriving a person of the means of livelihood."[218] The potential loss of employment calls for particularly robust due process protection—the potential loss of one's job as an elected official should be no exception.[219]

In addition to the private interest at stake, the *Mathews* test requires an assessment of the public interest at stake.[220] Typically, public interest analysis considers the administrative cost and burden to the government in providing extensive procedures. The public interest in a suspended official's removal hearing is heightened.[221] Removal of a duly elected official does not just deprive a single public employee of a job—it necessarily subverts the expressed will of the people. The potential for unwarranted disenfranchisement of voters raises the stakes of a pre-termination hearing of suspended elected official. Accordingly, there is a special public interest in preventing *wrongful* removals. Since erroneous removal of an elected official can result in drastic and undemocratic changes

216. *Id.* at *14.
217. *Id.*
218. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985).
219. Perhaps a court might assign more significance to the loss of a full-time elected position in comparison to a part-time elected position. This means that the process due to different types of positions could differ.
220. *See* Mathews v. Eldridge, 424 U.S. 319, 347 (1976).
221. *Id.*

in public policy,[222] adequate procedural safeguards to ensure that removals are consistent with the Florida Constitution are worth an investment of public resources.

The public undoubtedly has a strong interest in a properly functioning democracy where representatives may serve without fear of retribution. The attorney for suspended state attorney Monique Worrell posited that if governors are able to remove prosecutors "simply because they disagreed with [a prosecutor's] policies and categorize that as a neglect of duty or incompetence ... then that will have a substantial chilling effect on how state attorneys perform their roles or their willingness to serve."[223] The *Israel* court concluded that the government interest in providing meaningful procedure to a suspended public official was "higher than it would be in many other procedural due process cases."[224]

In a removal case, assessment of the private interest at stake is intertwined with consideration of the government interest at stake.[225] Given the extremely high stakes for both the elected official and the populace, there seems to be underrated wisdom in the hybrid-interest theory of *Tedder*. There is no need to choose between property and trusts when both could and should coexist within such a unique context. Within the *Mathews* framework, the public trust component of the *Tedder* theory indicates even more of a need for a robust process. Following a campaign and an election, both political candidates and their voters have interests in seeing elected representatives serve full terms. The process due to a suspended official should reflect both of those unique interests. In fact, *Tedder*

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222. After suspending elected prosecutor Monique Worrell in 2023, Governor DeSantis appointed Andrew Bain to replace her. In November 2024, voters elected Worrell back into office with 57 percent of the vote. Maria Serrano, *State Attorney Race: A Change of Leadership and Next Steps in Monique Worrell's Vindication Journey*, SPECTRUM NEWS 13 (Nov. 6, 2024, 3:40 PM), https://mynews13.com/fl/orlando/news/2024/11/06/state-attorney-race--a-change-of-leadership-and-next-steps-in-monique-worrell-s-vindication-journey [https://perma.cc/9MGJ-XHX7].

223. Akela Lacy, *DeSantis Lawyer Can't Name a Single Policy that Led to Reform Prosecutor's Suspension*, INTERCEPT (Dec. 6, 2023, 5:07 PM), https://theintercept.com/2023/12/06/ron-desantis-supreme-court-monique-worrell/ [https://perma.cc/N2Q8-K9EV].

224. Israel v. DeSantis, No. 4:19cv576-MW/MAF, 2020 WL 2129450, at *14 (N.D. Fla. May 5. 2020). Despite this higher interest, the court ultimately gave more weight to the legislature's "discretion and authority to operate in an orderly and efficient fashion." *Id.* at *26.

225. *See id.* at *11.

demands it.[226] Suspended officials and their constituents deserve a process that is taken as seriously as its potential consequences.

The remaining factor of a procedural due process analysis is assessing the risk of erroneous deprivation created by current procedures.[227] The *Mathews* court explained that the "fairness and reliability of the existing pretermination procedures" should be evaluated to help determine the likelihood of a wrong decision.[228] When the risk of erroneous deprivation is deemed too high, a court may consider whether additional or substitute procedural safeguards could decrease the risk.[229]

As part of his legal challenge, Scott Israel alleged that undisclosed ex parte communications between the Governor's Office and individual senators as part of a pre-hearing lobbying effort compromised his removal hearing.[230] The court admitted that "it would be naïve to suggest the risk of an erroneous deprivation [was] not to some extent heightened" by these communications.[231] But the court ultimately dismissed Israel's concerns because he received "a remarkably full and complete opportunity to present his case."[232] The *Israel* court held that "the panoply of other procedural protections" outweighed Israel's valid "significant concerns about the integrity of Florida's suspension and removal process."[233] Presence of actual bias on the part of adjudicators, though, would undermine the court's argument. Yes, a biased tribunal heightens the risk of erroneous deprivation. But an impartial adjudication is not a factor of the *Mathews* balancing test to be weighed against other considerations.[234] Bias cannot be outweighed by other factors; bias discredits the entire process. As a fundamental requirement that undergirds the basic concept of authentic checks on government power, a

226. *See* State *ex rel.* Landis v. Tedder, 143 So. 148, 150 (Fla. 1932).

227. *See* Mathews v. Eldridge, 424 U.S. 319, 341 (1976).

228. *Id.* at 343.

229. *See id.* at 335.

230. *See* Israel v. DeSantis, No. 4:19cv576-MW/MAF, 2020 WL 2129450, at *25 (N.D. Fla. May 5, 2020).

231. *Id.* at *26.

232. *Id.*

233. *Id.*

234. *See* Thomas J. Casamassima, *Fair Hearing*, 27 L.A. LAW. 47, 48 (2004) ("The balancing test, however, has no role in addressing the most fundamental, and perhaps most challenging, requirement of administrative due process: the right to a fair and impartial adjudicator.").

question regarding adjudicative impartiality should be subject to its own distinct inquiry.

B. Impartial Decisionmaking

Impartiality is indispensable to the integrity of procedural due process, for no amount of additional procedure can change an outcome if the adjudicator has already made up his or her mind.[235] Perhaps because most procedures are conducted by judges or administrative review boards, the impartiality requirement of due process is taken for granted. Impartiality deserves special attention when assessing the unique circumstance of a removal hearing where state legislators may overturn the will of the people.

Doctrinally, there is a rebuttable presumption against the existence of bias.[236] If an adjudicator is accused of bias, courts will objectively assess "whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[237] There can be violations of procedural due process when there are "sufficient indications that the adjudicator has prejudged the facts of the case."[238] Even if just one member of a group of adjudicators is found to be unduly biased, it can be considered a structural defect that "compromise[s] the decisionmaking of the whole body."[239] Applying these principles to the Florida Senate, or any state legislature, in the context of a high-profile removal casts serious doubt on the integrity of the procedure. It also directly refutes the *Israel* court's notion that potential bias may be "outweighed" by other procedural safeguards.[240]

Commentators have suggested that political biases motivated recent suspensions of elected officials in Florida.[241] These observers point to reports that the DeSantis administration scouted for a

235. *See, e.g.*, Schweiker v. McClure, 456 U.S. 188, 195 (1982) ("[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.").

236. 32 WRIGHT & MILLER, *supra* note 33, § 8143 ("Claims of bias must overcome a presumption of regularity, honesty, and integrity among adjudicators.").

237. Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 881 (2009).

238. 32 WRIGHT & MILLER, *supra* note 33, § 8143.

239. *Id.*

240. *See* Israel v. DeSantis, No. 4:19cv576-MW/MAF, 2020 WL 2129450, at *26 (N.D. Fla. May 5, 2020).

241. *See supra* notes 9-11 and accompanying text.

reform prosecutor to suspend and the fact that he touted suspensions in presidential primary debates.[242] In one debate, DeSantis referenced suspensions by declaring, "I am sick of Republicans who are not willing to stand up and fight back against what the left is doing to this country."[243] He then followed up by noting, "We beat George Soros when we removed two of his radical district attorneys."[244] In a concurring opinion, the Eleventh Circuit quoted this language as evidence that DeSantis's decision to suspend was unconstitutionally motivated by politics rather than a genuine concern about neglect of duty or incompetence.[245] DeSantis's rationale for removing Sheriff Scott Israel did not sit well with Senator Tom Lee, the sole Republican to vote against Israel's removal.[246] Lee worried about the precedent of a seemingly political suspension, warning that "in the future there could be a Democratic governor who dislikes an aggressive policing policy by a Republican sheriff and subsequently removes him from office.[247]

In theory, procedural due process serves as a check so that officials improperly suspended by the governor for political reasons can be reinstated by the senate. But if the issue of removal has already been politicized, it might be difficult for politicians to divorce themselves from the political consequences of their vote. Even if senators are explicitly tasked with the obligation to act impartially in removal hearings, one could argue that a state senate hearing is such an inherently political procedure that it does not comport with traditional notions of due process. As an elected policymaking body, the state senate is a quintessential political body. While a hearing held by the senate may not be considered an *inherently* political process, perhaps it has become so *politicized* in

242. *See generally* Berzon & Bensinger, *supra* note 13.

243. *RNC Fourth Presidential Primary Debate 12/06/23 Transcript*, REV (Dec. 7, 2023), https://www.rev.com/blog/transcripts/rnc-fourth-presidential-primary-debate-12-06-23-transcript [https://perma.cc/2Y8V-A6VV].

244. *Id.*

245. *See* Warren v. DeSantis, 90 F.4th 1115, 1139 (11th Cir. 2024) (Newsom, J., concurring). Recall that the Eleventh Circuit lacked the jurisdiction to reinstate the elected official.

246. *Florida Republican Senator on Fence Ahead of Vote on Former Broward Sheriff*, CBS NEWS (Oct. 22, 2019, 6:13 PM), https://www.cbsnews.com/miami/news/florida-republican-senator-on-fence-ahead-of-vote-on-former-broward-sheriff/ [https://perma.cc/UM37-ZFJG].

247. *Id.*

recent years that it is no longer the proper forum for impartial adjudication of removals, at least in high-profile cases.[248]

State senate leaders have dismissed claims of politicization. Bill Galvano, the former Republican President of the Florida Senate, flatly denied accusations of partiality and insisted that he would "continue to make every effort to ensure fair, unbiased due process for all involved with this important constitutional responsibility of the Florida Senate."[249] Kathleen Passidomo, a later Republican Senate President, discouraged senators from speaking out publicly about the merits of the suspensions.[250]

Although a speculative perception of bias is not enough to invalidate a procedure, a general loss of confidence in a procedure can have a chilling effect on those who might utilize it. Susan Bucher, an elections supervisor suspended by DeSantis, declined to even contest her suspension in a senate hearing, believing that she could not receive a fair adjudication in such a politically partisan environment.[251] Upon her suspension, Bucher called for legal reform of gubernatorial removal powers, stating that "[t]here should be minimum standards for removal of elected officials by a governor so that political agendas are not the only reason."[252] In theory, such standards already exist in the Florida Constitution.[253] Not only are standards for suspension in place, but the senate is supposed to serve as a check to ensure those standards are followed.[254] But if the

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248. Although a potential alternative forum for adjudication of suspension cases is outside the scope of this Note, the possibility should be considered. Perhaps adjudication should go to a dedicated quasi-judicial body like a nonpartisan commission or, more practically, an explicitly judicial body like the Supreme Court of Florida itself. The goal of an alternative forum would be to provide a fair tribunal to neutrally assess whether evidence of the basis for a suspension lies within the Governor's legal authority granted by the state constitution. The ideal system would be one that effectively prevents *wrongful* removals while upholding *rightful* ones.

249. Bennett, *supra* note 23.

250. *See* Memorandum from Kathleen Passidomo, President of the Florida Senate, Regarding Executive Order of Suspension 23-160, State Attorney Monique Worrell (Aug. 9, 2023), https://www.flsenate.gov/usercontent/session/executivesuspensione/Worrell_Monique/080923MemotoAllSenatorsfromPresident.pdf [https://perma.cc/2LQ9-JFHC].

251. Bennett, *supra* note 23.

252. *Id.* (commenting also that "Florida elected officials should not be afraid to express their views and stand strong for their constituents without fear of being removed from office through fabricated allegations which would not stand up in a court of law").

253. FLA. CONST. art. IV, § 7(a).

254. *Id.* art. IV, § 7(b).

infiltration of partisan political biases has compromised the integrity of that check, the risk of erroneous deprivation might be too great for a senate hearing to satisfy due process.

Although it is true that procedure often "need not be elaborate,"[255] a meaningful hearing cannot be purely performative. The principles of procedural due process do not permit bias to be outweighed within a balancing test. To prevent erroneous deprivation of rights, unbiased adjudicators cannot already have their minds made up prior to the hearing or consider personal political gain in the course of making a decision.[256] Put simply, the requirement that a due process hearing be meaningful cannot be itself meaningless. The process due to suspended officials must account for the real risk that politicization poses to an official's right to a meaningful opportunity to be heard.

C. A Quasi-Judicial Proceeding

The *Mathews v. Eldridge* balancing test determines "whether an evidentiary, quasi-judicial hearing must be held as opposed to some less formal means of securing evidence and rendering a decision."[257] A *Mathews* analysis of suspensions reveals an important private interest, unique public interest, and serious risk of erroneous deprivation. Under the circumstances, only a removal hearing that is *quasi-judicial* in nature can uphold the integrity of procedural due process. Anything short of a quasi-judicial proceeding fails to afford suspended elected officials adequate due process that respects the significant private and public interests at stake and minimizes the risk of erroneous deprivation.

In a quasi-judicial role, decisionmakers do not *formulate* the law like legislators, but rather *apply* the law like judges.[258] Although it might run contrary to a lawmaker's political instincts, acting like a judge limits discretion by requiring "impartial decisions based solely

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255. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545 (1985).

256. *See* 32 WRIGHT & MILLER, *supra* note 33.

257. Robert Lincoln, *Executive Decisionmaking by Local Legislatures in Florida: Justice, Judicial Review and the Need for Legislative Reform*, 25 STETSON L. REV. 627, 685 (1996).

258. *See* Bd. of Cnty. Comms. of Brevard Cnty. v. Snyder, 627 So.2d 469, 474 (Fla. 1993).

on fact and law."[259] Quasi-judiciality depoliticizes the decisionmaking process and ensures that a fair tribunal determines whether the deprivation of one's constitutionally protected rights is lawful.

Florida's removal proceedings are already relatively elaborate, with many of the trappings of a formal evidentiary hearing. Senate rules outline the process for fact finding and allow for the assistance of a special master and advisory reports.[260] Hearings feature oral arguments with questioning and senators are instructed to use the standard of "[a] preponderance of the evidence" to arrive at their judgment.[261] These guidelines, particularly the inclusion of an evidentiary standard, seem to implicitly indicate that hearings are judicial-like. But the rules stop short of explicitly describing hearings as quasi-judicial. While the pomp and circumstance of removal hearings might give the facade of a quasi-judicial proceeding, they are not authentically quasi-judicial in practice.

During Scott Israel's removal hearing, it became evident that there is profound confusion over the proper role of a senator in a removal hearing. Arguing before senators in favor of removing Israel, George Levesque, the attorney representing DeSantis, told senators:

> You're not a court. You're *not expected to act like a court*. If the people of Florida intended you to act like a judge, they would've given [removal power] to the judiciary, or they would've said in the constitution, "Please act like a judge when you're doing this." They did not. At the end of the day, [removal] is *a political decision*.[262]

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259. *Rule of Law and the Courts*, ABA (Aug. 22, 2019), https://www.americanbar.org/groups/public_education/resources/rule-of-law/rule-of-law-and-the-courts/ [https://perma.cc/3RPB-ZKXN].

260. *See* FLA. SENATE, *supra* note 204.

261. *Id.*

262. The Florida Channel, *Hearing on EO 19-14 Mr. Scott Israel Before the Senate Committee on Rules*, 2019 Leg., Special Sess. I 02:14:37-:56 (Fla. Oct. 21, 2019) [hereinafter *Hearing on EO 19-14*], https://thefloridachannel.org/videos/ 10-21-19-senate-rules-committee-part-1/ [https://perma.cc/9B27-S79G] (statement of George Levesque, attorney for Governor Ron DeSantis) (emphases added).

A quasi-judicial body *is* expected to act like a court.[263] Furthermore, quasi-judicial decisions are *legal* decisions, not *political* ones.[264] Given this confusing dynamic, State Senator Gary Farmer asked Levesque directly, "You don't think this is a quasi-judicial procedure that we're in right now?"[265] Notably, Levesque responded "I do not. It is a legislative process."[266] The implications of this statement should not be overlooked: if a removal hearing is legislative, the hearing falls short of satisfying the procedural due process guarantees of the Fourteenth Amendment. If no property interests in elected office are recognized, then perhaps Levesque's argument that removal is a mere legislative process might carry more weight. But if *Tedder* is controlling law (which this Note argues is the case) and constitutional rights are at stake, then procedural due process demands that a hearing of this magnitude be quasi-judicial.

Reemphasizing his belief that a removal vote is political, Levesque told senators that the motivations behind their ultimate decision to remove or reinstate were immaterial. Levesque indicated that senators could treat the decision whether to remove an elected official with nearly unfettered discretion like any other legislative vote. He suggested that:

> Any senator should use whatever moves his conscience or her conscience in making the vote. That's all that matters. Nobody gets any inquiry into those motivations. And they shouldn't. Just like any other piece of legislation that this body passes. You vote for the reasons that you vote, and that's whatever moves your conscience.[267]

A quasi-judicial procedural due process hearing, though, is not "[j]ust like any other piece of legislation."[268] A quasi-judicial decisionmaker cannot act like a politician and vote based on

263. *Quasi-judicial*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/quasi-judicial [https://perma.cc/XT77-8VKH] ("Quasi-judicial means 'court like.'").

264. *See Rule of Law and the Courts*, *supra* note 259.

265. *Hearing on EO 19-14*, *supra* note 262, at 03:17:48-:53 (statement of Gary Farmer, Florida State Senator).

266. *Id.* at 03:17:58-:18:02 (statement of George Levesque, attorney for Governor Ron DeSantis).

267. *Id.* at 03:18:53-:19:16.

268. *Id.* at 03:19:07-:09.

whatever moves his or her conscience because quasi-judicial decisions must be based on neutral interpretations of evidence.[269] The special master in Israel's hearing, a neutral party appointed to collect facts and make an advisory opinion, recommended reinstatement, concluding that "the evidence offered has not demonstrated that Sheriff Israel should be removed from office."[270] A majority of senators disagreed.[271] Senator Annette Taddeo, a Democrat who voted in favor of Israel's removal, admitted that her decision "was a vote of my conscience."[272] Perhaps she would have voted differently if knowlingly bound by quasi-judicial decisionmaking. But Levesque told senators that they could base their decision on virtually any reason whatsoever, including political or partisan bases, saying:

> I would certainly hope that the senators are not making this decision based upon jerseys, however there are lots of things that come forward in the process. It's not a court. We don't have the rules of evidence. We don't have those types of strictures that courts have. So you can—and I certainly would encourage you to—listen to the public comment.... Listen to the people in your districts. Consider all the things that a senator considers when he's voting whether he should support ... a bill or oppose it.[273]

If senators followed Levesque's directives, any hope for a truly impartial adjudication would be dashed. Ultimately, Israel's 25-15 removal vote fell mostly along partisan lines, with only three Democrats voting for removal and one Republican voting against removal.[274] While politicians can (and should) typically listen to the

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269. *See* Lincoln, *supra* note 257, at 686; Goldberg v. Kelly, 397 U.S. 24, 271 (1970).

270. J. DUDLEY GOODLETTE, REPORT AND RECOMMENDATION OF SPECIAL MASTER 32 (2019), https://www.flsenate.gov/usercontent/session/executivesuspensions/israel_scott/20190924EO19-14ReportandRecommendationofSpecialMasterGoodlette.pdf [https://perma.cc/RH82-3VMF].

271. *See Florida Senate Votes to Permanently Remove Former Broward Sheriff Scott Israel*, CBS NEWS (Oct. 23, 2019, 11:23 PM), https://www.cbsnews.com/miami/news/florida-senate-votes-25-15-not-to-reinstate-former-sheriff-scott-israel/ [https://perma.cc/D485-MSGB].

272. *Id.* ("[Taddeo] said [her vote] boiled down to listening to the wishes of the Parkland families, several of whom watched the Senate proceedings from the gallery.").

273. *Hearing on EO 19-14*, *supra* note 262, at 03:19:34-:20:12.

274. *See Florida Senate Votes to Permanently Remove Former Broward Sheriff Scott Israel*, *supra* note 271.

people in their districts and even consider how a decision might affect reelection chances, it is the duty of those entrusted with acting in a judicial capacity to insulate themselves from politics.[275] In a quasi-judicial hearing, decisionmakers may only consider the evidence presented to them and neutrally apply the law.[276] Elected officials in Florida are entitled to the fullest extent of procedural due process protections under the U.S. Constitution; it is inappropriate for state senators to simply vote their political or personal conscience.

A legislative procedure that allows for political calculations runs too high a risk of erroneous deprivation to satisfy the *Mathews v. Eldridge* test. Fairer process is due. A removal hearing that is not authentically quasi-judicial should be considered an unconstitutional violation of procedural due process. At the very least, the quasi-judicial nature of removal hearings should be codified into the senate's rules or even state law. Such reform could also enact other safeguards associated with quasi-judicial proceedings like prohibiting ex parte communications or installing a nonpartisan presider such as the Chief Justice of the Supreme Court of Florida. Regardless of how it is resolved, the status quo must change in order to better comport with traditional notions of procedural due process.

CONCLUSION

Nearly a century ago, the Supreme Court of Florida determined in *Tedder* that elected officials possess private property rights in their positions.[277] Those property interests should still be recognized today. A thorough and nuanced examination of the law reveals that the Florida Supreme Court has never repudiated its decision, nor was its holding superseded by a constitutional amendment. Simply put: *Tedder*'s not dead.

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275. *See Rule of Law and the Courts*, *supra* note 259 ("An independent judge can assure that your case will be decided according to the law and the facts and not a shifting political climate."); *The Judicial Branch*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/ [https://perma.cc/9KMQ-X8L3] ("Judges and Justices serve no fixed term—they serve until their death, retirement, or conviction by the Senate. By design, this insulates them from the temporary passions of the public, and allows them to apply the law with only justice in mind, and not electoral or political concerns.").

276. *See* Lincoln, *supra* note 257, at 686; Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

277. *See* State *ex rel.* Landis v. Tedder, 143 So. 148, 149 (Fla. 1932).

Consistent with *Tedder*, the process due to suspended officials should recognize the significant interests of *both* elected representatives *and* their constituents. The stakes are high. A wrongful removal would not only deprive an official of their position, but undermine the will of the people. To mitigate against the threat of a politicized process, the circumstances of suspension hearings call for proceedings that are authentically quasi-judicial.

No individual in the United States can be deprived of life, liberty, or property without proper notice and a meaningful opportunity to be heard before an impartial adjudicator. This simple concept strives to ensure that the rights of citizens are zealously guarded against abuses of power. The power to suspend and remove duly elected public officials is an important one that can serve a worthy purpose. Procedural due process, when exercised correctly, serves as a constitutional check to ensure this awesome power is wielded properly. Adherence to the fundamental principles of due process will help instill confidence in Florida voters that democracy and the rule of law are alive and well in the Sunshine State.

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