Twenty-Five Years After Goldberg v. Kelly: Traveling From the Right Spot on the Wrong Road to the Wrong Place

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INTRODUCTION

When A.A. Milne wrote,
"No one can tell me,
Nobody knows,
Where the wind comes from,
Where the wind goes,"
he could have been discussing the procedural due process revolution of the early seventies as much as he was discussing the wind. Beginning with *Goldberg v. Kelly* in 1970, the revolution blew in almost from nowhere changing notions not only of process, but of property and deprivation as well. By 1976, however, the revolution had passed as inexplicably as it had arrived. Yet, although the revolution ceased to blow through the chambers of the Supreme Court, its marks remained on the contours of the Court's procedural due process landscape. These marks were perhaps not as pronounced as they might have been, but they were still clearly present.

In some sense, the revolution never left academic circles. *Goldberg v. Kelly* was for years the heart of the "Metaprocedure" course taught at Yale by Owen Fiss and the late Bob Cover. Through at least the early eighties, several years after its test had been altered and its holding severely restricted, the case continued to enjoy attention in at least three courses at Harvard while also figuring prominently in some moot court problems there. In 1990, Brooklyn Law School threw a symposium to

3. Although one could argue that Arnett v. Kennedy, 416 U.S. 134 (1974) (plurality opinion), signaled the end, much still remained unresolved after Arnett. See infra notes 678-89 and accompanying text. For this reason, Mathews v. Eldridge, 424 U.S. 319 (1976), has been chosen to mark the end of the revolution because it was in *Mathews* that the Court actually settled on its procedural due process approach. *Id.* at 334-35.
4. "Metaprocedure" was the term used to capture the way Professors Fiss and Cover taught the required first year procedure course, and the way many of their students went on to teach it at other institutions. In addition to drawing from the Cover, Fiss, and Resnik casebook, the course also drew from a collection of readings compiled by Cover (continued)
Such attention is not simply nostalgic yearning. Rather, the cases that mark this revolution provide the reader with helpful insights into what procedural due process currently is and what it can and should become. The procedural due process revolution was not a constant force driving cases in a single direction for several years. Instead, it was a period of alternating gusts and stillness marked by a host of different tests. During this time, the Court searched for the origins of property and liberty and tried to measure the adequacy of procedures with a wide variety of presumptions and balancing tests. In retrospect, these tests have proven to be enlightening not only in what they considered but also in what they ignored.

In the end, the Supreme Court settled on a balancing test that was probably neither the best nor the worst of the tests considered. One could praise that balance as more realistic than some tests but criticize it for being less idealistic than others. Its structure probably prevented consideration of concerns that should have been relevant, but one might well suspect that not considering some relevant concerns has little practical significance. Given the subjectivity that balancing allows, the result in any given case may depend more on the outcome that a court desires than on the concerns considered anyway.

It is in this latter recognition that one finds an urgency to study the cases of the revolution. The current test, like any balancing test, is vulnerable. In the right hands, it can yield the right results, but in the wrong hands, it may not do so. The question then becomes how one distinguishes the right hands from the wrong hands. To make such distinctions, one must understand where we are as a nation and where we...
want to go with respect to the interests we want to promote. These issues always find a way to raise themselves in these cases. Are we, as Brennan suggests, seeking community,7 or are we, as Black suggests, seeking protection from the State?8 Are we a people who all suffer when one of us suffers,9 or are we a people who find our societal interests defined by Governmental interests?10 Do we structure our relationships in terms of love,11 or do we structure them in terms of rights?12

It is not surprising that such personal questions appear at the heart of a procedural due process debate. Granted some may be quick to pass procedure off as purely mechanical, but in reality, it goes to our core more fundamentally than does substance. Substantive law says only what we will protect, and that decision can often require only a commitment of words. Procedural law, however, says what we are willing to sacrifice to do that protecting, and needless to say, our actions can often speak more loudly about us than can our words.

The five parts of this paper will consider all this in greater detail. Part One of this paper will consider the state of procedural due process before the revolution. Part Two will consider how Goldberg began that revolution and will focus on not only Justice Brennan's majority opinion but also the lower court opinions preceding it and Justice Black's dissent. Part Three will examine the cases following Goldberg: first, those that took advantage of the new freedom Goldberg had set in motion; second, those that sought to settle on a final test; and third, those that signaled what that test might become. Finally, Part Four will consider what the legacy of Goldberg should be, and a conclusion will follow.

I. AN EVOLVING PLAYING FIELD: DUE PROCESS BEFORE GOLDBERG V. KELLY

Prior to 1970 and Goldberg v. Kelly,13 the Constitution protected from government interference only those interests "that would enjoy protection at common law against invasion by private parties."14 Thus,

8. Id. at 272-73 (Black, J., dissenting).
9. Id. at 265.
11. See infra notes 807-53 and accompanying text.
"advantageous relations with the government," such as benefit payments and employment, were not interests to which the courts extended due process protection. In 1941, for example, a Supreme Court of New York rejected the notion that an old age pension could be anything other than charity. In another example, the D.C. Circuit, in 1950, rejected emphatically the notion that government employment was entitled to due process protection:

It has been held repeatedly and consistently that Government employ is not "property" and that in this particular it is not a contract. We are unable to perceive how it could be held to be "liberty." Certainly it is not "life." So much that is clear would seem to dispose of the point. In terms the due process clause does not apply to the holding of a Government office.

Other considerations lead to the same conclusion. Never in our history has a Government administrative employee been entitled to a hearing of the quasi-judicial type upon his dismissal from Government service. That record of a hundred and sixty years of Government administration is the sort of history which speaks with great force.

Even though the notion that the Due Process Clause could not protect governmental entitlements was indicated by "so much that is clear" and a


In any case his old age pension is not given as a reward, it is given to satisfy a human need regardless of the kind of a life the man has lived, and, in accepting charity, the appellant has consented to the provisions of the law under which charity is bestowed.

Id. at 620. This perception of the entitlement, that the acceptance of the entitlement is necessarily consent to any provision that accompanies it, is a foreshadow of Justice Rehnquist's opinion in Arnett v. Kennedy, 416 U.S. 134 (1974) (plurality opinion). See infra text accompanying notes 589-97.

17. Bailey v. Richardson, 182 F.2d 46, 57 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951) (per curiam). In Bailey, the D.C. Circuit rejected a number of claims by the plaintiff, including free speech and discriminatory classification claims, id. at 59-63, so the affirmation of the decision by a divided Court does not necessarily signal that some members of the Supreme Court had a problem with the due process analysis in Bailey.
"record of a hundred and sixty years of Government administration" in 1950, by the 1960's a legal foundation began to evolve upon which the Supreme Court would try to build a new view of due process. One law professor and two Supreme Court cases were particularly important in the process.

The law professor was Charles A. Reich of Yale Law School, who wrote first *The New Property* in 1964 and then *Individual Rights and Social Welfare: The Emerging Legal Issues* in 1965. Both articles were cited by Justice Brennan in *Goldberg v. Kelly*, both to help establish that welfare benefits are property and to show the need, in determining due process, to consider the government's interest in preserving a person's receipt of such a benefit.

In both articles, Professor Reich argued that citizens had property interests in the distribution of the "public largesse" and that those interests had to be protected necessarily by expansive and thorough procedures. Reich argued this, however, not as someone interested in more bureaucracy but as someone keenly interested in protecting the individual from greater governmental intrusion. This is ironic because when the Court embraced Reich's conclusions in *Goldberg*, the most vigorous dissent would come in the name of protecting people from governmental intrusion.

Two points convinced Reich that governmental largesse had to be elevated to property status. First, government in America was becoming a major source of wealth, and this wealth was in fact displacing traditional notions of private property:

Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits,

18. *Id.* at 57. This is not to say that during this time administrative action was immune from judicial review. For a discussion of the various ways the Court used to reach administrative action during this period, see Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1047-60 (1984).


22. *Id.* at 265 n.13.

23. Reich, *supra* note 19, at 785; Reich, *supra* note 20, at 1253-54.

24. Reich, *supra* note 19, at 783-84; Reich, *supra* note 20, at 1252.

25. Reich, *supra* note 19, at 733.


27. *Id.* at 271-73 (Black, J., dissenting).
services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largesse is on a vast, imperial scale.

The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth—forms which are held as private property. Social insurance substitutes for savings; a government contract replaces a businessman's customers and goodwill.\(^28\)

Second, given the relationship between property and liberty, the substitution of government largesse for private property threatened to undermine "the underpinnings of individualism and independence."\(^29\) Liberty, as Reich saw it, "must at least cover the management of personal and family affairs—the sort of things that are, to the average person, nobody else's business, certainly not government's."\(^30\) Meanwhile property protected liberty "by creating zones within which the majority has to yield to the owner."\(^31\) Within those zones, "[w]him, caprice, irrationality and 'antisocial' activities are given the protection of law; the owner may do what all or most of his neighbors decry."\(^32\) Thus, Reich maintained, that as people became dependent on government largesse rather than on private property, these "zones of whim" eroded and, consequently, so did liberty.\(^33\)

From this position, Reich might have seen the solution to preserving liberty as simply reducing government largesse and allowing these zones of traditional private property to return. Reich, however, saw this as unworkable because these zones were already dominated by large corporations, "private governments," which had used their wealth to further the interests not of the majority but of "the arbitrary and selfish few."\(^34\)

Thus, if the traditional zones were not safe to return to, then new zones had to be created around the government benefits that had replaced traditional property. The urgency in creating these new zones was driven

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28. Reich, supra note 19, at 733.
29. Id.
30. Reich, supra note 20, at 1254.
31. Reich, supra note 19, at 771.
32. Id.
33. Id. at 771-74.
34. Id. at 772-73.
by the recognition that the public had an interest not only in furthering
the will of the majority but also in the "independence of the individual."\textsuperscript{35} For Reich, this interest did not exist primarily because the individual was
selfless and devoted to the majority. To the contrary, Reich knew that
the individual was quite capable of irrational and anti-majoritarian
behavior.\textsuperscript{36} Rather, Reich saw this interest existing and the new zones
being so essential because this is "a society that considers the individual
as its basic unit."\textsuperscript{37}

For Reich, procedural due process was the mechanism that created
the necessary protection for these new zones of property, and the
protections he envisioned required "scrupulous observance of fair
procedures."\textsuperscript{38} Although the nature of these procedures could depend
somewhat on the nature of the individual interest implicated,\textsuperscript{39} they would
uniformly require certain protections:

Action should be open to hearing and contest, and based
upon a record subject to judicial review. The denial of
any form of privilege or benefit on the basis of
undisclosed reasons should no longer be tolerated. Nor
should the same person sit as legislator, prosecutor,
judge and jury, combining all the functions of
government in such a way as to make fairness virtually
impossible.\textsuperscript{40}

The Supreme Court cases to which the Court would be drawn in the
early seventies were \textit{Cafeteria & Restaurant Workers Union v. McElroy}\textsuperscript{41}
and \textit{Sniadach v. Family Finance Corp.}\textsuperscript{42} The two cases differ markedly
in result, philosophy, and approach—differences which foreshadowed the
turbulence that would mark this era following \textit{Goldberg}.\textsuperscript{43}

In \textit{Cafeteria Workers Union}, Justice Stewart wrote for a majority that
held that the military could summarily deny an individual "access to the

\begin{footnotes}
\item[35] Id. at 774. \\
\item[36] See supra text accompanying note 32. \\
\item[37] See Reich, supra note 20, at 1253. \\
\item[38] Reich, supra note 19, at 783. Reich maintained that "a sense of fairness . . . is
vital to community acceptance of a welfare program." Reich, supra note 20, at 1253. \\
\item[39] Reich, supra note 19, at 784 (distinguishing between decisions with penal and
nonpenal implications). \\
\item[40] Id. at 783-84; see also Reich, supra note 20, at 1252-53. \\
\item[41] 367 U.S. 886 (1961). \\
\item[42] 395 U.S. 337 (1969). \\
\end{footnotes}
site of her former employment" without violating the Due Process Clause of the Fifth Amendment. Stewart seemed to apply a single balancing test to decide simultaneously whether the individual had a liberty or property interest in her job and then, if so, what procedural protections the government had to provide before threatening that interest. Stewart justified such a balancing test because "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." From Stewart's perspective, due process was "not a technical conception with a fixed content unrelated to time, place and circumstances" but instead was "compounded of history, reason, [and] the past course of decisions."

The interests to which Stewart looked in this balancing test were "the precise nature of the government function involved" and the "private interest that has been affected by governmental action." As Stewart balanced these interests, it became clear how intertwined he saw the property and process issues. In examining the private interest affected, Stewart characterized it as not a right but merely "the opportunity to work at one isolated and specific military installation." Even though this interest was not a right, it could still be entitled to "notice and hearing" protection under the Due Process Clause if the government function were something to be weighed as lightly as race or religious discrimination would be. Here, however, the function was of "the internal operation of an important federal military establishment," and

44. 367 U.S. at 894. The plaintiff in Cafeteria Workers was a short-order cook named Rachel Brawner. Id. at 887. Mrs. Brawner worked at a privately owned cafeteria operated within a naval gun factory. Id. No one could enter the factory without an identification badge issued only to people who met certain security requirements. Id. On November 15, 1956, the Navy required Mrs. Brawner to turn in her badge because it had decided "that she had failed to meet the security requirements of the installation." Id. at 888. No further meetings or explanations occurred, and without her badge Mrs. Brawner could not get to her job. Id. Mrs. Brawner sued certain governmental personnel "to compel the return . . . of her identification badge . . . ." Id. at 888-89.
45. Id. at 894-98.
46. Id. at 895.
49. Id. at 896.
50. Id. at 897.
51. Id. at 896.
such a function could not be outweighed by a mere opportunity.\textsuperscript{52}

Although in this context, Stewart's test did not work out as a sword in the hand of the individual, the test could have been just that if administered by a different court or in a different context. Despite the authority to the contrary,\textsuperscript{53} Stewart's combining of the property and process steps could have opened the door of protection to a whole host of "opportunities" and privileges not traditionally covered under the Due Process Clause. In addition, within the process context, the balancing could have also given judges an opportunity to guarantee a complete panoply of procedural protections never before allowed.

In his dissent to \textit{Cafeteria Workers}, however, Brennan effectively changed what the opinion would mean in future cases. Brennan resegregated the property and process issues, and he did so in such a way that the balance became a function only of the latter issue. Brennan noted first that Stewart acknowledged that the plaintiff's interest in her employment was "of sufficient definiteness to be protected by the Federal Constitution from some kinds of governmental injury."\textsuperscript{54} From here, Brennan reasoned fairly that "the Court would concede that some constitutionally protected interest - whether 'liberty' or 'property' it is unnecessary to state—had been injured."\textsuperscript{55} Thus, in only a portion of a paragraph, Brennan was able to attribute to the majority a vision of property in direct contradiction to what the Court had affirmed in \textit{Bailey};\textsuperscript{56} and he did so without being hampered by a need to balance in the future in order to legitimate the interest. Although Brennan did not subsequently define the breadth of procedural protection to which this new liberty or property was entitled, or how one could determine that level of protection,\textsuperscript{57} he knew that it included at least "'the right to be heard before being condemned to suffer grievous loss of any kind.'"\textsuperscript{58} In future cases, however, the \textit{Cafeteria Workers}'s method of determining the level of protection would be more clear. By a process of elimination,

\textsuperscript{52} \textit{Id.} at 898.


\textsuperscript{54} \textit{Cafeteria Workers}, 367 U.S. at 899-900 (Brennan, J., dissenting).

\textsuperscript{55} \textit{Id.} at 900.

\textsuperscript{56} See supra note 17 and accompanying text.

\textsuperscript{57} \textit{Cafeteria Workers}, 367 U.S. at 900-01 (Brennan, J., dissenting).

\textsuperscript{58} \textit{Id.} at 901 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (Frankfurter, J., concurring)).
if the majority's balance did not establish the property interest, it must have established the level of protection. The legacy of Cafeteria Workers, therefore, became a balancing of private interest and governmental function to determine the scope of procedural protection.59

Given the roundabout manner in which the Cafeteria Workers legacy came to be formed, it is not surprising that the second important case from this era took a markedly different approach to determining the scope of procedural protection. In Sniadach v. Family Finance Corp.,60 the Supreme Court declared the procedures created by a Wisconsin garnishment statute violated the Due Process Clause. Although the approach taken in Sniadach had some aspects of the Cafeteria Workers balancing test, the approach resembled more closely something one might expect from Reich61 by presuming certain procedural protections flowed automatically from the presence of a property or liberty interest.62

Justice Douglas, writing for the majority, gave almost no attention to the issue of whether a garnishment of wages created a deprivation of property. This was in sharp contrast to Justice Black's dissent in Sniadach63 and to the Supreme Court of Wisconsin's opinion,64 both of which cited numerous authorities for the proposition that the statute "operated only to detain the property temporarily."65Apparently in response to this, Justice Douglas pointed out, before going on to the process issue, that the wages may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise.66

61. See supra text accompanying notes 38-40.
63. Sniadach, 395 U.S. at 348-49 (Black, J., dissenting).
65. See, e.g., id. at 264.
Though brief, the observation was important. By determining that a "temporary detainment" of property was in fact a deprivation of property under the Due Process Clause, Douglas eliminated the possibility that a postdetainment hearing could foreclose due process review. In Justice Black's and the Wisconsin Supreme Court's views, there was no deprivation and, therefore, no requirement for due process until the property was irretrievably lost. Thus, so long as more process was forthcoming, the courts could not review under the Due Process Clause whether a state had inappropriately detained an individual's property. In such a world, the plaintiffs in *Goldberg v. Kelly*67 would never have gotten a chance to challenge the procedures used to justify the prehearing termination of benefits because that termination would be viewed not as a deprivation but simply as a detainment pending the constitutionally sufficient hearing. Douglas opened the door for *Goldberg* by making the initial detainment of property a deprivation, and, therefore, allowing the timing of the hearing to be a due process issue.68

Having met the deprivation of property requirement through the temporary denial, Douglas turned his attention to what process was due. Two passages from this section were particularly important in raising the notion of a presumption of certain protections rather than a balance. The most striking comes at the end of the opinion where Douglas said, "[w]here the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing this prejudgment garnishment procedure violates the fundamental principles of due process."69 Thus, it is not a balancing of interests but an "obvious" taking of property that demands notice and a prior hearing. This sentiment is echoed in an earlier passage where Douglas suggested that due process requires a certain protection unless the state can overcome this expectation by showing an "extraordinary situation": 

"Such summary procedure may well meet the requirements of due process in extraordinary situations. But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition."70

This is not to say that aspects of balancing were not suggested in

68. Effectively, one might view this as shifting the focus from a pre-hearing termination to a pre-termination hearing.
69. *Sniadach*, 395 U.S. at 342 (citation omitted).
70. *Id.* at 339 (citations omitted).
Sniadach. First, one must recognize that the whole notion of presuming protection for the individual and overcoming that presumption with situations "requiring special protection to a state" is really just a form of balancing individual and state interests with a thumb pushing down in favor of the individual. Second, reminiscent of Cafeteria Workers, Douglas spent considerable time in Sniadach discussing "the precise nature of . . . the private interest that has been affected by governmental action."\(^{71}\) His conclusion from this discussion was "that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage earning family to the wall."\(^{72}\) Although it is not clear from the opinion whether this degree of need was essential to the outcome, it is clear that it did not hurt. Furthermore, the presence of such a need in one way or another would fuel a number of cases in the Goldberg line.\(^{73}\)

The concurring opinion of Justice Harlan and the dissenting opinion of Justice Black in Sniadach also foreshadow a debate which would color Goldberg.\(^{74}\) Harlan characterized his, and the majority's, differences

Douglas's discussion of this interest appears at 395 U.S. at 340-41.

\(^{72}\) Sniadach, 395 U.S. at 341-42.


Justice Douglas also included a quote of Congressman Sullivan that included a reference to the frequency with which current procedures yielded wrongful terminations. Douglas did not appear to see this as a distinct consideration, but it does foreshadow the probability factor that was to become a part of the balance in Kelly v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968) and later in Mathews v. Eldridge, 424 U.S. 319 (1976). Sniadach, 395 U.S. at 341 (quoting Comment, C. Kenneth Grosse & Charles W. Lean, Wage Garnishment in Washington—An Empirical Study, 43 WASH. L. REV. 743, 753 (1968)) ("What we know from our study of this problem is that in a vast number of cases the debt is a fraudulent one, saddled on a poor ignorant person . . . .").

\(^{74}\) See infra text accompanying notes 265-86. In fact, even the wording of Black's dissents in the two cases are hauntingly familiar. For example, in Sniadach he said,

The foregoing emotional rhetoric [the majority opinion of Justice Douglas] might be very appropriate for Congressmen to make against some phases of garnishment laws. . . . But made in a Court opinion, holding Wisconsin's law unconstitutional, they amount to what I believe to be a plain, judicial usurpation of state legislative power to decide what the State's laws shall be.

Sniadach, 395 U.S. at 344-45 (Black, J., dissenting). Similarly, in Goldberg, Justice Black said, "I would have little, if any, objection to the majority's decision in this case if it were written as the report of the House Committee on Education and Labor, but as an opinion ostensibly resting on the language of the Constitution I find it woefully deficient." 397 U.S. 255, 275 (1971) (Black, J., dissenting).
with Black as the philosophical battle over whether judges may stray from the "specifics of the Constitution" in finding the meaning of that document:

His [Black's] and my divergence in this case rests, I think, upon a basic difference over whether the Due Process Clause of the Fourteenth Amendment limits state action by norms of "fundamental fairness" whose content in any given instance is to be judicially derived not alone, as my colleague believes it should be, from the specifics of the Constitution, but also, as I believe, from concepts which are part of the Anglo-American legal heritage—not as my Brother Black continues to insist, from the mere predilections of individual judges.75

Black, meanwhile, saw the majority as not so much searching for "fundamental fairness" amongst "Anglo-American legal heritage" but as acting as a "super-legislature" in much the same way as it had done when the Court "brought on President Roosevelt's Court Fight" in the 1930's.76

Thus, Black characterized the root of their differences in this way:

In any event, my Brother Harlan's "Anglo-American legal heritage" is no more definite than the "notions of justice of English-speaking peoples" or the shock-the-conscience test. All of these so-called tests represent nothing more or less than an implicit adoption of a Natural Law concept which under our system leaves to judges alone the power to decide what the Natural Law means. These so-called standards do not bind judges within any boundaries that can be precisely marked or defined by words for holding laws unconstitutional. On the contrary, these tests leave them wholly free to decide what they are convinced is right and fair. If the judges, in deciding whether laws are constitutional, are to be left only to the admonitions of their own consciences, why was it that the founders gave us a written Constitution at all?77

75. Sniadach, 395 U.S. at 342-43 (Harlan, J., concurring).
76. Id. at 345 (Black, J., dissenting). For a brief discussion of that Court fight, see infra note 283.
77. Sniadach, 395 U.S. at 350-51 (Black, J., dissenting).
This debate was not a new one for Black. As former United States Solicitor General Erwin Griswold noted of Justice Black, "From the beginning to the end of his service [on the Court] he fought what he considered to be unauthorized efforts of judges to supersede the judgment of voters and their elected representatives with the judges' views of appropriate remedies for social and economic problems."\(^{78}\)

Nor would it appear that Black's assertion of the concern over the years represented any concern other than the one he expressed. Although in *Sniadach*, he found himself in dissent arguing that the majority could not, based on its own notions of fairness, guarantee a wage-earner a hearing before the garnishment of wages,\(^{79}\) in *Adamson v. California*,\(^{80}\) he had argued that the Court's own notions of fairness could not be used to compel a witness to testify against himself.\(^{81}\) Thus, he was not always tied to an "individual" or "government" position, nor was he always tied to a liberal or conservative position. He appeared, however, to be keenly tied to a constitutional philosophy.\(^{82}\)

One other subtle point emerged from Black's dissent in *Sniadach*, but it was a point that would appear profoundly twelve years later in *Lassiter v. Department of Social Services*.\(^{83}\) What Black did in *Sniadach* was to consider the implications of the current system not as they would apply customarily but as they applied to the particular person seeking refuge in the Due Process Clause.\(^{84}\) Thus, Black indicated that although a system might not always provide adequate due process protection, a litigant only had a due process claim if she could show she had been wronged.\(^{85}\)

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78. *Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Black*, 405 U.S. at ix, xvi (1972) (comments of Griswold) [hereinafter *Memory of Justice Black*].


80. 332 U.S. 46 (1947).

81. *Id.* at 69-70 (Black, J., dissenting). In his concurrence in *Rochin v. California*, 342 U.S. 165 (1952), Justice Black wrote separately from the majority even though in *Rochin* the majority moved towards Black's position in *Adamson that states cannot compel a witness to testify against himself. Black did so because the majority based this move on what Black considered the majority's view of what "'shocks the conscience,' offends 'a sense of justice' or runs counter to the 'decencies of civilized conduct.'" *Rochin*, 342 U.S. at 175 (Black, J., concurring).


85. *Id.* at 346-47 (Black, J., dissenting).
From this approach, however, it would necessarily follow that depending on the nature of their cases, different people trying to protect the same property interest would have different procedural rights under the Due Process Clause. For example, under this approach, although a hearing might not be required before garnishing Ms. Sniadach's wages, someone else might be entitled to a hearing before their wages could be garnished. Although problems with such an approach might seem readily apparent, the discussion of them will be postponed until the discussion of *Lassiter v. Department of Social Services* and the adoption of such an approach by the Court.  

As the sixties ended, and the seventies began, not only were the contours of the Due Process Clause uncertain, but its shape was not completely discerned. On the property side, the Court had inadvertently opened itself up to consideration of government largesse as a form of property. On the deprivation side, the Court had determined that temporary detainments were in fact deprivations. Finally, on the due process side, the Court had demonstrated that it was caught between two lines. One sought to balance individual and governmental interests to determine what due process meant for each form of liberty or property, and the other sought to guarantee a highly protective fixed notion of due process which could only be modified if the state could show an extraordinary need. In *Goldberg v. Kelly*, Justice Brennan would attempt to clarify the shapes even more, at least temporarily.

II. *GOLDBERG V. KELLY’S DAY IN THE SUN*

A. *The Lower Court Opinions*

Justice Brennan's opinion in *Goldberg v. Kelly* came in response to two conflicting opinions from separate three judge district court panels in *Wheeler v. Montgomery* and *Kelly v. Wyman*. In *Wheeler*, the Northern District of California held that a fair hearing after termination
of welfare benefits met the requirements of due process, but in Wyman, the Southern District of New York found that such a hearing did not. For whatever reason, the defendants in both cases conceded that the plaintiffs had been deprived of their property interests when their welfare benefits were terminated prior to a hearing and, therefore, that the recipients were entitled to the protection of the Due Process Clause. Consequently, the defendants limited their arguments to whether the subsequent hearings were sufficient to meet the requirements of due process. Given Sniadach, it seems clear that there would have been little point in the defendants having argued that denying benefits prior to a hearing was merely a detention rather than a deprivation. It seems odd, however, that neither defendant chose to argue that welfare was not property, particularly in Wyman where there was at least local authority supporting that very proposition.

In any event, where the courts diverged, both in result and presentation, was on the due process issue. After having presented the facts and establishing the issue, the Wheeler court said simply and without elaboration, "The court finds that the present California regulations . . . do comport with the Due Process Clause of the fourteenth amendment to the United States Constitution." Meanwhile, the Wyman court found, after working through an extensive structure, that "due process requires an adequate hearing before termination of welfare benefits." That structure looked initially like a presumption of a pretermination hearing "unless overwhelming considerations justify" varying from such a hearing. The Wyman court, however, eventually articulated its due process test as a balance, although its balancing test was different from that used in Cafeteria Workers. Consistent with the Cafeteria Workers balance, the Wyman court looked to the Government's

92. 296 F. Supp. at 140.
93. 294 F. Supp. at 901.
94. 296 F. Supp. at 139; 294 F. Supp. at 898.
96. See supra notes 63-68 and accompanying text.
97. Wilkie v. O'Connor, 25 N.Y.S.2d 617, 619-20 (N.Y. App. Div. 1941). In support of this concession, the Wyman Court cited only Professor Reich's article, Reich, supra note 19, and one other law review article. 294 F. Supp. at 898. The Wheeler court offered no authority nor explanation. 296 F. Supp. at 139.
98. 296 F. Supp. at 140.
99. 294 F. Supp. at 901.
100. Id. at 900.
interest "to protect public funds" and the individual's interest in not being "wrongfully deprived of assistance," but it added to these considerations the probability of erroneous denial if no hearing were initially held. Although this was not the balance the Supreme Court would embrace in *Goldberg*, it would in 1976 become the due process test that the Court would settle on eventually.

**B. Brennan's Majority Opinion**

In response to these lower court opinions, Justice Brennan brought Professor Reich, *Cafeteria Workers* and *Sniadach* together and molded them into *Goldberg v. Kelly*. There, writing for the majority, Brennan determined that "the Due Process Clause requires that the recipient be afforded an evidentiary hearing 'before' the termination of benefits." In the opinion, Brennan found a property interest and a lack of sufficient due process protection through a test that tended to blur the property and due process elements. Clearly, the test he applied did not combine these two elements as the Court had in *Cafeteria Workers*, but his analyses of the two requirements did overlap within the opinion. This overlap may have contributed to subsequent confusion.

This problem, however, seems trivial in light of other questions raised by Brennan's *Goldberg* opinion. First, both colleagues and commentators considered Brennan to write opinions which were—particularly sensitive to the human side of his cases, but in *Goldberg* he omitted the relevant facts that would have reflected this sensitivity. Chief Justice Earl Warren, for example, said of Brennan, "His belief in the dignity of human beings—all human beings is unbounded. He also believes that without such dignity men cannot be free. These beliefs are


104. See *supra* notes 19-40 and accompanying text.


108. *Id.* at 260.

109. See *supra* text accompanying notes 45-52.

110. 397 U.S. at 262-66.

111. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); see also infra notes 548-52 and accompanying text.
apparent in the warp and woof of all his opinions."112 Similarly, Dean Erwin Griswold of Harvard said of Brennan the following:

[His] approach is not overtly philosophic. He is interested in people as people. He is concerned with the impact of the law on the individual before the Court, and he is thoroughly aware of the influence which the Court's decision will have on the conduct of countless others not before the Court.113

Normally, Brennan's opinions bore out these observations as the opinions would reveal numerous details about the people involved and the circumstances in which they found themselves. For example, in New York Times v. Sullivan114 a First Amendment defamation opinion said to best capture "Brennan's own spirit,"115 the justice revealed that the petitioners were "Negroes and Alabama clergymen"116 and went into great detail about what these men had said about the civil rights movement in the South in their allegedly defamatory advertisement in the New York Times.117 Certainly, at the very least, the race and occupation of the petitioners were not legally operative facts in the opinion;118 yet, they were facts Brennan felt the reader needed to understand in order to understand the case.119

To some degree, Brennan brought this approach to his writing of

116. 376 U.S. at 256.
117. Id. at 256-59.
118. But see John Noonan, The Passengers of Palsgraf, in Persons and Masks of the Law 141 (1976); Mary B. McManamon, A Case for a Closer Examination of Our So-Called "Neutral" Principles, Widener Sch. L. Mag., Spring 1994, at 22, 23 ("Even the most 'neutral'—seeming principle is value-laden.").
At the outset, he was meticulous in describing how the State had failed to resolve underlying questions of eligibility for terminated recipients even though the State resumed the payment of benefits in response to the lawsuit. Ironically however, when Brennan reached those parts of the opinion where specific facts could have helped the reader understand new legal concepts, like "participate meaningfully" and "societal malaise," or get a sense of the parameters of subjective factors, like "brutal need," he omitted facts entirely. Not only does this omission deny the reader facts necessary to understand what Brennan was talking about legally, but it also denies the reader the opportunity to see how the law impacted "the individual before the Court," the very thing that Griswold praised Brennan for doing so well.

Such an omission is not only atypical of Brennan opinions in general, but it is even atypical of his opinions in the procedural due process area. When, for example, in Bell v. Burson, the state took away the driver's license of an uninsured motorist who had had an accident, Brennan was quick to point out in his majority opinion that the motorist was a minister who needed to drive to get around to his congregation. Similarly, in his dissent in Mathews v. Eldridge, the most analogous case factually to Goldberg, Brennan detailed quite carefully the impact on the individual recipient when the state terminated his benefits:

121. Id. at 256 n.2. Justice Brennan indicated here, for example, that the State still had not indicated whether Mrs. Altagracia Guzman would be forced to cooperate with the City in suing her estranged husband. Id.
122. Id. at 265.
123. Id. at 261. In a speech delivered in 1988 to the Bar Association of the City of New York, Justice Brennan criticized the State in Goldberg for failing to appreciate "the drastic consequences of terminating a recipient's only means of subsistence." William J. Brennan, Jr., Reason, Passion, and "the Progress of the Law," 10 CARDOZO L. REV. 3, 20 (1988). Thus, Brennan recognized that the term and condition it described could be misunderstood.
124. Erwin N. Griswold, William J. Brennan, Jr.—Legal Humanist, in WILLIAM J. BRENNAN, JR.: AN AFFAIR WITH FREEDOM, supra note 112, at 351-52. Brennan eventually would come to argue that one strength of Goldberg was that in fact it did reflect "that dimension of passion, of empathy, necessary for a full understanding of the human beings affected." Brennan, supra note 123, at 21. Professor Fiss, however, could not find in the opinion such a focus on the individual and saw the strength, instead, in Justice Brennan's dealing with society rather than with any single individual. Owen M. Fiss, Reason in All Its Splendor, 56 BROOK. L. REV. 789, 804 (1990).
126. Id. at 537.
[The] Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument. It is speculative .... Indeed, in the present case, ... disability benefits were terminated, there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed.128

One might attempt to attribute this omission to an absence of such facts in the record, but not only were these facts available in the record, they were discussed at length by the district court.129 For example, the district court discussed graphically the plight of Mrs. Angela Velez and her four children who were denied benefits for four months before a post-termination hearing determined the denial to be erroneous:

[In the four months between termination of AFDC benefits and the decision reversing the local agency, Mrs. Velez and her four children, ages one to six, were evicted from her apartment for nonpayment of rent and went to live with her sister, who has nine children and is on relief. Mrs. Velez and three children have been sleeping in two single beds in a small room, and the youngest sleeps in a crib in the same room. Thirteen children and two adults have been living in one apartment, and Mrs. Velez states that she has been unable to feed her children adequately, so that they have lost weight and have been ill.130

The district court even added to this account the events that befell another victim of benefit termination, Mrs. Esther Lett. During her time off public assistance, Mrs. Lett and her children had to go to the hospital after having only spoiled chicken and rice to eat,131 and Mrs. Lett passed out from hunger while waiting in an emergency aid line.132

128. Id. at 350.
131. Id.
132. Id. at 900.
What makes these omissions particularly curious is that Brennan did not just fail to mention these case histories; rather, he came as close as he could to embracing these facts and then failed to use them as support for his decision. In one paragraph, Brennan used three ellipses in quotes of the district court. Each of these omitted a reference to Mrs. Velez or Mrs. Lett. \footnote{133} First, Brennan quoted the district court for "'By hypothesis, a welfare recipient is destitute, without funds or assets . . . suffice it to say that to cut off a welfare recipient in the face of . . . "brutal need" without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it.'"\footnote{134} A check of the first ellipsis, between "assets" and "suffice" in \textit{Wyman}, reveals that the stories of Mrs. Velez and Mrs. Lett begin precisely after "assets" and end precisely before "suffice."\footnote{135} In the second ellipsis between "of" and "brutal," one finds "this kind of," a reference to the need experienced by Mrs. Velez and Mrs. Lett.\footnote{136} Finally, Brennan quoted \textit{Wyman} for another proposition:

Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance. . . . While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process.\footnote{137}

In that ellipsis, one will find two omissions, one important now and one important later. The one important now is another reference to the facts of Mrs. Velez's case: "The obvious fact is that there is no way truly to make whole a recipient like Mrs. Velez for the indignity of living with her sister and thirteen children in one apartment because of a wrongful


\footnote{135}{\textit{Wyman}, 294 F. Supp. at 899-900.}

\footnote{136}{\textit{Id.} at 900.}

\footnote{137}{\textit{Goldberg}, 397 U.S. at 261 (quoting \textit{Kelly}, 294 F. Supp. at 901).}
The one omission important later is a reference to the district court's probability factor, which Brennan chose ultimately not to use. 139

If one compares these two quotes by Brennan, one discovers a final puzzle. While the second communicates the balancing test that the district court actually used to determine the extent of due process protection, the first reflects the presumption approach the district court threatened to use but abandoned. 140 Thus, the first quote did not communicate anything useful from the district court's rationale. Under the circumstances, one may wonder whether that quote and the ellipses were included not so much to bypass facts but to lead the reader to facts Brennan believed to be relevant but preferred not to include in the opinion per se. One would certainly hope a lawyer would always check to see what was being left out in a quote, so one might consider an ellipsis a roundabout way to draw attention to a passage.

The questions surrounding Brennan's writing of Goldberg, however, are not limited to his treatment of facts. They extend also to his treatment of authority, and the third ellipsis mentioned above is a good place to start in recognizing this second problem. As noted previously, that quote contained two important omissions, and the second can now be examined. Although Brennan limited the first sentence of that quote to this: "Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance," 141 the district court went on to add "and the startling statistic that post-termination fair hearings apparently override prior decisions to terminate benefits in a substantial number of cases." 142 Thus, Brennan represented the district court's balance as a two factor balancing test when, in fact, it was a three factor test, and the factor Brennan omitted turned out to be the one Brennan would choose not to use. 143

This is not the only place in Goldberg where Brennan took liberties

139. Id.
140. See supra text accompanying notes 100-03.
142. Wyman, 294 F. Supp. at 901.
143. See infra notes 186-93 and accompanying text.
with his authorities. In some places, he used authority inaccurately where he may not have actually needed any authority at all, and he certainly did not need inaccurate ones. It is hard to understand how this use of authority came from the pen of a man whose legal career has been "best characterized as a triumph of competence."

Although several explanations could be offered for Brennan's uncharacteristic use of law and fact in Goldberg, one particularly plausible one is that Brennan felt pressured by Black's dissent in that case. There, Black maintained that Brennan had no authority for what he was doing in Goldberg and was simply letting his conscience be guided by the facts. Such criticism would have hit home with Brennan because he felt a certain loyalty to precedent even though he quite willingly acknowledged its limitations. Thus, for Brennan the best

144. See infra notes 151-77 and accompanying text.
145. See infra notes 151-77 and accompanying text.
148. Justice Brennan often seemed caught between a call to do justice and a call to do law, and this is reflected in his Edward Douglas White lecture at Georgetown. William J. Brennan, The Role of the Court—The Challenge of the Future, in William J. Brennan, Jr.: An Affair with Freedom, supra note 112, at 315. There, Brennan spoke of a shift in law from abstract rules to doing justice and this shift meant that cases alone, or even cases, the Bill of Rights, and the Legislative Statutes together, are not enough; the philosophy of law which the judge . . . brings to the cases, the Constitution, the Bill of Rights, and the Legislative Statutes is equally important. In fact, it is all-important since it determines the interpretation that is put upon the Bill of Rights, the Legislative Statute, and the case.

Id. at 322-23 (quoting F.S.C. Northrop, Philosophical Issues in Contemporary Law, 2 Nat. Lf. 41, 48 (1957)). Yet, Brennan also quoted Justice Cardozo in saying that "the range of free activity is relatively small," id. at 323 (quoting Benjamin Cardozo, The Growth of the Law 60-61 (1924)), and Judge Learned Hand in saying that "[t]he judge's authority depends upon the assumption that he speaks with the mouth of others" and cloaks "himself in the majesty of an overshadowing past." Id. at 324. This same tension was also displayed at Justice Brennan's confirmation hearing. Nomination of William Joseph Brennan, Junior of New Jersey, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary of the United States Senate, 85th Cong., 1st Sess. 36-39 (1957) [hereinafter Hearings].

For his part Justice Felix Frankfurter, a colleague and former law professor of Justice Brennan's, felt that Brennan saw the range of free activity a little too broadly. Friedman, supra note 46, at 6 ("I always wanted my students to think for themselves, but (continued)
response to Black's dissent would have been a sterile, factless opinion loaded with authority. Unfortunately, it is hard to write such an opinion and revolutionize an area of the law simultaneously. Quite simply, if the authority existed, one would not need to revolutionize the area of law. Thus, something has to give in that situation, and in this instance, the giving may well be reflected in Brennan's atypical writing of Goldberg.

Be that as it may, Goldberg did in fact refocus both property and due process jurisprudence under the Due Process clause, and the significance of that cannot be denied. Our attention focuses now on the impact the opinion had in those areas.

1. **Brennan's approach to governmental largesse as property**

Brennan found a property interest in welfare—or at least moved through that requirement—in much the same way as the district court had done in Wyman:¹⁴⁹ He acknowledged that the State had not raised the issue that welfare was not property and cited Professor Reich to support the reasonableness of this concession.¹⁵⁰ Brennan, however, also used four Supreme Court cases to bolster his reliance on Reich.

The first two, and the more striking of the four cases, were two other Brennan-authored opinions: *Shapiro v. Thompson*¹⁵¹ and *Sherbert v. Verner*.¹⁵² Brennan quoted Shapiro for his ultimate conclusion on this issue, that the welfare recipient's "constitutional challenge cannot be answered by an [sic] argument that public assistance benefits are 'a "privilege" and not a "right."'"¹⁵³ Then he used Sherbert to point out that "[r]elevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation," the interest directly attacked but protected in Sherbert.¹⁵⁴

The problem with this reliance, however, was that neither case really stood for the proposition for which it was being used. Certainly, in Shapiro the Court did prevent states from denying people welfare

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¹⁵⁰. 397 U.S. at 261-62.


¹⁵³. 397 U.S. at 262 (quoting Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969)).

¹⁵⁴. *Id.*
benefits, but it did so not because welfare benefits were a right but because the states were using the denial of welfare to infringe on people's right to travel. In Shapiro, the Court rejected on equal protection grounds, rather than for any due process concern, attempts by states to limit welfare recipients to those people who had lived in the state for one year. The Court's problems with these attempts stemmed both from a classification the Court considered to be irrational and from the states' penalizing the individual's fundamental right of interstate movement. Thus, the Court's problem in Shapiro was not that the state was interfering with some right to welfare but that the state was using welfare payments to infringe upon the right to travel:

We conclude therefore that appellants in these cases do not use and have no need to use the one-year requirement for the governmental purposes suggested. Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting-period requirement clearly violates the Equal


156. In considering whether a one-year residency requirement was constitutional in the District of Columbia, the Court did rely on the Due Process Clause of the Fifth Amendment. Id. at 641-42. In doing so, however, the Court indicated that notions of equal protection are contained in that clause and that, therefore, the Court's equal protection analysis applied to the states would apply to the District of Columbia as well. Id. at 642; see also Bolling v. Sharpe, 347 U.S. 497 (1954).

157. Shapiro, 394 U.S. at 627. Although the status of welfare as a right or privilege was not controlling in the case, Justice Brennan was aware of the nature of welfare benefits in Shapiro in a way that would be echoed in Goldberg. In Shapiro, Brennan spoke of welfare as the "aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life." Id. Compare with Goldberg, 397 U.S. at 264 ("Termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.").

158. 394 U.S. at 638.
Protection Clause.\textsuperscript{159}

Thus, in \textit{Shapiro}, when Brennan said the constitutional challenge could not be answered by saying welfare was "'a privilege' and not a 'right,"'\textsuperscript{160} he did not say that because the case held welfare benefits were a right. On the contrary, he said that because, in that case, it did not matter whether welfare was a privilege or a right. Even a privilege could not be withheld for the purpose of discouraging interstate travel. This brings us to the second Brennan opinion, \textit{Sherbert v. Verner},\textsuperscript{161} because Brennan quoted the rights-privilege language in \textit{Shapiro} from \textit{Sherbert}. One finds the language in \textit{Sherbert} used again, not to indicate a right to government largesse, but to indicate that the decision in \textit{Sherbert} did not depend on there being a right to government largesse.\textsuperscript{162}

In \textit{Sherbert}, the Court held that under the Free Exercise clause of the First Amendment, as that clause applies to the states through the Fourteenth Amendment, a state placed an undue burden on an individual's free exercise of religion when it disqualified her for unemployment compensation because she refused to accept a job that would require her to work on her sabbath.\textsuperscript{163} Although Brennan's reliance on \textit{Sherbert} in \textit{Goldberg} suggested otherwise,\textsuperscript{164} in \textit{Sherbert}, Brennan was very clear that the case was not deciding that unemployment benefits were a matter of right; rather, he indicated that "benefits" such as unemployment compensation could not be used to undermine one's exercise of constitutional rights:

Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.\textsuperscript{165}
The other two cases Brennan relied upon in Goldberg to show a property interest in governmental largesse are of the same vein and, hence, no more supportive of his position. Although in Goldberg Brennan cited Speiser v. Randall for a property interest in a tax exemption, Brennan more accurately captured the Speiser opinion when he described it in Sherbert as holding that the state cannot use a "gratuitous benefit" such as a tax exemption to discourage the First Amendment right of expression:

In Speiser v. Randall, 357 U.S. 513, we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. While the state was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to "produce a result which the state could not command directly."

The last case upon which Brennan relied, Slochower v. Board of Higher Education, is simply more of the same. While Brennan cited it to show a property interest in public employment, the case itself held the state violated the Due Process Clause when it used a teacher's exercise of her Fifth Amendment right against self-incrimination as a basis for her dismissal. Here again, it was not the public employment that implicated the Constitution but the use of that employment to undermine the exercise of a constitutional right, against self-incrimination.


166. See 397 U.S. at 262.
168. 374 U.S. at 405 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).
171. 350 U.S. at 559.
172. Id. at 556-58.
Although it may sound harsh, Brennan's holding that governmental largesse creates property rights, the most enduring portion of the holding of *Goldberg v. Kelly*,\(^{173}\) was actually dictum which was written in response to an issue that was never argued and was supported by a law review article and four cases that had little to do with the propositions they were asked to support. What makes this more troubling is that Brennan entirely ignored authorities in opposition to this holding,\(^{174}\) including the Court's own *per curiam* opinion in *Bailey v. Richardson*.\(^{175}\) In addition, one could question his reliance on Professor Reich's work because Reich had argued based on the premise that individual autonomy needed to be protected\(^{176}\) while in the due process portion of his opinion, Brennan stressed the communal nature of society.\(^{177}\)

Nonetheless, *Goldberg* undeniably ushered in the notion that government benefits were property, and it was a notion the courts embraced even if they were not always sure how Brennan arrived at it.\(^{178}\) Part of this confusion may have come from Brennan's decision to introduce his due process test in the same paragraph in which he established that welfare was property.\(^{179}\) Although Brennan seemed to state clearly where one ended and the other began,\(^{180}\) even the Supreme Court itself would come back to this paragraph and read it to mean that governmental benefits could be property interests only if denial of a certain benefit meant that "an individual will be 'condemned to suffer grievous loss.'"\(^{179}\)

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173. Although even now the Court continues to recognize property interests in governmental largesse, see, e.g., Atkins v. Parker, 472 U.S. 115 (1985) (recognizing food-stamp benefits as property); Brennan's due process test developed in *Goldberg* was permanently disregarded in 1976 in Mathews v. Eldridge, 424 U.S. 319 (1976).

174. See supra notes 13-18 and accompanying text.

175. 341 U.S. 918 (1951) (per curiam); see also supra note 17.

176. See supra text accompanying notes 35-37.


179. 397 U.S. at 262-63.

180. Immediately after establishing the property right to welfare benefits, Brennan began the due process test by saying, "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" Id. (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951)).
grievous loss. The confusion was somewhat understandable given Brennan's reliance on Cafeteria Workers in the paragraph. As noted earlier, Cafeteria Workers used a balancing test to decide simultaneously whether an interest was property and to what degree it was entitled to procedural protection. Thus, one could see Cafeteria Workers in a paragraph dealing with both property and procedure, and balancing personal need, and conclude reasonably that the author was applying a test in which personal need affected the property interest.

Such was not Brennan's intent. Welfare, for him, was property simply because it was a matter of "statutory entitlement," and one might see in that a foreshadowing of the view he would express in DeShaney v. Winnebago County Department of Social Services. A statute became a promise that never needed to be made, much like a wedding vow. Once made, however, the state was bound to deliver what it promised, and the individual recipient, as well as society as a whole, was justified in believing the state would live up to that promise. In Brennan's eyes, no balancing needed to be done until the court reached the second Due Process Clause question. This question concerned what procedures the state had to go through to decide that a certain person was not among those to whom the statute had promised the interest. In creating this balance, Brennan, like the district court in Wyman, would build upon the governmental and individual interests articulated in Cafeteria Workers. Brennan, however, like the district court, had a new weight for the balance, and while the district court had used its new weight to tip the scale with utility, Brennan would tip it with a new sense of community.

2. Brennan's approach to procedural due process

Justice Brennan received a procedural due process test from the district court which weighed three factors: first, the government's interest

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183. *See supra* notes 44-47 and accompanying text.


in avoiding the costs associated with the additional procedural protection being sought; second, the individual's need for the interest to be protected by the procedure, and, third, the likelihood that an individual would be wrongfully denied the protected interest if she did not receive the procedural protection she sought.\footnote{\textit{Wyman}, 294 F. Supp. at 901.} In applying this test to determine whether welfare recipients were entitled to a pretermination hearing, the district court had articulated the necessary balance: "Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance, and the startling statistic that post-termination fair hearings apparently override prior decisions to terminate benefits in a substantial number of cases."\footnote{\textit{Id.} The "substantial number of cases" in which prior decisions to terminate were overridden was less than 18% of all cases. \textit{See id.} at 901 n.17 (stating 64% of appeals were affirmed.); \textit{Goldberg v. Kelly}, 397 U.S. 254, 265 (1970) ("[M]ost terminations are accepted without challenge.").}

Justice Brennan was necessarily aware of this test, and even this articulation of its application in the welfare context, when he wrote \textit{Goldberg}. In fact, as noted earlier,\footnote{\textit{See supra} text accompanying notes 141-43.} he even quoted this articulation in his \textit{Goldberg} opinion; however, when he quoted it, Brennan omitted the likelihood of error factor.\footnote{"'Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance.'" \textit{Goldberg v. Kelly}, 397 U.S. 254, 261 (1970) (quoting \textit{Kelly v. Wyman}, 294 F. Supp. at 901).} This omission was not an oversight. Rather, it indicated one of the two ways in which Brennan would change the district court test. The first change, as just noted, was this deletion of the likelihood of error factor. The second was the addition of a factor which focused on the governmental interests in not erroneously denying the individual the protected interest.\footnote{\textit{Id.} at 265.} Thus, although Brennan and the district court reached the same result, Brennan's articulation of the necessary balance looks much different in structure than the district court's balance. Brennan declared, "the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens."\footnote{\textit{Id.} at 266 (emphasis added).}
It is curious that Brennan would cite as liberally as he did to the district court decision but neither acknowledge that he was changing that test nor explain why he was doing so. This is particularly true given that the deletion and addition of factors were significant even if they did not change the result of the balance in the welfare context.

To understand that significance, we first must return to the district court's original test. As noted previously, that test consisted of these three factors: the government's interest in avoiding the costs associated with procedural protection; an individual's need for the protected interest; and the likelihood of erroneous termination if the sought-after protection is not provided. Given a moment's reflection, one can see that this test is effectively nothing more than the Learned Hand test for negligence. The Hand test provides that one has a duty of reasonable care when her burden of avoiding an injury to another is outweighed by the loss that the injury would create multiplied by the probability that the injury will occur if the burden of avoiding the injury is not undertaken. Alternatively, this is articulated as follows:

\[ B \text{ (Burden)} < P \text{ (Probability)} \times L \text{ (Loss)}. \]

To see that the two tests are one and the same, one need only consider the deprivation of an interest protected by the Due Process Clause as if that deprivation were a negligence case. In this context, we would use the Hand test to determine whether the state had a duty to avoid causing the deprivation. Using that test, we would turn first to the loss factor and find that that factor is addressed perfectly by the factor in the district court test that looks at the individual's need for the protected interest. This is so because if that protected interest were to be denied, the loss suffered would be a function of the need an individual has for that interest. Thus,

\[ L = \text{Individual's Need for the Protected Interest}. \]

If we move next to the burden factor, we see that theoretically the burden on the state to avoid the injury is to assume the cost of the

194. See supra text accompanying note 188.
197. Carroll Towing, 159 F.2d at 173.
198. Id.
additional procedural protection. This is so because, theoretically, if the state provided the procedural protection, people would not lose the protected interest erroneously. That is, in fact, why the procedure would be considered a protection. Thus,

\[ B = \text{Cost of Providing Additional Procedural Protection}. \]

Having established these relationships between the loss and burden factors of the two tests, we can now square up the final probability factors. In our context, the probability for the Hand test that the loss will occur if the state fails to undertake its burden of avoiding the loss is the likelihood of erroneous termination if the sought-after protection is not provided. Thus,

\[ P = \text{Likelihood of Erroneous Termination if the Sought-After Protection is Not Provided}. \]

The Hand test, therefore, becomes the district court's original procedural due process test:

\[
\text{Cost of Providing } B < \text{Likelihood of Erroneous} \]
\[ \text{Protection} \quad \text{Termination if the Sought-} \]
\[ \text{Provided} \quad \text{After Protection is Not} \]
\[ \text{Provided} \]

All of this should not suggest that the district court test is better than Brennan's test simply because the district court test mirrors the Hand test, a test of near-legendary stature.\textsuperscript{199} That relationship, though, does give us some insight into the implications of Brennan's changes in the district court test.

First the deletion of the probability factor facilitates the requirement of procedures even when the procedure would not reduce the possibility of erroneous termination or when the possibility for erroneous termination is very low even without the additional procedure. Two sets of examples will illustrate this. First, in the tort context, let us revisit the immortal Mrs. Palsgraf and her friends at the Long Island Railroad.\textsuperscript{200} There, Mrs. Palsgraf is standing next to a large scale well down the railway platform while train employees are trying to help a man with an innocuous brown package onto the train.\textsuperscript{201} In such a situation one might well say that the burden on the employees of not dislodging the package

\textsuperscript{199} But see, e.g., Randy Lee, \textit{A Look at God, Feminism, and Tort Law}, 75 MARQ. L. REV. 369 (1992); Leslie Bender, \textit{A Lawyer's Primer on Feminist Theory & Tort}, 38 J. LEGAL EDUC. 3 (1988).

\textsuperscript{200} Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928).

\textsuperscript{201} \textit{Id.} at 99.
is minimal. They simply must watch where they put their hands. Meanwhile, one might also say that the loss to be suffered by Mrs. Palsgraf would be enormous if that package were to become dislodged, explode, and knock the scale onto Mrs. Palsgraf.202 Thus, if we simply balance burden and loss, we would expect the employees to have a duty to Mrs. Palsgraf. However, when we factor in the probability requirement, the duty goes away. This is so because the probability is negligible of an innocuous package exploding and knocking a scale onto a passenger many feet away.203 Thus, we have a duty when only burden and loss are considered but no duty when probability is also considered.

Not surprisingly, we can see the same dynamic when moving between Brennan's test and the district court test. To illustrate this, let us consider Brennan's holding that a welfare recipient has a right to the protection of privately retained counsel at a pretermination hearing.204 For the illustration's sake, let us assume that the pretermination hearing has already reduced the probability of erroneous termination to almost zero. In this scenario, the burden of allowing the additional procedural protection is low because the state does not need to pay for the privately retained counsel and her presence at the hearing will be only a minor inconvenience. As Brennan pointed out, "[W]e do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing."205 On the other hand, the loss here would be high if an erroneous termination did occur because it would "deprive an eligible recipient of the very means by which to live ...."206 Thus, under Brennan's test, given the low burden but high loss, the state would have a duty to allow a privately retained lawyer into the hearing even though the probability of wrongful termination in that hearing was nonexistent. When we move this to the district court test, however, the duty goes away because the loss cannot outweigh the duty once that loss is factored in with the negligible probability.207

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203. Palsgraf, 162 N.E. at 99. But see 162 N.E. at 105 (Andrews, J., dissenting). Andrews made the danger to Mrs. Palsgraf more likely by waiting until after the package had exploded to determine the risk the package poses to people on the platform. Id.
205. Id. at 271.
206. Id. at 264 (emphasis added).
207. For the sake of illustrating the point, we may safely assume that here the minimal probability can offset the large disparity in weight between the burden and loss. We should recognize, however, that in the tort context, there are cases where liability has been found in the face of minimal probability of accident. See, e.g., Gulf Ref. Co. v. (continued)
The deletion of the probability factor, therefore, affects explicitly those situations where procedural protections are already adequate.\textsuperscript{208} Beyond that, the deletion affects implicitly those situations where the procedural protection reduces but does not eliminate the probability of loss.\textsuperscript{209}

To illustrate this second, implicit effect, let us again consider the private counsel example. Now, however, let us assume that many errors occur in pretermination hearings but that those errors are just as likely to occur when the recipient brings counsel to the hearing. Again, under Brennan's test, this would simply be a matter of great loss and little burden. Therefore, the state would have a duty to allow counsel to the recipient. Under the district court approach, however, things are not so simple since the probability factor there requires us to acknowledge the magnitude of the erroneous termination problem. Having to acknowledge that, at least implicitly, requires us to think about whether the proposed procedure would actually reduce that magnitude. Once we recognize the procedure would have little or no impact on the probability of erroneous termination, we might well feel moved to manipulate the test to find the state without a duty rather than require the state to incorporate additional process that appears to be worthless.\textsuperscript{210}

\textsuperscript{208} One might argue that this distinction is meaningless because no one would ever seek additional procedural protections when current protections ensure accurate results. Three reasons suggest that an individual might sue for such additional protections. First, an individual might not trust the system to generate accurate results in its current form even if the system does in fact generate such results. Therefore, that lack of trust would encourage an individual to seek additional procedural protections although additional protections would seem, to the objective eye, unnecessary. Second, an individual might want to press the state for additional procedural protections to increase the state's cost of terminating the protected interest, and, therefore, discourage the state from pursuing termination. \textit{See Goldberg}, 397 U.S. at 279 (Black, J., dissenting). Finally, one might attempt to pursue a claim for additional procedural protection simply to delay the inevitable termination. One could argue that this is a motivation in the continuous appeals of certain death penalty cases and even for those recipients in \textit{Goldberg} who would have recognized that even though for them termination may have been inevitable, pursuit of the additional protection would have guaranteed continued welfare benefits through the litigation of the case and then the scheduling and holding of a hearing.

\textsuperscript{209} For our purposes, it is not worth delving into the complexities these situations can pose and the manner in which those complexities can be addressed in tort law. For a fuller discussion of those topics, however, see Mary K. Kearney, \textit{Breaking the Silence: Tort Liability for Failing to Protect Children from Abuse}, 42 BUFF. L. REV. 406 (1994).

\textsuperscript{210} \textit{See} Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 562 (1985) (continued)
Having seen the implications of the deletion of the probability factor, we may now turn our attention to the implications of inserting the factor focused on the government's interest in not erroneously terminating an interest. At first glance, this factor may not appear to add anything new to the test at all, and in fact, may do nothing more than require the double-counting of the individual's need to avoid the loss of the protected interest.

This would certainly be true if Brennan simply sought to weigh here the government's, or society's, perception of the individual's loss. This can be seen from the following observation about the Hand Test. Although the cases may not always reflect this clearly, the commentators agree that the loss factor in the Hand Test measures the loss to the individual, but it does so "in the light of the social value of the interest threatened . . . ."211 The loss factor in the Hand Test, therefore, already weighs the loss from society's perspective and the addition of another factor, such as Brennan's, to do the same thing necessarily would double-count that loss.

Even if the loss factor in Brennan's test valued the loss from the individual's perspective, that would not justify another factor that measured the same loss from a different perspective. That would again lead to double-counting. An example here may help. If we want to know the value of a block of gold, we would not determine its value in dollars and then in francs and then add the two together. Rather, we would decide whether we needed the value in dollars or in francs and then add the two together. Rather, we would find out the value in that currency. Here, the loss is the

(Rehnquist, J., dissenting) ("The balance is simply an ad hoc weighing which depends to a great extent upon how the Court subjectively views the underlying interests at stake."). In Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940), rev'd, 312 U.S. 492 (1941), Judge Hand, himself, noted that even in the tort context, these factors are not hard and fast but can be molded to respond to preferences:

The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk. All these are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between incommensurables . . . .

_id., at 612.

block of gold, and the individual and social perceptions are the two currencies. Just as the gold is not more valuable because we measure it in terms of two different currencies, the loss here is not larger because we look at it from different perspectives.

A more careful review of this factor, however, indicates that Justice Brennan intended this factor to measure something very different than what he measured in the individual's loss factor. The governmental loss factor truly is a measure of what society can lose in this context rather than simply how society values what the individual can lose. This governmental loss has two parts and, paradoxically, those parts reflect both the bright side and dark side of 1970 America and perhaps even America today. Brennan's presentation of this factor is also intriguing because, although Brennan relies on Reich in establishing the factor, the factor emphasizes the importance of social integration rather than the individual autonomy Reich sought to protect.

The first part of the governmental interest reflects America at its brightest and most optimistic. Here Justice Brennan sought to measure the loss each citizen suffers when one of our fellow Americans can no longer contribute meaningfully to the life of the community:

> From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.

Understanding and applying this part of the interest might come more

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213. See supra text accompanying notes 25-37.
214. 397 U.S. at 264-65. Although this piece focuses on the concept of meaningful participation from the quote, one could create a different bend by focusing on the effect of the "forces not within the control of the poor." Although not relying on Goldberg per se, Professor Beermann has taken such a bend in arguing for a governmental duty to act "[b]ecause social ills are socially caused . . . ." Jack M. Beermann, Administrative Failure and Local Democracy: The Politics of DeShaney, 1990 DUKES L.J. 1078, 1091.
easily if we understood its origin. This interest may well have been simply a reflection of some random notion that Brennan had that Americans should be kind to all persons within our borders. Yet, there is reason to believe that that origin was not so random. In fact, the "background of our traditions," to which Brennan referred here, could be Jeffersonian. For Brennan, the wrongful denial of welfare to one person hurts everyone because it denies all of us of that person's meaningful participation in the community. Such a notion echoes Jefferson's vision of a democracy that flourishes because of each citizen's civic virtue, or willingness to act for the general good. When a wrongful termination binds one person in such a democracy, it denies all citizens the contribution of that person to the community.

Such a notion of political community coming from a federal Supreme Court justice may seem both ironic and naive to us today. It could seem ironic because Jeffersonians would have cringed at the thought of an unelected, national judge dictating local policies as Brennan was doing here. It could seem naive because we may believe that, because we now live in a post-Watergate, post-Roe v. Wade political world, we must be dominated by special interests, political action committees, and cultural pluralism. One might look upon our time not as reminiscent of a quiet Monticello afternoon of reflection but as dominated by the "factions" with which Madison justified the need for federalism. Madison described these as factions which are "united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community" and factions which are always merely a "frivolous [or]

216. For an understanding of how much such people have to offer, see MOTHER TERESA, WORDS TO LOVE BY 69 (1983) ("We don't realize the greatness of the poor and how much they give us. It is a wonder."). See generally ROBERT COLES, DOROTHY DAY (1987). Not everyone, however, sees constitutional communitarianism flowing in this direction. For example, in the constitutional community of Justice Oliver Wendell Holmes, "the government had the power, and the individual had the duty, to subordinate personal interests to the survival of the race." Novick, supra note 196, at 350.
217. MAYER, supra note 215, at 143.
218. 410 U.S. 113 (1973) (holding that the Fourteenth Amendment recognizes a woman's right to have an abortion).
fanciful distinction" away from bursting into the flame of "unfriendly passions" and "violent conflicts."\(^{221}\)

Given the time and his background, such irony and naivete may have escaped Brennan. Brennan, for example, might not have even needed Jefferson to square his notion of individual loss and community loss. For all the friction his votes in the privacy area may have generated with the Catholic Church,\(^{222}\) Brennan had arrived on the Supreme Court a Catholic,\(^{223}\) and this may well have created within him a Christian notion of community and of government that would have made his position seem not at all ironic to him.\(^{224}\) When Brennan spoke of the loss to a person

\(^{221}\) Id. at 79.


\(^{223}\) Hearings, supra note 148, at 31-34; STONE ET AL., supra note 115, at lix. In fact, some have suggested Brennan's Catholic faith may have been a reason for his appointment. Id.; Stephen J. Friedman, Introduction, in WILLIAM J. BRENNAN, JR.: AN AFFAIR WITH FREEDOM, supra note 112, at 10.

Such a realization does not put Brennan at odds with Jefferson. As David Mayer points out, Jefferson had his own Christian inclinations:

[Jefferson] considered himself a true "Christian," but this was in no accepted theological sense. It was to moral philosophy, rather than theology, that Jefferson referred when he described himself as "disciple of the doctrines of Jesus," "sincerely attached to his doctrines" of benevolence and ascribing to him "every human excellence ... believing that he never claimed any other." Jefferson took religion seriously and later in life entered upon serious, systematic religious studies.

MAYER, supra note 215, at 161.

\(^{224}\) This is not to suggest that Brennan sought to make the United States a Catholic or Christian nation. As early as his confirmation hearings, Brennan distanced himself from such a notion by assuring the Senate Judiciary Committee that his oath to support the Constitution and laws of the United States was superior to any obligation of his faith "to follow the pronouncements of the Pope on all matters of faith and morals." Hearings, supra note 148, at 34. Furthermore, his positions joining majorities in opposition to the integration of religion into public schools, see, e.g., Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); and in support of a right to obtain an abortion, see, e.g., Roe v. Wade, 410 U.S. 113 (1973); indicate a commitment not to impose Christian teachings or Catholic rules on Americans generally. The point here is simply that growing up Catholic may have implicitly affected the way Brennan thought about the world, much as Noonan, for example, has suggested that being the son of a disgraced judge may have affected Benjamin Cardozo. Noonan, supra note 118, at 143-44.

This is not the first piece to have reached such a conclusion. See, e.g., STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 141-42 (1993). Carter, for example, sees in Brennan's opinion in Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 342 (continued)
when her fellow countryman suffers, he echoed Paul's words in the Epistles "If one part suffers, all the parts suffer with it," \(^{225}\) and he also echoed those of the Reverend John Donne: "Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls, it tolls for thee." \(^{226}\) As a Christian, Brennan was aware of the concept of all members of the Church forming one "body." \(^{227}\) In discussing religious community in *Corporation of the Presiding Bishop v. Amos*, \(^{228}\) Brennan vividly portrays this notion: "Such a community represents an ongoing tradition of shared beliefs, an organic


In *Presiding Bishop*, Brennan noted that often individuals derive more meaning from religious activity when they act together with others in religious community just as in *Goldberg* he suggests that one's social and political activity is enhanced by the meaningful participation of others in the American community. *Presiding Bishop*, 483 U.S. at 342 (Brennan, J., concurring). Furthermore, Brennan noted a causal relationship between aiding the autonomy of the community and consequently aiding the rights of the individual. *Id.* Such a notion would fit well with this governmental interest in *Goldberg* and would begin to bridge the gap between Brennan and Reich. *See supra* text accompanying notes 176-77.

In reflecting all of this in *Presiding Bishop*, Brennan said the following:

For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

*Presiding Bishop*, 483 U.S. at 342 (Brennan, J., concurring).


entity not reducible to a mere aggregation of individuals." Given Brennan's understanding of community in the religious context, therefore, it would take no new imaginative vision to see all Americans as parts of a national "body." Thus, Brennan may not have seen himself in Goldberg as an unaccountable figure in a powerful and remote national government imposing his views on the teeming masses down below but simply as one part of the body of America reminding the other parts of their relation to one another. Such a notion of the government as public conscience would be reminiscent of Brennan's dissent in Moose Lodge No. 17 v. Irvis. There he described government as both "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct" and, more succinctly, as "the authoritative oracle of community values."

Brennan's speeches outside the Supreme Court seem to bear out these observations. In a 1965 speech at Georgetown Law Center, Brennan noted that America was coming together as a community in a way that would facilitate the fulfillment of all individuals:

The mists which have obscured the light of freedom and equality for countless tens of millions are dissipating. For the unity of the human family is becoming more and more distinct on the horizon of human events. The gradual civilization of all people replacing the civilization of only the elite, the rise of mass education and mass media of communication, the formulation of new thought structures due to scientific advances and social evolution—all these phenomena hasten that day.

For Brennan, religion was not irrelevant to this unification of the "human family;" rather, this unification was related to the maturing tolerance of our religious differences and our recognition of our need to come together:

As I read in a recent Jewish periodical: "Catholics are

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229. Id. at 342 (Brennan, J., concurring).
231. Id. at 185 (Brennan, J., dissenting) (quoting Adickes v. Kress & Co., 398 U.S. 144, 190-91 (1970)).
talking about their Jewish heritage; church leaders are damning anti-Semitism as sin. Christian clergymen, educators and laymen are re-examining the face of Judaism and are finding a family resemblance in the features - marks of common roots, common aspirations. And Jews are taking a closer look at Christianity, are clarifying their own position, are publicly discussing issues without embarrassment, apology, or compromise . . . . There is a movement toward unity - not theological unity, but unity as people, as members of one American society working together to find solutions to mutual problems and mutual concerns."

Moreover, such a faith in a common bond among Americans would have made this governmental interest in social integration seem less naive to Brennan, particularly at this point in time. Keep in mind that Brennan was a product of an America that still considered itself a melting pot into which people of all cultures could be melded and an America whose 1940's and 1950's imagination was captured by Frank Capra film heroes who could overcome factions and political machines through appeals of goodness made to the people. Even at the time of Goldberg

233. Id. at 320 (quoting Lynne Ianniello, Perspectives on a New Society, in Anti Defamation League Bull., Sept. 1964, at 1). For a similar perspective, see MOTHER TERESA, WORDS TO LOVE BY 35 (1983).

Other examples of Brennan integrating religious themes and Christian sources into his speeches abound. Brennan would draw on the teachings and words of St. Thomas Aquinas, Warren supra note 112, at 322; Bishop Fulton J. Sheen, Hearings, supra note 148, at 13; and even Jesus. Id. at 12, 16. He spoke of "service" as "a religious concept," id. at 13; and maintained that "the fundamental difference between our Government and that of our enemy [communism] is that we Americans accept, and he rejects, the concept that man-made government must ever be subject and obedient to the laws of God." Id. at 9 (quoting Justice William Brennan, Speech before the Charitable Irish Society, Boston, Massachusetts (March 17, 1954)).


235. But see infra text accompanying notes 240-250.

236. Hearings, supra note 148, at 8 (quoting Justice William Brennan, Speech before the Charitable Irish Society, Boston, Massachusetts (March 17, 1954)).

237. IT'S A WONDERFUL LIFE (Liberty Films 1946) (portraying George Bailey as he realizes the loss to the community had he not been around to participate meaningfully); MEET JOHN DOE (Warner Bros. Pictures 1941) (showing through John Doe and his band of grass roots supporters that even the great and powerful cannot defeat the human spirit);
v. Kelly, the American imagination still tuned in to see Pete Dixon enter Room 222 every week and transform his class of high school students from every imaginable background into a single body of goodness and understanding.\textsuperscript{238} Furthermore, although this was undeniably the era of the "generation gap," it remained the time when people across generational lines sang along with Graham Nash’s plea to "teach your children [and your parents] well."\textsuperscript{239}

Yet, as Dickens might suggest, if Brennan did write Goldberg in a "best of times" that supported his optimistic notion of community, he also wrote it in a "worst of times" that caused him to allow room in the due process standard to factor in our worst fears.\textsuperscript{240} Certainly, Brennan was aware of Professor Reich’s perspective that the individual in America was already under attack both by large private entities and by an ever-expanding government.\textsuperscript{241} Perhaps it did not escape Brennan that this was as much a time for the strident chords of "Ohio"\textsuperscript{242} which called for a

\begin{quote}
Gotta get down to it  
Soldiers are cutting us down  
Should’ve been done long ago.
\end{quote}
striking back as it was for "Teach Your Children" which called for a reaching out.

The room that Brennan allowed for our fears took the form of the "societal malaise" portion of the governmental interest in preventing the loss. Brennan stated clearly that when joined with the guarantee of meaningful participation, this prevention of societal malaise demonstrates how public assistance "is not mere charity, but a means to 'promote the general Welfare, and secure the Blessing of Liberty to ourselves and our Posterity.' Beyond that, however, Brennan was cryptic about what "societal malaise" actually means, and he limited his discussion of it to a single sentence about its origins: "At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity."

If we look to the striking back going on in the late 1960's, however, we can begin to get a sense of what societal malaise is and why Brennan felt preventing it should take on constitutional proportions. To Brennan, societal malaise was a product of frustration and fear and was prevented by welfare. Thus, societal malaise was what the nation's poor generated when they lost hope that they could escape their poverty. In the late sixties and early seventies societal malaise included rioting. With riots running through Watts, Detroit, and Newark; Baltimore, Kansas City,
and Washington, D.C.;\textsuperscript{247} and then Chicago,\textsuperscript{248} the depth and fury of societal malaise could not be ignored.\textsuperscript{249} Even if the bureaucrats in their government offices could not see their role in these riots, Brennan perhaps could, and he built into his test a factor which would remind us that the ultimate reward for selfishness and insensitivity will be "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe."\textsuperscript{250}

\textsuperscript{247} After Martin Luther King's death, America was swept for a week by riots. Forty-six people died, all but five of them black. Washington, the city where King led his triumphant nonviolent march in the summer of 1963, was overtaken by arson and looting. The rioting was almost as bad in Baltimore, Chicago and Kansas City. In all, there was violence in 125 cities. The authorities called out 20,000 regular Army troops and 34,000 National Guardsmen.

\textit{Id.}

\textsuperscript{248} Morrow further stated,

As much as any event in 1968, Chicago [and the Democratic National Convention] is an origin myth of the tribe. Grant Park, Lincoln Park, Michigan Avenue. Those were battle names. Chicago was an extravagant dramatization of America's war with itself. "The truth is that these were our children in the streets and the Chicago police beat them up," wrote Tom Wicker of the New York \textit{Times} after he watched [Mayor] Daley's cops wade into the scruffy, taunting, passionate young.

\textit{Id. at 26.}

\textsuperscript{249} Lance Morrow described it as a time when "it seemed that the deeper drive, the murderous urge, was taking over the [nation's] soul." \textit{Id. at 23.}

\textsuperscript{250} \textit{Exodus} 21:23-25. For a less cynical view of societal malaise, one might look to Mother Teresa and her link between poverty and "human dignity":

I believe that we should realize that poverty doesn't only consist in being hungry for bread, but rather it is a tremendous hunger for human dignity. We need to love and to be somebody for someone else. This is where we make our mistake and shove people aside. Not only have we denied the poor a piece of bread, but by thinking that they have no worth and leaving them abandoned in the streets, we have denied them the human dignity that is rightfully theirs as children of God. They are my brothers and sisters as long as they are there. And why am I not in their place? This should be a very important question. We could have been in their place without having received the love and affection that has been given to us. I will never forget an alcoholic who told me his story. He was a man who gave in to drinking so he could forget that he wasn't loved. I think we should (continued)
It should come as no surprise that fear of societal malaise, of any kind, both rational and irrational, can affect the meaning of the Constitution. Although we may prefer to associate constitutional law more with courage than timidity, the latter has been known to be a driving force. In *Korematsu v. United States*, fear of foreign invasion allowed the words "equal protection," as they have been associated with the Fifth Amendment, to include the forced relocation of all persons of Japanese descent from their homes on the West Coast. More recently, one is free to speculate on how the fear of additional rioting in Los...
Angeles affected the meaning of the term "impartial jury" both for the retrial of Officers Laurence Powell, Timothy Wind, Theodore Briseno and Sgt. Stacey Koon for the beating of Rodney King and then for the trial of Damien Williams and Henry Watson for the beating of Reginald Denny. It should not be surprising, therefore, that Brennan allowed fear of societal malaise to affect the meaning of the Constitution; it was, however, unique that he was honest enough to give it the attention of its own factor, cryptic as that factor may have appeared.

C. Black's Response to Brennan

Brennan's test received the support of five of the eight members of the Court sitting during that session, but within six years, it would officially disappear from the constitutional landscape and be reconverted to the test of the district court. Ironically, that reconversion would take place with the same type of subtle disregard that Brennan used in originally dismissing the district court test. This rapid demise of Brennan's test may be more a function of politics than of merit. During the six years before the test's end, four new members joined the court. Three of these new members were to cast the votes necessary to end whatever reign Brennan's test may have had. The fourth would take

254. U.S. CONST., amend. VI.
255. John Riley, King Case, Trial No. 2; Prosecutors' Strategy Different, but Will Verdict Be, NEWSDAY, Mar. 12, 1993, at 67. For a discussion of the effect the King cases had on the meaning of "double jeopardy," see Akhil Reed Amar & Jonathan L. Marcus, Double Jeopardy after Rodney King, 95 COLUM. L. REV. 1 (1995).
256. Daniel B. Wood, Police Ready for Trouble as L.A. Trial Goes to Jury, CHRISTIAN SCI. MONITOR, Oct. 4, 1993, at 4. Walter Goodman of the New York Times reported that the two defendants were found guilty "only of relatively minor charges like assault" by a jury who, during their deliberations, "could hear the shouts of street demonstrators, reminders of the eruption after an all-white jury acquitted the white police officers who were seen on another famous videotape beating Rodney G. King, a black man." Walter Goodman, When Jurors Flout the Facts, and Sentiment Is the Issue, N.Y. TIMES, July 13, 1994, at C18.
258. See supra text accompanying notes 188-93.
259. Justices Blackmun, Rehnquist, Powell and Stevens all joined the Court during this period. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 977 (Kermit L. Hall et al. eds., 1992).
260. Mathews, 424 U.S. at 319. For those who follow the evolution of seats on the Supreme Court, Justice Black, one of the three dissenters in Goldberg, was replaced by Justice Powell, who wrote the opinion ending Brennan's test.
no part in the decision.  

The turbulence in the short life of the test began immediately with Justice Black’s dissent in *Goldberg*. Black criticized Brennan’s opinion on three levels: First, the test was an arbitrary balancing based solely "on the collective judgment of the majority as to what would be a fair and humane procedure in this case." Second, the test lacked any factor that would allow courts to discriminate between procedures to be required. Third, even if one conceded that the Due Process Clause should be used as a social policy tool to help poor people, ultimately the court’s opinion would not help poor people.

In response to the first criticism, one might well suggest based on what we have seen so far that this arbitrary balancing was at least somewhat related to the arbitrary balancing that courts had been doing with the Hand test in negligence for twenty-three years.

Black, however, would have been unpersuaded. As Black pointed out in his dissent, he believed that while judges were required to interpret the Constitution, they were not "to slide imperceptibly into constitutional amendment and law making" to the extent that they would "use this judicial power for legislative purposes." To support that conclusion, Black maintained that Brennan’s decisions did not "depend on the language of the Constitution itself or the principles of other decisions, but solely on the collective judgment of the majority as to what would be a fair and humane procedure." To the

263. *Id.* at 278.
264. *Id.* at 278-79.
265. *See supra* text accompanying notes 193-256.
266. The Hand test first appeared in 1947, 23 years before *Goldberg* was decided. United States v. Carrol Towing Co., 159 F. 2d 169 (2d. Cir. 1947). *See supra* text accompanying notes 196-98.
268. *Id.* at 275-76.
269. *Id.* at 276; *accord Ely*, supra note 251, at 44; *see also* Robert E. Burns, *Due Process of Law: After 1890 Anything; Today Everything—A Bicentennial Proposal to (continued)
extent that Brennan might argue that the balance was not based on the majoritiy's judgment but on that of a collective conscience of people, Black would have been quick to point out that the collective conscience of people quickly becomes the conscience of the person making the decision.270

Black would maintain that the Constitution invites the legislature to determine what is fair and humane but requires that judges apply the language of the law.271 Black's support for these beliefs took the form of an American history lesson. Black's vision of history and destiny, however, differs a great deal from Brennan's. While Brennan saw the American Constitution as an expression of community,272 Black saw it as a barrier to intrusion on private autonomy.273 Specifically, the purpose of the Constitution for Black was to keep government from intruding on the rights of the people:

Many of those [American] settlers had personally suffered from persecutions of various kinds and wanted to get away from governments that had unrestrained powers to make life miserable for their citizens. It was for this reason, or so I believe, that on reaching these new lands the early settlers undertook to curb their governments by confining their powers within written boundaries, which eventually became written constitutions. They wrote their basic charters as nearly as men's collective wisdom could do so as to proclaim to their people and their officials an emphatic command that: "Thus far and no farther shall you go; and where we neither delegate powers to you, nor prohibit your

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270. Goldberg, 397 U.S. at 277 n.6 (Black, J., dissenting) ("Judges are as human as anyone and as likely as others to see the world through their own eyes and find the 'collective conscience' remarkably similar to their own.").
271. Id. at 275 ("I would have little, if any, objection to the majority's decision in this case if it were written as the report of the House Committee on Education and Labor, but as an opinion ostensibly resting on the language of the Constitution I find it woefully deficient."). Black is not alone in this view. See, e.g., Lombardo v. Hoag, 566 A.2d 1185, 1189 (N.J. Super. Ct. Law Div. 1989) (noting both sides of this debate in the context of a negligence cause of action).
272. See supra text accompanying notes 214-39.
exercise of them, we the people are left free."

The history lesson cannot stop there, however, but must journey further to the "long, hot months in the summer of 1787 in Philadelphia, Pennsylvania" where "[r]epresentatives of the people" determined that the power to make law would rest with the branch of government of elected representatives of the people rather than with the judiciary. This step is essential to Black's support. Without it, Brennan could well respond that if the Constitution is to protect people from government, then it must protect the poor from a government that had structured society to include "forces not within the control of the poor [that] contribute to their poverty." To do so, Brennan might continue, the judiciary would have to interpret the Due Process Clause to give the poor the protection of a pretermination hearing for welfare benefits. In response to that last step, however, Black would argue that in creating the Constitution, the people realized they could protect themselves from their elected representatives. It was a free-wheeling unelected elite from which the people needed protection.

Thus, a tension arises between Brennan's view of the nation as the body of Americans, with the Court as a part of that body simply providing gentle reminders of common destiny to those parts who may grow selfish, and Black's view of the nation as autonomous individuals bound by their elected representatives but protected from an imposing, unaccountable judiciary.

The differences in perspectives may be explained by again looking more closely at the backgrounds of the people involved. Brennan, in addition to being Catholic, was a career judge having worked his way up through the New Jersey court system before reaching the Supreme Court. His contact with the political system included a recognition that it contained an executive branch that was not above selecting Supreme Court justices, including Brennan, more to buy votes than to achieve merit, and a legislative branch that had unleashed Senator Joseph

274. Id.
275. Id. at 273; see also Loren A. Smith, Judicialization: The Twilight of Administrative Law, 1985 DUKE L.J. 427, 459 ("The expansion of government programs into more and more substantive areas has also resulted in an understanding of due process alien to the framers of either the fifth or the fourteenth amendments.").
276. Goldberg, 397 U.S. at 265.
277. STONE ET AL., supra note 115, at lxx.
278. Id; see also ABRAHAM, supra note 148, at 245.
McCarthy on the world and even on Brennan himself.\textsuperscript{279} Meanwhile Brennan's vision of the Supreme Court necessarily was tinted by the pride he no doubt felt in the social advancements led by the Warren Court.\textsuperscript{280} Black, on the other hand, was not a career judge but had been a United States Senator for ten years before being appointed to the Supreme Court.\textsuperscript{281} He knew the political system as the arena in which he had helped Roosevelt's New Deal programs gain acceptance,\textsuperscript{282} and he knew the unelected judiciary as the arena that had blocked those programs which he believed necessary to pull America out of a depression.\textsuperscript{283}

Black's objection to the balance then came down to a difference in views on the roles of the various branches of government, a difference which appears to come from differences in historical perspective, both national and personal. Thus, when Black said, "I would have little, if

\begin{itemize}
\item \textsuperscript{279} \textit{Hearings}, supra note 148, at 5 ("I [Senator McCarthy] believe that Justice Brennan has demonstrated an underlying hostility to congressional attempts to expose the Communist conspiracy."); \textit{see also} \textit{ABRAHAM}, supra note 148, at 245-46.
\item \textsuperscript{280} \textit{See} Earl Warren, \textit{Mr. Justice Brennan, in WILLIAM J. BRENNAN, JR.: AN AFFAIR WITH FREEDOM}, supra note 112, at 348-49.
\item \textsuperscript{281} \textit{STONE ET AL.}, supra note 115, at lvii. For a more complete discussion of Justice Black's background, see \textit{Memory of Justice Black}, \textit{supra} note 78, at ix; and \textit{ABRAHAM}, \textit{supra} note 148, at 199-204.
\item \textsuperscript{282} \textit{See} \textit{ABRAHAM}, \textit{supra} note 148, at 195-200.
\item \textsuperscript{283} In A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Carter v. Carter Coal Co., 298 U.S. 238 (1936), the Supreme Court held provisions of Roosevelt's New Deal unconstitutional. After Roosevelt's overwhelming reelection in 1936 and his Court-packing proposal, \textit{ABRAHAM}, \textit{supra} note 148, at 195-98; \textit{STONE ET AL.}, \textit{supra} note 115, at 180-81, the Court became more receptive to the constitutionality of New Deal programs. \textit{See, e.g.}, \textit{NLRB v. Jones & Laughlin Steel Corp.}, 301 U.S. 1 (1937).
\end{itemize}


\begin{quote}
There is not one word in our Federal Constitution or in any of its Amendments and not a word in the reports of that document's passage from which one can draw the slightest inference that we have authority thus to try to supplement or strike down the state's selection of its own policies. The Wisconsin law [on garnishment] is simply nullified by this Court as though the Court had been granted a super-legislative power to step in and frustrate policies of States adopted by their own elected legislatures. The Court thus steps back into the due process philosophy which brought on President Roosevelt's Court fight.
\end{quote}

\textit{Id.} at 345 (Black, J., dissenting).
any, objection to the majority's decision in this case if it were written as the report of the House Committee on Education and Labor," he is probably being sincere rather than sarcastic.284 As a New Deal Democrat, one would expect he would have been open to social programs to help the poor.285 But as a legislator, he would have wanted to guarantee that the legislature had the room that they needed to have to develop these programs. Black had seen firsthand that the representatives of the people can be brought to support such programs but that over-zealous judges could not always be trusted to uphold them. He expressed as much at the end of his dissent in Goldberg:

> The operation of a welfare state is a new experiment for our Nation. For this reason, among others, I feel that new experiments in carrying out a welfare program should not be frozen into our constitutional structure. They should be left, as are other legislative determinations, to the Congress and the legislatures that the people elect to make our laws.286

Given the extent of the Court's own debate over the years on this issue287 and the wealth of scholarship on it as well,288 one could hardly

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284. Goldberg, 397 U.S. at 275 (Black, J., dissenting).
285. Black, himself, had humble roots, "the eighth and last child of a storekeeper's family in Clay County, Alabama" who "completed law school without having attended college." 50 TEX. L. REV. at iii (1971). As a senator, he saw himself aligned with the poor against the rich as can be seen in his description of his first impression of Chief Justice Hughes:

> When Hughes was nominated [to the Court] I thought of him as a big business Wall Street lawyer, not much interested in the people. I was a Senator from a rural state and it was the poor people and small farmers who sent me here and he didn't seem like our kind of man.

> But I was wrong. Hughes was a fine human being and a fine justice, and a great Chief Justice, and we became warm friends.

Memory of Justice Black, supra note 78, at lix (expressing memories of the Court by Chief Justice Burger).

286. Goldberg, 397 U.S. at 279 (Black, J., dissenting); see also Burns, supra note 269, at 810-11.

287. See supra notes 74-82 and accompanying text.

attempt to elaborate on its full implications here. It is enough to have focused the tension behind Black's criticism of balancing. We now move on to his second criticism: that the test lacked any factor which would allow courts to discriminate between procedures to be required.

As has been noted earlier, when Brennan deleted the likelihood of error factor, he did in fact reduce the ability of a court to justify requiring some procedural protections for an interest while not requiring other protections. The reality of this effect was articulated, though perhaps overstated by Justice Black, who saw this limitation leading necessarily to costly, time-consuming, unnecessary procedures. As Black noted, under Brennan's test, once a court determined that an individual's need for an interest outweighed the state's concern for withholding that interest from the undeserving, Brennan's test would allow that weighing to justify any procedural protection that happened to come along:

[T]he inevitable logic of the approach taken will lead to constitutionally imposed, time-consuming delays of a full adversary process of administrative and judicial review. . . . Since, by hypothesis, termination of aid at that point may still "deprive an eligible recipient of the very means by which to live while he waits," . . . I would be surprised if the weighing process did not compel the conclusion that termination without full judicial review would be unconscionable. After all, at each step, as the majority seems to feel, the issue is only one of weighing the government's pocketbook against the actual survival of the recipient, and surely that balance must always tip in favor of the individual.

Brennan's review of procedures under his test indicates that, at least in his mind, the test provided some mechanism for discriminating between procedures. For example, Brennan indicated that the Due Process Clause clearly required that a recipient be able to bring privately retained counsel to a hearing, but, strangely, he did not see the state's provision of counsel at these hearings as an equally obvious entitlement. Thus, although Black would anticipate that the balance

289. See supra text accompany notes 200-10.
290. Goldberg, 397 U.S. at 278 (Black, J., dissenting).
291. Id. (emphasis added).
292. Goldberg, 397 U.S. at 270. This is particularly true because welfare recipients
between the recipient's survival and the government's pocketbook "must always tip in favor of the individual," Brennan indicated that simply looking at costs does allow discrimination between procedures. Furthermore, although he offered no explanation, Brennan was also able to distinguish between the appropriateness of a requirement for a statement of the reasons for a decision and a requirement of a formal opinion, as well as between the appropriateness of a requirement for an impartial decision maker and a requirement for a decision maker completely divorced from the welfare agency. In both cases, one could attribute the distinction to government cost.

Interestingly, however, when Brennan indicated the recipient has a right to bring privately retained counsel to a hearing, he supported this notion by discussing the value counsel may serve to the proceeding:

We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing.

While this may have been included simply to show that the governmental burden of the procedure would be minimal because the attorney would not "unduly prolong or otherwise encumber the hearing," it may have also been included to show that Brennan required a threshold showing that the desired procedure would actually "safeguard the interests of the recipient." If the latter were true, then before Brennan would require a procedure under the Due Process Clause, he would demand that the procedure offer some probability, or at least a possibility, of reducing termination errors. Thus, although not balanced in the equation, this

would be, by definition, too poor to retain counsel.

293. Id. at 278 (Black, J., dissenting).
295. Id. at 270-71.
296. Id. at 271.
297. Id. at 270-71.
298. Courts examining tort cases under the Hand criteria have discussed this notion of "possibility" and held that even in cases of huge loss and minimal burden, the probability factor must be present at a level above zero probability. See, e.g., Gulf Ref. Co. v. Williams, 185 So. 234 (Miss. 1938).
minimal threshold possibility requirement would allow some
discrimination between various sought-after procedural protections.
Therefore, Black's observation in this area was accurate, although not as
uncontrollable as he suggested.

All of which brings us to the final of Black's three concerns: to the
extent the Due Process Clause reflects social policy, Brennan's result
reflected bad social policy. Black's point here was the Court could not
help poor people by imposing increased bureaucracy on welfare
agencies.

Black's rationale was simple. Welfare was not property at all but
"the government's promise of charity to an individual." As such, the
resources available for welfare are not unlimited but depend on the extent
to which affluent members of society are willing to be taxed "to help
support, feed, clothe, and shelter its less fortunate citizens." Given
that welfare agencies must work with limited funds rather than demand
whatever funds they want, they must respond to increased procedural
burdens in one of two ways: they must either make it more difficult
initially to get on the welfare rolls or decrease benefits to offset the cost
of procedures. In either event, poor people end up in worse shape.

The reality of the post-Goldberg welfare state was that Black was
probably right about the negative implications of the result in
Goldberg. On the other hand, the negative implications of continuing

299. At the risk of undermining the earlier notion that Brennan's Catholic
background may have influenced his view of the Constitution as symbolic of a community
or body of Americans, see supra text accompanying notes 222-27, it may be noted here
that the Bible also says, "You shall not be partial to the poor or defer to the great, but in
righteousness shall you judge your neighbor." Leviticus 15:19. Thus, by that standard, it
would be "bad social policy" to interpret the Constitution to favor the poor simply to help
the poor. On the other hand, such interpretation would be appropriate if one were seeking
righteousness by trying to offset societal "forces not within the control of the poor [that]
contribute to their poverty." Goldberg, 397 U.S. at 265.

300. Goldberg, 397 U.S. at 279 (Black, J., dissenting).

301. Id. at 275. Although Black argued vehemently that welfare was not property,
although Brennan defended the assertion that welfare was property, id. at 262, and
although no court had ever previously held that welfare was property, the agency never
contested in this case that welfare was property. Id. at 261-62; see supra notes 149-77
and accompanying text.


303. Id. at 279.

304. [Post-Goldberg] administrative difficulties reinforced a political
difficulty. Welfare rolls were already increasing rapidly. State
legislators were unwilling to provide more funds either for well-
constructed hearings or for welfare benefits. A strategy was needed
(continued)
to terminate welfare benefits without a hearing may well have been equally troublesome. As the district court expressed and Brennan framed, the world of wrongfully terminated families included sick, undernourished children living thirteen to an apartment and parents collapsing from hunger in emergency aid lines. Thus, what Black may have been discovering here was not so much that there was a flaw in Brennan's social policy analysis but that the Court was faced with a case which, from a policy standpoint, offered no good answers. No matter what the Court did, the poor would continue to suffer the hardships of being poor.

If Brennan's notion of community were more binding or if America had the community of the early Christian church, where all shared everything so none were needy, perhaps the alternatives would not that would preserve fiscal integrity and produce defensible decisions.

A number of tactical moves ultimately comprised the grand design. One was to tighten up and slow down the initial eligibility determination process. Another was to generalize and objectify the substantive eligibility criteria so that messy subjective judgments about individual cases would not have to be made and defended. This move led to the realization that professional social workers were no longer needed. Costs could be reduced further by lowering the quality of the staff and by depersonalizing staff-claimant encounters. If these reactions were not sufficient to restore fiscal balance, then payment levels could be reduced or allowed to remain stable in the face of rising prices. A tougher stance was also to be taken with respect to work requirements and prosecution of absent parents. Moreover, because hearings presumably protected the claimants' interests, internal audit procedures were skewed to ignore nonpayment and underpayment problems and to concentrate on preventing overpayments and payments to ineligibles.

Jerry L. Mashaw, Due Process in the Administrative State 34-35 (1985); see also Epstein, supra note 133, at 771-75; Joel F. Handler, "Constructing the Political Spectacle": The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History, 56 Brook. L. Rev. 899, 900-01 (1990); White, supra note 250, at 867-69; Smith, supra note 275, at 461. But see Hon. Cesar A. Perales, The Fair Hearings Process: Guardian of the Social Service System, 56 Brook. L. Rev. 889, 892 (1990) ("In the twenty years since Goldberg, the concept of due process has been sewn into the fabric of social welfare policy and institutionalized so well that it permeates the practices and policies of the Department and local social services districts.").


306. Now the company of those who believed were of one heart and soul, and no one said that any of the things which he possessed was his own, but they had everything in common. . . . There was not a needy
have been so bleak. But this was not the case. Regardless of whether welfare was legally property or charity, realistically, the chest from which it would come could contain only so much as those with money could be convinced to contribute. As a practical matter, therefore, welfare remained a function of charity and had to exist with all the limitations with which charities exist.

At some level, Brennan was aware of all this. His discussion of need in \textit{Goldberg} began in the same paragraph in which he established that welfare is property,\footnote{307} consequently the discussions did tend to mingle suggestively. His justification for welfare being property, however, was solely that "[s]uch benefits are a matter of statutory entitlement for those qualified to receive them."\footnote{308} Thus, the conscience tells the body that welfare is the property of the poor not because they are needy but because the body has promised to give welfare to the poor.

Of course the heart does not pump blood to the rest of the body because of a promissory obligation but because the fate of the heart and the rest of the body are intertwined. Thus, this notion of rights and obligations is on a different philosophical plane than is Brennan's discussion of community and governmental interest in ensuring meaningful participation.\footnote{309} Beyond the matter of internal consistency, this does not necessarily create a problem. On this level, the poor might still have benefited from Brennan's opinion. This would be so, particularly if Brennan could have argued that the promise of welfare is not a promise of an amount of money but a promise of a response to a problem of poverty. In that case, the poor may rightfully demand that the nation put the funds necessary to solve the problem into the chest.\footnote{310}

\begin{footnotes}
\item person among them, for as many as were possessors of lands or houses sold them, and brought the proceeds of what was sold and laid it at the apostles' feet; and distribution was made to each as any had need.
\item \textit{Acts} 4:32-35. \textit{But see Acts} 6:1 ("Now in these days when the disciples were increasing in number, the Hellenists murmured against the Hebrews because their widows were neglected in the daily distribution.").
\item \textit{Goldberg}, 397 U.S. at 262-63 ("The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss . . . '").
\item \textit{Id.} at 262.
\item See supra text accompanying notes 214-39; see infra text accompanying notes 794-807.
\item See \textit{DeShaney v. Winnebago County Dep't of Social Serv.}, 489 U.S. 189, 203 (1989) (Brennan, J., dissenting); \textit{LaShawn A. v. Dixon}, 762 F. Supp. 959 (D.C. Cir. (continued)
If such were the case, Brennan could have his additional procedural protections without costing other recipients benefits.

There is at least one reason why this did not work in the world outside Brennan's courtroom. If people really believed they promised a solution and were willing to contribute until the problem were solved, the democratic process could deal with the situation, as Black indicated, without the Court's help. On the other hand, if people did not believe they were obligated to pay for a solution, the Court simply could not force them to pay for one. If Brennan had memories of Eisenhower ordering the troops into Little Rock to enforce the Court's ruling\textsuperscript{311} in \textit{Brown v. Board of Education},\textsuperscript{312} he should have also remembered that the Court successfully imposing its will on an unwilling nation was the exception rather than the rule.\textsuperscript{313} In fact, the pace of school desegregation was slow at best until the Court's decision gained the support of a political coalition strong enough to have an impact on Congress.\textsuperscript{314} Perhaps, Black also had memories of life after \textit{Brown} and that was why he was so convinced of the need to let the legislatures "experiment" with welfare,\textsuperscript{315} at least until they had gotten the public comfortable with the public's responsibility for the program.\textsuperscript{316}

\textsuperscript{311} \textit{Stone} et al., \textit{supra} note 115, at 508.
\textsuperscript{312} 349 U.S. 294 (1955).
\textsuperscript{313} \textit{Stone} et al., \textit{supra} note 115, at 507-09.
\textsuperscript{314} The court's renewed interest in the pace of school desegregation coincided with the reemergence of an effective political coalition supporting black equality for the first time since Reconstruction. The changed political atmosphere finally provided the court with needed support—support that translated into real progress toward southern desegregation.

An important turning point was passage of the Civil Rights Act of 1964, 42 U.S.C. § 2000a et seq.

\textit{Id.} at 510.

\textsuperscript{315} \textit{Goldberg}, 397 U.S. at 279 (Black, J., dissenting).

\textsuperscript{316} One might argue that the Court was successful in acting as a social conscience in the abortion area without needing any club to force through public acceptance. Two points need to be noted here, however. First, in \textit{Roe v. Wade}, 410 U.S. 113 (1973), when the Court recognized a woman's right to abort a pregnancy, it recognized a right the individual could exercise without public involvement. The right to welfare cannot be exercised without the public putting money in the chest, nor can schools be integrated without the public sending their children to integrated schools. In fact, the Court has refrained from ordering the public to put money in the chest to fund abortions. \textit{See, e.g.}, \textit{Harris v. McRae}, 448 U.S. 297 (1980); \textit{Maher v. Roe}, 432 U.S. 464 (1977).

(continued)
If this discussion has exhausted Black’s criticisms of Brennan’s test, the only peace that exhaustion offers for the test is the opportunity to rest in peace. Six years after its adoption, the Supreme Court officially replaced Brennan’s test with that of the district court. As will be seen in the next section, even before that replacement, however, Brennan’s procedural due process test was to experience an on-again, off-again relationship with the Court and, in fact, even with its author.

III. Goldberg’s Wild Ride

The years following Goldberg v. Kelly may be divided into three periods. In the first, spanning from Goldberg to Perry v. Sindermann, the Court was content to be miles from nowhere. During this period, the Court struggled with a multitude of different approaches to due process, unable to use any one consistently. In the second period, running from Arnett v. Kennedy to Mathews v. Eldridge, the Court brought together its most promising due process structures from the first period and set out on the road to find out which would work best. Finally, in the third period covering the years after Mathews, the Court cast the test it had settled upon into the wild world, only to find that a lot of nice things do indeed turn bad out there.

When this ride ended, the Goldberg due process test was a shadow of its former self. In particular, though statutory entitlements remained

Second, at the time Roe v. Wade was decided, a large number of women were already getting abortions. 135 Cong. Rec. E907-08 (daily ed. Mar. 21, 1989) (report of C. Everett Koop, M.D. ScD., Surgeon General) (reporting that there were 200,000-1,200,000 abortions a year prior to Roe); Rachel Benson Gold, Alan Guttmacher Inst., Abortion and Women’s Health: A Turning Point for America? 20 (1990) (finding 745,000 legal abortions performed in the year Roe was decided). Thus, unlike welfare and school desegregation, Roe began with an effective political coalition to advance it.

Furthermore, even with these advantages, life has not been easy for Roe. See Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).


319. 408 U.S. 593 (1972).


322. The reader who is a vintage rock and roll fan will notice in this paragraph references to three Cat Stevens songs that will serve as subsection headings. See infra notes 323, 579, 733.
property, the protection property status afforded entitlements fell short of what Brennan had originally envisioned. This should not suggest that *Goldberg* was an empty promise nor that *Goldberg* has little to offer for the future. No one can deny that the world of due process today looks quite different than did the world of due process before *Goldberg*, even if that world is not everything that Brennan might have envisioned. In addition, a number of good ideas presented themselves both in *Goldberg* and in the succeeding cases, and those ideas can still be used to improve the course of due process analysis. There is a point, therefore, in re-examining this period and settling in to share in *Goldberg*'s wild ride.

A. *Miles from Nowhere*\(^\text{323}\)

*Miles from nowhere, guess I'll take my time,*  
Oh yeah, to reach there.  
Look up at the mountain I have to climb,  
Oh yeah, to reach there . . .

\([\ldots]\)

*Miles from nowhere, not a soul in sight,*  
Oh yeah, but it's alright.  
I have my freedom, I can make my own rules,  
Oh yeah, the ones that I choose.\(^\text{324}\)

The Cat Stevens song "Miles from Nowhere" captures perfectly the two years of due process analysis following *Goldberg v. Kelly*.\(^\text{325}\) The title alone communicates the sense of meandering that one gets from the period. If *Goldberg* can claim to be the first word in a due process revolution, it cannot claim to be the last. In the numerous cases that quickly followed *Goldberg*, the Court strayed regularly in almost every direction from every aspect of the *Goldberg* structure, and Brennan was less than assertive in calling them back to it.

Two explanations can be offered to explain the period, and each corresponds neatly to a verse in the song. First, one can see *Goldberg* as the first step up the mountain of a new notion of due process. Moving within this explanation, one might say that given the complexity of the issues and implications, the Court had to take its time in settling on a test. Methodically, it set its best minds to consider the problem in a host of


\(^{324}\) *Id.*

different contexts, and through trial and error the Court determined eventually how the due process test should be formed. In this light, the two year period is an exciting example of the Court at its best.

Alternatively, one might see in this period an arrogance and a lack of a sense of accountability. In this context, one might well attribute to the Court a feeling that members of the Court were free to make their own rules without answering to anyone or anything in sight, including their previous opinions. In that light, it is hardly a period to be proud of.

Regardless of how one explains the decisions from this era, they remain an interesting line of cases. The issues went to home, family, economic and personal liberty, and occupational security. Tests volleyed back and forth across opinions like ping pong balls. Although the period would begin with Goldberg and end with a case that attempted to trace the Goldberg structure, the Court would travel miles in between, and even when the Court eventually did return to Goldberg, one could not help but think that the Court was still nowhere where it intended to stay.

1. *Early court responses to Goldberg and Brennan's response*

Three points became immediately clear from the initial responses in the various courts to Brennan's opinion in Goldberg. First, no one seemed to want to use it; second, when it was used, no one seemed to understand it; and third, Brennan, himself, did not appear eager to address the problems associated with the first two points.

In two disability cases that were decided within months of Goldberg, the district courts seemed to see Brennan's approach in Goldberg as basically the same as the approach used by the Wyman court and ignored entirely his factor of the government's interest in the provision of a benefit. The disability benefits cases served as a particularly good barometer of the lower courts' perception of Goldberg because welfare benefits and disability benefits were perceived by the courts as closely related. In the first of these to be decided, *Messer v. Finch*, the court skipped any consideration of disability benefits as property and immediately addressed the degree of due process required to protect

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328. See supra notes 211-56 and accompanying text.
those benefits. In deciding that disability benefits were entitled to less protection than welfare, the court looked exclusively to the test in Wyman,\(^{331}\) simply acknowledging that Wyman had been affirmed in Goldberg.\(^{332}\) Although the Messer court may have hinted that the personal interest in disability benefits was less than the personal interest in welfare,\(^{333}\) its focus was that disability decisions involved "more objectively ascertainable facts" and more limited issues than did welfare decisions.\(^{334}\) Thus, disability terminations presented a lower likelihood of error and, by way of the Wyman balance, were entitled to less protection.\(^{335}\)

Although in the second case, Wright v. Finch,\(^{336}\) the district court gave Goldberg more prominence, the approach and result were the same as in Messer. In Wright, the court met the property requirement by analogizing disability benefits to the welfare benefits Brennan had declared property in Goldberg.\(^{337}\) The Wright court then sought to apply Brennan's test to determine the extent of due process required for


\(^{332}\) Messer, 314 F. Supp. at 513.

\(^{333}\) The Messer Court noted that disability payments were retroactive in wrongful termination cases while welfare payments were not. Id.

\(^{334}\) Id. (quoting Wyman, 294 F. Supp. at 901 n.20). Although this greater reliability of disability evidence was a theme throughout the six year court review of disability procedures, see, e.g., Mathews v. Eldridge, 424 U.S. 319, 343-44 (1976); by the early 1980s it became clear that this theory of greater reliability did not stand up in practice. See, e.g., Samuel Cordes, Down's Syndrome Victim Denied Benefits, SQUIRREL HILL TIMES, July 28, 1982, at 1, 6 ("SSA ... is ignoring information from physicians in its attempt to throw people off the disability [rolls].").

\(^{335}\) Messer, 314 F. Supp. at 513.


\(^{337}\) Id. at 385 n.8. The district court's additional reliance on Flemming v. Nestor, 363 U.S. 603 (1960), while appropriate, is strained. Wright, 321 F. Supp. at 385 n.9. While the Court in Flemming did say, "The interest [in social security] of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause," Flemming, 363 U.S. at 611 (quoted at Wright, 321 F. Supp. at 385 n.9), the Court there also said that "To engrave upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to everchanging conditions which it demands." Flemming, 363 U.S. at 610.

The primary argument raised in Flemming to show that social security was a right was that, unlike welfare, social security was a form of insurance, to which employees were required to contribute and which was "based upon the contributions and earnings of the individual." Flemming, 363 U.S. at 623-24 (Black, J., dissenting).
disability benefits. The district court characterized Brennan's test as a two factor, rather than a three factor, balance. The test included "the extent to which he may be "condemned to suffer grievous loss"" and "the governmental interest in summary adjudication" but omitted the governmental interest in the provision of the benefits.

Neither of those factors, however, proved to be the critical factor in the district court's decision that less procedural protection needed to be provided in the disability context compared to the welfare context. Implicitly, the critical factor turned out to be the Wyman court's likelihood of error factor. In Wright and Messer, the court relied primarily on the greater reliability of evidence in the disability context to hold that less procedural protections were necessary.

Over the next two years, Brennan would have no less than nine opportunities to pull the lower courts away from the Wyman due process balance and back to his Goldberg approach. During this time, both he and the Court experimented instead with a number of due process tests with each test having a host of variations.

338. Wright, 321 F. Supp. at 386 (quoting Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970)). Courts sometimes seemed to read Goldberg to direct them to use the balance to determine whether pretermination protection was required, but then, if it was, courts would feel their way through what procedures had to be included in that protection. See, e.g., Morrissey v. Brewer, 408 U.S. 471 (1972). The court in Wright has this voice to it as well. Wright, 321 F. Supp. at 386-87.


340. An additional case, Wisconsin v. Constantineau, 400 U.S. 433 (1971), found that an injury to reputation could meet the liberty requirement but did not consider what procedural protections should be required.

341. During this period, Brennan not only showed a lack of commitment to his due process values on the civil side of due process, but he also made no attempt to bring the test over to the criminal side of due process. In In re Winship, 397 U.S. 358 (1970), Brennan wrote a majority opinion that held that due process required a "beyond a reasonable doubt" standard for juveniles just as it did for adults. In doing so, as one would expect of him, Brennan looked to the individual interest, id. at 365-66, 367, and the government interest in not using the higher standard. Id. at 366-67. Reminiscent of the Wyman probability factor, however, he then considered whether a lower standard was likely to make a difference in the outcomes of cases. Id. at 367-68. Thus, he was more consistent here with the Wyman approach to due process than with what he had expressed in Goldberg.

Shortly thereafter, in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), Brennan allowed his concurrence and dissent to be directed by the likelihood that existing procedures could bring about "fundamental fairness . . . [in] factfinding," id. at 554, again consistent with the Wyman probability factor. Brennan did not draw on his own governmental interest in community. The issue in McKeiver was whether due process for juveniles required a jury trial.
The Court's first major post-Goldberg test came in *Boddie v. Connecticut*, where the Court held that due process is not met when a state charges indigents court costs when they file for divorce. Reminiscent of the majority's opinion in *Cafeteria Workers*, Harlan's majority opinion in *Boddie* seems to lump the property interest, deprivation, and due process issues together. Given the issue, this lumping may seem inevitable. After closer examination, however, the issues seem to divide out nicely in the following manner: first, does an individual have a life, liberty, or property interest in a divorce, and second, does a filing fee, in the face of indigency, constitute a deprivation. In this light, the case becomes purely a substantive due process case rather than a procedural due process case. The reality of this was not lost on Justice Douglas, who, in his concurrence, indicated that he found the majority's substantive due process inferences a strong enough invitation for *Lochner* that the Court should have refrained from due process analysis altogether and resolved the case on equal protection grounds.

343. *Id.* at 383.
344. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961); *see also supra* notes 44-52 and accompanying text.
345. *See* 401 U.S. at 374-82.
346. Certainly, once it is determined that charging an indigent a fee is a deprivation, issues of the sufficiency of procedural protection could arise with respect to the determination of indigency. For example, if the state promised to waive its fees for an indigent person but then provided people no opportunity to prove indigency and get the fee waived, a procedural due process issue would arise.
348. 401 U.S. at 384-85 (Douglas, J., concurring). Douglas acknowledged that "[t]he power of the States over marriage and divorce is, of course, complete except as limited by specific constitutional provisions," *id.* at 385, but insisted that, under equal protection, just as the State could not "deny divorces to domiciliaries who where Negroes and grant them to whites," *id.* at 385, it also could not grant them to those in affluence but deny them to those in poverty. *Id.* at 386.

Not surprisingly, Justice Black shared Justice Douglas's concern over bringing too much moral vision to the Due Process Clause, but could not see Douglas's equal protection approach as different from Justice Harlan's due process approach. *Id.* at 393-94 (Black, J., dissenting).
Within the context of their lumping, the majority seemed to adopt the *Sniadach*\(^{349}\) presumption approach\(^{350}\) rather than the *Goldberg* balance. Consistent with that approach, Justice Harlan said that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."\(^{351}\) The weight of this presumption was clarified when, in language reminiscent of the "least restrictive means" test,\(^{352}\) Harlan indicated that the state could not present countervailing interests in this case at least in part because "other alternatives existed[ed]" to the approach employed by the state.\(^{353}\)

This is not to say, however, that the implicated personal interest was irrelevant to the analysis. In its effort to limit the scope of the opinion to court costs in divorce actions rather than to court costs in any action, the majority emphasized that the personal interest implicated in *Boddie* "is the exclusive precondition to the adjustment of a fundamental human relationship."\(^{354}\) It is not clear, however, whether this consideration of the personal interest was designed to show that its "fundamental human" nature elevated it to a property right, just as some believed "brutal need" created the property interest in *Goldberg*,\(^{355}\) or whether that consideration was designed to show that a balance was going on similar to the two part balance of *Cafeteria Workers*.\(^{356}\) In any event, the majority did not mention Brennan's governmental interest in providing the benefit.

In his concurring opinion, Brennan showed a commitment more to the spirit of *Goldberg* than to the test it proposed. Brennan's objective in that concurrence was to establish that the Court's holding should apply to any court cost imposed on indigents and not just to those associated with divorce.\(^{357}\) To support this, Brennan relied on the application of the two part balancing test from *Cafeteria Workers*\(^{358}\) rather than his own three

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350. *See supra* notes 68-70 and accompanying text.
352. *See In re Griffiths*, 413 U.S. 717 (1973) (applying strict scrutiny analysis to find that states could not constitutionally prevent aliens from bar membership).
353. *Boddie*, 401 U.S. at 381.
354. *Id.* at 383.
355. *See supra* notes 108-11 and accompanying text.
357. *Boddie*, 401 U.S. at 386-87 (Brennan, J., concurring in part).
358. "*[C]onsideration of what procedures due process may require under any given (continued)
part test in *Goldberg*. In doing so, Brennan concluded that, "When a State's interest in imposing a fee requirement on an indigent is compared to the indigent's interest in being heard, it is clear that the latter is the weightier." 359 The inference that comes reasonably from this concurrence, and is in fact borne out in subsequent cases in this line, is that Brennan's primary concern after *Goldberg* was to preserve a broad notion of government largesse as property and little of his energy was left to preserving a particular test to define the contours of procedural due process.

Support for this inference followed almost immediately in Brennan's majority opinion in *Bell v. Burson*. 360 There, the Court held that under the Due Process Clause, Georgia could not suspend the driver's license of an uninsured motorist involved in an accident unless the state first gave the motorist an opportunity to show he was not at fault. 361 In so doing, Brennan was very careful to extend the notion of property he had created in *Goldberg*. Although he conceded that there was no property interest in the expectation of the issuance of a license, 362 Brennan stated that once issued, "licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." 363 Brennan based this on the notion that once issued, possession of a license "may become essential in the pursuit of a livelihood." 364 It was not, however, his view that this property interest was limited to licenses essential in the pursuit of a livelihood or even licenses generally. Rather, Brennan indicated that as a "general proposition," the Due Process Clause "limit[s] state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' " 365

If Brennan was quick to buttress the notion from *Goldberg* that any

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359. Id. at 387.
361. Id. at 543.
362. Id. at 539.
363. Id.
364. Id.
365. Id. Because the license here was only being suspended and not revoked, the deprivation requirement had to be met by a detention, but this was not a problem given the Court's holding in *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). *See supra* notes 63-68 and accompanying text.
"statutory entitlement" meets the property requirement, he still could not have placed himself further from the due process test he established in that case. Instead, he applied the presumption approach that notice and hearing are required before deprivation unless the government can show "countervailing government interests" or "emergency situations." In applying this approach, Brennan considered the sufficiency of the government's interest in not hearing evidence on fault and did not need to consider the individual's need for this particular property interest. In doing so, Brennan de-emphasized any similarity between the presumption approach and the balancing approach.

2. A time to retreat

Although one may have been tempted to believe after Boddie and Bell that the Court was prepared to settle on the presumption approach to procedural due process, the Court was quick to quash such beliefs as its due process ride entered 1972. Within two weeks of Valentine's Day that year, the Court began to show signs of embracing a balancing test, but that balance was not either of the ones it had applied in Goldberg or Cafeteria Workers. Instead the Court began to drift vaguely toward the Wyman district court balance.

Richardson v. Wright marked the first appearance of the disability benefits cases at the Supreme Court. Richardson was the appeal of Wright v. Finch, however, the Supreme Court did not deal with the appropriateness of that district court opinion at all. Instead the Court decided that because the Secretary of Health, Education, and Welfare had adopted new regulations since the district court's decision, the district court opinion would be vacated and the case remanded back to the district court for consideration of the new regulations.

This per curiam opinion of the Court invited a comment by Brennan

368. Id. at 542.
369. Goldberg, 397 U.S. at 266.
373. See supra notes 328-39 and accompanying text.
375. 405 U.S. at 209.
for two reasons. First, even under the new regulations, recipients of Supplemental Security Income (SSI) benefits were not entitled to a Goldberg-type pretermination hearing, and therefore, in spite of the change in regulations, the regulations remained at odds with Goldberg v. Kelly. Second, as already noted, the district court in Wright v. Finch had strayed from the Goldberg balance and, moving in the direction of the Wyman balance, had distinguished disability benefits from welfare benefits on the reliability of the evidence likely to appear at a hearing. The district court, therefore, used the likelihood of error factor, which was absent in Brennan's Goldberg test, to hold that pretermination procedures in disability cases did not need to be as comprehensive as those for welfare cases. In light of this, at the very least, one would have expected someone on the Court to offer some guidance to the district court as to the test to be used the second time around.

In his dissent, Brennan seized the opportunity to correct the district court on the inconsistency of its outcome with that in Goldberg. Brennan, however, did not question the balancing approach used in the district court. In fact, he used a large portion of his dissent to show that the evidence and issues in disability hearings are no more objective than those in welfare hearings and, therefore, that the likelihood of error is just as troubling in both contexts. Thus, the structural guidance that Brennan provided to the district court was to reinforce its use of the Wyman balance of personal interest, governmental interest in not providing the procedure, and probability of error if the procedure is not used.

The day before Richardson, in Lindsey v. Normet, the Supreme
Court had begun its embracing of the Wyman balance. Justice White entered the due process fray in Lindsey and wrote for the majority. The majority held that the Due Process Clause was not violated by the tenant eviction procedures established in the Oregon Forcible Entry and Wrongful Detainer Statute (FED statute).³⁸⁶

Although White did not divide his analysis of the elements of due process explicitly, his discussion seemed to flow in the following manner. For White, the case presented two procedures that required review under the Due Process Clause: first, whether the FED statute violated due process because the statute required that unless the tenant posted security for the accruing rent, a trial had to be held no later than six days after service on the tenant of the complaint for his removal, and second, whether due process was violated because the statute sought to limit "the triable issues in an FED suit to the tenant's default and to preclude consideration of defenses based on the landlord's breach of duty to maintain the premises."³⁸⁷

With respect to the first issue, White seemed to view the deprivation of property as the detention of accruing rent that the posting of security required. Such a view fit easily within the Court's deprivation of property view in Sniadach, where the detention of wages constituted a property deprivation in a garnishment action.³⁸⁸ White, however, felt that the process surrounding this deprivation was adequate. To determine this, as one would consider with the Wyman test, White considered the probability of an erroneous deprivation without additional procedural protection and the tenant-defendant's interest in the accruing rent.³⁸⁹ Unlike the Wyman test, however, White's approach did not consider any governmental interest in maintaining the procedures as they were.

³⁸⁶. Id. at 64. In Lindsey, the property rented by the tenants had been declared "unfit for habitation" by the City of Portland, Oregon. Id. at 58. The tenants refused to pay the landlords additional rent until the landlord brought the property up to the city's requirements. Id. at 58-59. Rather than do so, the landlord brought a suit in state court to evict the tenants under the forcible entry law. Id. at 59. The tenants immediately sought a declaratory judgment in federal court that the Oregon law violated due process and equal protection. Id. at 59-60.

³⁸⁷. Id. at 64. The case also considered equal protection issues, id. at 69, as well as issues of abstention, id. at 65-66 n.12; id. at 83 (Douglas, J., dissenting in part); id. at 90 (Brennan, J., dissenting in part); but these are beyond the scope of this paper.


³⁸⁹. Lindsey, 405 U.S. at 65.
White maintained that error was unlikely in this case even without additional procedural protections. If a tenant wanted to avoid the detention of funds, all she needed to do was be prepared to go to trial in six days, and given the clarity of the issues and the tenant's access to all relevant facts, this was not "an unduly short time for trial preparation."\textsuperscript{390} Furthermore, even if one were to find that the tenant needed additional time to prepare, the tenant's personal interest in the accruing rent was not great enough to justify additional procedural protections.\textsuperscript{391} Justice White pointed out the following:

A requirement that the tenant pay or provide for the payment of rent during the continuance of the action is hardly irrational or oppressive. It is customary to pay rent in advance, and the simplicity of the issues in the typical FED action will usually not require extended trial preparation and litigation, thus making the posting of a large security deposit unnecessary.\textsuperscript{392}

Although White was again not explicit in the structure of his analysis, it would appear that the problem in the second issue, concerning the tenant’s opportunity to raise affirmative defenses at trial, was that there was no property interest implicated in a suit against a tenant who either was not paying her rent or had overstayed the duration of her lease. Although the tenants had couched this claim in other terms,\textsuperscript{393} White saw the tenants’ claim as being "that they are denied due process of law unless Oregon recognizes the failure of the landlord to maintain the premises as an operative defense to the possessory FED action and as an adequate excuse for nonpayment of rent."\textsuperscript{394} For White, however, such a claim only worked if the property interest that the tenant had in the dwelling included a right to remain in the dwelling but not pay rent if the landlord failed to meet his duty to maintain the premises. This was so because the tenant could continue to have a property interest in her lease, even if she was not paying rent, only if the tenant's obligation to pay rent depended on the landlord's obligation to maintain the premises.

\textsuperscript{390} Id.
\textsuperscript{391} Id.
\textsuperscript{392} Id.
\textsuperscript{393} "Their claim is that they are denied due process of law because the rental payments are not suspended while the alleged wrongdoings of the landlord are litigated." Id. at 66.
\textsuperscript{394} Id. at 68.
However, if these obligations were independent of one another rather than dependent, the tenant could not have a property interest in a dwelling for which she was not paying rent. If the latter was in fact the case, once it was established that the tenant was not paying rent, she had no property interest, and, therefore, she could not seek the authority of the Due Process Clause to claim the protection of additional affirmative defenses.

To White and the majority, it was not for the Constitution but for the state of Oregon to determine whether these obligations to pay rent and to maintain the dwelling were dependent or independent, and Oregon had apparently decided that they were independent:

The Constitution has not federalized the substantive law of landlord-tenant relations, however, and we see nothing to forbid Oregon from treating the undertakings of the tenant and those of the landlord as independent rather than dependent covenants. Likewise, the Constitution does not authorize us to require that the term of an otherwise expired tenancy be extended while the tenant's damage claims against the landlord are litigated. The substantive law of landlord-tenant relations differs widely in the various states.395

Two points may be taken from White's presentation of the majority's position. The first is a very relaxed approach to the Wyman balance that allows the judge to choose which of the factors will be used in a particular case. The second is a disinclination to use the property element of the Due Process Clause to expand the scope of state substantive law rights. Justice Douglas's dissent to the due process questions effectively took issue with both these points.

In response to the latter point, Douglas initially appeared to argue for recognition of a property interest in one's home that transcended state law.396 This was rather curious given his warning in Boddie v. Connecticut against Lochnering.397 Douglas argued extensively that Oregon state law saw the obligations of a lease as dependent covenants

395. Id.
and, therefore, the tenants had a property interest that was threatened. Ultimately, however, Douglas conceded that there was reason to doubt this, and he then rested his property argument on an interest in the "right to complain to public authorities," and on a man's home being "where man's roots are":

"Where the right is so fundamental as the tenant's claim to his home, the requirements of due process should be more embracing. In the setting of modern urban life, the home, even though it be in the slums, is where man's roots are. To put him into the street when the slum landlord, not the slum tenant, is the real culprit deprives the tenant of a fundamental right without any real opportunity to defend. Then he loses the essence of the controversy, being given only empty promises that somehow, somewhere, someone may allow him to litigate the basic question in the case."

Douglas's response to White's former point came in the context of Douglas's subsequent review of the FED procedures. Unlike White, Douglas reviewed all the process created by the FED statute as one whole rather than reviewing the security and affirmative defense provisions separately. In reviewing these procedures, Douglas, unlike White, acknowledged all three provisions of the Wyman approach. Also, unlike White, Douglas saw the current procedures offering a high probability of erroneous result for two reasons. First, although the facts may have been equally accessible to both sides, the limited time allowed before trial made it unlikely the tenant would be able to retain counsel. That meant that "[t]he trial is likely to be held in the presence of only the judge and the landlord and the landlord's attorney." For Douglas, such a hearing was "in actuality no opportunity to be heard." Second, the

398. 405 U.S. at 86-89 (Douglas, J., dissenting).
399. See, e.g., id. at 88 ("We do not know what Oregon would hold if a lease in violation of a housing code was before it in an FED case."); id. at 88 ("[A]ppellees represent to us that the Oregon judges at the trial level have usually held that such defenses are not relevant, though the Oregon Supreme Court has not considered the question.").
400. Id. at 89.
401. Id.
402. Id. at 85.
403. Id.
404. Id.
prohibition against raising certain affirmative defenses meant that certain essential factors would not be raised, and, therefore, neither the real "culprit" nor the basic question would ever be found.

Douglas also acknowledged the state's apparent interest in maintaining the current procedures "to protect landlords against loss of rental income during lengthy litigation." The weight of this, however, was reduced by the availability of "other less drastic devices for protecting the landlord, and in any event, it was no match for a personal interest "so fundamental as the tenant's claim to his home."

There was also one subtle point of contention between White and Douglas here. White, like Stewart in Cafeteria Workers, suggested that due process analysis must be based on the particular circumstances in the case and, therefore, the same interest may be protected with different procedures for different people. Implicitly, Douglas rejected this notion.

Although both White's majority opinion and Douglas's dissent reflect a clear departure from Brennan's due process test in Goldberg, and although Brennan wrote a dissenting opinion in Lindsey, Brennan did not use that dissent to reassert his due process test. Such a move might have been particularly effective given the similarity between the governmental interest in providing welfare and in ensuring adequate housing to the poor. Brennan, instead, used the dissent to deal with an abstention issue, and he effectively invited the Oregon Supreme Court

405. Id. at 85-87.
406. Id. at 90. Douglas's discussion here was reminiscent of Brennan's majority view in Bell v. Burson, 402 U.S. 535 (1971), the primary difference being that Brennan was able to convince his fellow justices that the state created property interest in a driver's license was affected not only by solvency but also by culpability while Douglas was not able to convince the Court that the right to an apartment included a right to a habitable place in which to live.
407. 405 U.S. at 88 (Douglas, J., dissenting).
408. Id.
409. Id. at 89.
410. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S 886, 896 (1961); see also supra notes 83-87 and accompanying text.
411. 405 U.S. at 65 ("Of course, it is possible for this provision to be applied so as to deprive a tenant of a proper hearing in specific situations, but there is no such showing made here, and possible infirmity in other situations does not render it invalid on its face.").
412. See id. at 85 n.8 (Douglas, J., dissenting).
413. Id. at 90-92 (Brennan, J., dissenting).
414. See supra note 399.
to right a wrong that he could see the U.S. Supreme Court was not going to right. This invitation was one that Brennan would pose more broadly to state courts as the Supreme Court grew more conservative. 415

3. A time to charge on

One might have taken Lindsey416 as a signal that a more conservative Court was moving toward a tightening of the notion of property and also departing from the presumption approach to due process in favor of a less sympathetic notion of balancing. Such notions, however, would have dissipated quickly in the months that followed. During that time, the Court would review two cases that were similar to Lindsey417 but would decide them differently. In the first, Stanley v. Illinois,418 the Court would find a property interest broader than that created by state law and would protect it with a balancing test featuring factors more sympathetic to the property interest than were the factors used in Lindsey.419 In the second, Fuentes v. Shevin,420 the Court would find a property interest within interests created by state law and would do so in a way that would limit the scope of Lindsey.421 Additionally, the Court in Fuentes would once again abandon its balancing approach to due process analysis and return emphatically to the presumption approach.422 In all, the rhetoric of Fuentes would suggest a new high-water mark for the Due Process Clause, and the author of that rhetoric was ironically to be the previously and subsequently more conservative Justice Stewart.

In Stanley v. Illinois,423 the Court held that a state violated the Due Process Clause when it created an irrebuttable presumption that unwed fathers are unfit to raise their children.424 Although the case was argued in the Illinois state courts as an equal protection claim,425 the Supreme

417. Id.
418. 405 U.S. 645 (1972).
419. See infra notes 432-45 and accompanying text.
421. See infra notes 450-61 and accompanying text.
422. See infra notes 473-78 and accompanying text.
423. 405 U.S. 645 (1972).
424. Id. at 658.
425. Id. at 659 (Burger, J., dissenting).
Court chose to deal with it under due process.\textsuperscript{426} White wrote for the majority in \textit{Stanley},\textsuperscript{427} and, reminiscent of his \textit{Lindsey} opinion,\textsuperscript{428} he was not explicit in the way in which he approached the requirements of the Due Process Clause.\textsuperscript{429} Rather than sloppiness here, White seemed to be trying to approach the case in a manner consistent with the \textit{Cafeteria Workers}\textsuperscript{430} test and used a single balance to determine both the property and the due process requirements.\textsuperscript{431}

In \textit{Stanley}, White described the private interest to be recognized as property or liberty as "that of a man in the children he has sired and raised."\textsuperscript{432} White rejected the contention of the State of Illinois that this interest had not been deprived because "Stanley might still be able to regain custody of his children as a guardian or through adoption proceedings."\textsuperscript{433} Given that by now the Court considered it beyond question that states deprived individuals of property when they detained property pending additional guaranteed procedures,\textsuperscript{434} it should come as no surprise that White found a deprivation where a state completely terminated the parent's legal interest in the children but offered the

\begin{footnotesize}
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\item[426.] \textit{Stanley}, 405 U.S. at 658. Justice Douglas had no comment on this although, as noted earlier, in \textit{Boddie v. Connecticut}, 401 U.S. 371 (1971), he had sought to convince the Court to use equal protection rather than due process because he feared the decision to recognize a substantive property interest in divorce would draw the Court dangerously close to \textit{Lochnering}. \textit{See supra} notes 347-48 and accompanying text. Apparently Douglas felt confident that the Court would be on firmer ground in \textit{Stanley} with the family issue of an unwed father's property interest in his child. \textit{Stanley v. Illinois}, 405 U.S. 645, 651 (1972). That confidence might well have been shaken 17 years later, however, when four justices of the Court, led by Justice Scalia, looked to the interests "traditionally protected by our society," Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (plurality opinion), to limit severely that liberty or property interest. \textit{Id.} at 123-24, 128-29. Four other justices explicitly disagreed with that limitation, \textit{id.} at 136 (Brennan, J., dissenting); \textit{id.} at 157 (White, J., dissenting), and a fifth indicated that he was amenable to disagreeing. \textit{Id.} at 133 (Stevens, J., concurring in the judgment) ("I think cases like Stanley v. Illinois, 405 U.S. 645 (1972), and \textit{Caban v. Mohammed}, 441 U.S. 380 (1979), demonstrate that enduring 'family' relationships may develop in unconventional settings. I therefore would not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist in a case like this.").

\item[427.] \textit{Stanley}, 405 U.S. at 646.
\item[429.] \textit{Stanley}, 405 U.S. at 649-58.
\item[431.] \textit{Stanley}, 405 U.S. at 650-51.
\item[432.] \textit{Id.} at 651.
\item[433.] \textit{Id.} at 647.
\end{enumerate}
\end{footnotesize}
parent the opportunity to initiate alternative procedural mechanisms that might generate a similar interest to the one denied.

When White then turned to the balancing test to resolve the due process issue, he used a much different balance than what he had used in *Lindsey*.\footnote{Lindsey v. Normet, 405 U.S. 56, 65 (1972).} In *Lindsey*, White restricted himself to the personal interest and probability of wrongful termination.\footnote{See supra notes 388-92 and accompanying text.} In *Stanley*, White weighed no less than six different interests.

As in *Lindsey*, White's first interest on the scale was the "cognizable and substantial" personal interest Stanley had "in retaining custody of his children."\footnote{Stanley, 405 U.S. at 652.} Also, as in *Lindsey*, White considered the small probability of erroneous deprivation under current procedures.\footnote{Id. at 654, 656.} While this weighed heavily in *Lindsey*,\footnote{Lindsey, 405 U.S. at 65.} however, in *Stanley*, it was consistently outweighed by an interest similar to the one developed by Brennan in *Goldberg* to reflect the state's interest in providing the benefit.\footnote{Goldberg, 397 U.S. at 264-65; But see infra text accompanying notes 783-85.} Along those lines, the State in *Stanley* had articulated interests in "the moral, emotional, mental, and physical welfare of the minor," "the best interests of the community," and "the minor's family ties."\footnote{Stanley, 405 U.S. at 652 (quoting ILL. REV. STAT. c.37, para. 701-702 (1972».} All of these interests were to be furthered not by termination but only by a correct decision. As White put it, "Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family."\footnote{Id. at 652-53.}

White coupled these governmental interests in child, community, and family with the personal interest and found that they easily outweighed both the government's interest in preserving its current "prompt efficacious procedures" and the claim that "unmarried fathers are so seldom fit" that wrongful deprivation was improbable.\footnote{Id. at 656.} In doing so, White noted, in the tradition of Thoreau,\footnote{In his essay *On the Duty of Civil Disobedience*, Henry David Thoreau responded to the expediency arguments of Paley by saying, "But Paley appears never to have contemplated those cases to which the rule of expediency does not apply, in which a people, as well as an individual, must do justice, cost what it may." HENRY DAVID THOREAU, *On the Duty of Civil Disobedience*, in WALDEN; OR, LIFE IN THE WOODS—ON (continued)}
placing some values higher "than speed and efficiency," particularly those values that are "fragile values of a vulnerable citizenry."445

*Fuentes v. Shevin*446 meanwhile, involved the procedures associated with state replevin statutes. These statutes generally provided that upon commencement of an action of replevin and the creditor's posting of a bond, the sheriff would seize from the debtor the property securing the debt.447 The debtor could bring this seizure to an end within the first three days by filing a counterbond.448 After that, however, the property would be held by the creditor until final judgment.449

On the deprivation of property side, *Fuentes* seemed to fall along the line previously defined by *Sniadach*450 and *Lindsey*.451 All three cases involved a detention of an interest rather than a complete loss, but by this time, this distinction had no legal significance.452 The cases, however, varied somewhat on the nature of the interest being detained. In *Sniadach*, the personal interest was in one's income. Everyone had an unencumbered legal right in their income even though they might well have outstanding debts. This interest met the property requirement.453 In *Lindsey*, the interest urged unsuccessfully was in a dwelling for which the creditor showed the individual had ceased paying rent.454 While one might well have had legally supportable reasons for ceasing to pay rent, as a matter of state law, those reasons were not part of a pattern of mutually dependent promises guaranteeing a right to live in the dwelling.455 That interest did not meet the property requirement. *Fuentes* fell between the two because it involved an encumbered legal right to an interest. Both the debtor and creditor had contractual rights to

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447. *Id.* at 98 (White, J., dissenting).
448. *Id.*
449. *Id.*
453. 395 U.S. at 339.
454. *See Lindsey*, 405 U.S. at 66-69. In *Fuentes*, 407 U.S. at 85 n.15, Justice Stewart noted that the tenant was never denied of his possessory interest in the dwelling "even for one day without opportunity for a hearing." *Id.* The tenant could, however, be permanently deprived of that interest without a hearing on his affirmative defenses. *Lindsey*, 405 U.S. at 68. Stewart also distinguished the natures of the security postings in *Lindsey* and *Fuentes*. *Fuentes*, 407 U.S. at 85 n.15.
the property, and the creditor had not yet shown at a hearing that the debtor had ceased making his payments.\textsuperscript{456}

In addressing this positioning between the two cases, Stewart indicated first that a property interest could exist in the encumbered right. Property protection, he noted, had never been restricted to "safeguard only the rights of undisputed ownership," but had "been read broadly to extend protection to 'any significant property interest' including statutory entitlements."\textsuperscript{457} Furthermore, there was a significant difference between \textit{Lindsey} and \textit{Fuentes} because in \textit{Lindsey} the tenant's possessory interest in the dwelling would have been litigated before affirmative defenses became relevant; however, at the time of replevin in \textit{Fuentes}, the debtor's "ultimate right to continued possession was, of course, in dispute."\textsuperscript{458} As Stewart noted, "The right to be heard does not depend on an advance showing that one will surely prevail at the hearing."\textsuperscript{459} Stewart indicated that this property interest might not be present if, as in \textit{Lindsey}, it had been "shown at a hearing that the appellants had defaulted on their contractual obligations."\textsuperscript{460} Until such a determination is made, however, "[i]t is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods."\textsuperscript{461}

Reminiscent of Brennan's opinion in \textit{Bell v. Burson},\textsuperscript{462} Stewart sought next to ensure that "significant property interest" did not invite a restrictive definition.\textsuperscript{463} Stewart maintained that although "\textit{Sniadach} and \textit{Goldberg} emphasized the special importance of wages and welfare benefit," they did not "carve out a rule of 'necessity' for the sort of nonfinal deprivations of property that they involved."\textsuperscript{464} Stewart noted that such a rule would both be difficult to administer and involve the Court in inappropriate reviews that would threaten personal liberty. Stewart pointed out that the problem in administering such a rule is that almost any good or benefit can be a necessity in some contexts but may

\textsuperscript{456} Fuentes, 407 U.S. at 86-87. \textit{But see} Rubin, \textit{supra} note 18, at 1064-65 (arguing that the property issue in \textit{Fuentes} was treated as a "straw man . . . readily disposed of").

\textsuperscript{457} Fuentes, 407 U.S. at 86.

\textsuperscript{458} \textit{Id.} at 87.

\textsuperscript{459} \textit{Id.}

\textsuperscript{460} \textit{Id.}

\textsuperscript{461} \textit{Id.}

\textsuperscript{462} 402 U.S. 535 (1971); \textit{see supra} text accompanying notes 362-65.

\textsuperscript{463} Fuentes, 407 U.S. at 88.

\textsuperscript{464} \textit{Id.} at 89.
not be in others. In addition, reminiscent of the nature of some of Justice Black’s concerns in Goldberg, Stewart pointed out that the text of the Due Process Clause itself said “property” without restriction. Then, reminiscent of Professor Reich, Stewart indicated that if the Court recognized some types of property and not others, it would undermine the individual autonomy allowed for in a free-enterprise system. Stewart put it like this:

[I]f the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of "property" generally. And, under our free-enterprise system, an individual’s choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are "necessary."

Such words sound ironic coming from a justice who dissented in Goldberg and in Cafeteria Workers advocated a need to balance interests to find any property interest at all. This is particularly so because Fuentes cannot be read as a conversion of Justice Stewart to a new way of thought. If Fuentes represented the outer reaches of the Court’s reading of the Due Process Clause, then the succeeding cases, which the Court was about to hear, would attack those outer reaches, and Stewart would be a principal figure in that attack.

On the due process side, Stewart displayed a particularly strict adherence to the presumption approach. Although Stewart took a moment to see if the current procedures reduced the risk of erroneous

465. Id.
467. 407 U.S. at 90.
468. See supra text accompanying notes 31-33.
469. Fuentes, 407 U.S. at 90.
470. Id.
473. Current procedures required "that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong." 407 U.S. at 83.
deprivation sufficiently to excuse the lack of a pretermination hearing, he displayed a firm commitment to the presumption that "the central meaning of procedural due process" was notice and a hearing "at a meaningful time and in a meaningful manner." That meaningful time would always be prior to detention unless the state could meet three requirements:

1) the seizure had to be "directly necessary to secure an important governmental or general public interest;"

2) the State had to have "a special need for very prompt action"; and

3) the State had to keep "strict control over its monopoly of legitimate force." 

Although Stewart attributed this test to prior Court action, the text appeared to be at least a new perspective and articulation of what had been done previously. Prior to Fuentes, the Court had indicated that the presumption could only be overcome by "a countervailing state interest of overriding significance." 

If the Court as a whole rode Stanley's momentum to greater heights in Fuentes, Stanley's author chose to deboard the train early. Justice White wrote for a three justice dissent in Fuentes. White pointed out initially that "in the typical installment sale of personal property both seller and buyer have interests in the property until the purchase price is fully paid," but he did not press this as a challenge to the debtor's property interest. He took issue instead with Stewart's approach to due process analysis and the result it yielded in this case.

White cited Cafeteria Workers and Goldberg for the requirement of a balance in due process analysis. The balance White struck, however, was again not the same as that struck by the Supreme Court in prior cases. White balanced the interest of the debtor in using "the property pending final judgment," the interest of the creditor "in preventing

474. Id. at 84-85.
475. Id. at 80.
476. Id. at 91.
477. Id.
480. Id. at 102.
481. Id. at 100.
further use and deterioration of the property in which he has substantial
interest,"482 and the "likelihood of a mistaken claim of default."483
Although this balance resembles the Wyman test, it differs because in the
second factor White focused on the creditor's own interest rather than on
the state's interest in retaining current procedures or, as Douglas noted in
Lindsey, the state's interest to protect creditors "against loss of ... in-
come during lengthy litigation."484 Such fungibility of factors was now
becoming typical of White in the due process arena. Lindsey,485
Stanley,486 and Fuentes487 were are all steps in the evolution of a White
balance which did not include a set list of mandatory factors but looked
instead with an eye to the particular interests implicated by each case and
afforded flexibility to accommodate those interests. In Fuentes, that
balance indicated to White that current procedures were adequate.488

White closed his dissent in a manner reminiscent of Justice Black's
final paragraphs in Goldberg. First, as Black had done in Goldberg,489
White argued that the Court's "tinkering with state law" would probably
end up hurting poor people.490 He then closed, again as had Black,491 by
acknowledging the wisdom of deferring to the legislatures in these
matters.492

While anyone hoping for a broadly protective approach to due
process should have found Fuentes inviting, the case should not have
been reassuring. The decision rested on a 4-3 vote, and Justice Stewart
was among that four person majority. Although he was the author of
Fuentes, Stewart's past track record could not have made him a secure
ally.493 Furthermore, the two nonparticipants were the Nixon appointees,

482. Id. at 102.
483. Id. at 100.
488. Id. at 102 (White, J., dissenting).
489. Goldberg, 397 U.S. at 278-79 (Black, J., dissenting).
490. Fuentes, 407 U.S. at 102-03 (White, J., dissenting). While Black saw the
injury in Goldberg being that "many will never get on the [welfare] rolls, or at least that
they will remain destitute during the lengthy proceedings followed to determine initial
eligibility, "Goldberg, 397 U.S. at 279 (Black, J., dissenting), White saw the injury in
Fuentes being that "the availability of credit may be diminished or, in any event, the
expense of securing it increased." Fuentes, 407 U.S. at 103 (White, J., dissenting).
491. Goldberg, 397 U.S. at 279 (Black, J., dissenting).
492. Fuentes, 407 U.S. at 103 (White, J., dissenting).
493. See supra notes 471-73 and accompanying text.
Powell and Rehnquist.\footnote{Fuentes, 407 U.S. at 97; see also The Oxford Companion to the Supreme Court of the United States, supra note 261, at 977.} One would have expected that upon entering the fray, they would align themselves with the two previous Nixon appointees, Burger and Blackmun, both of whom joined White's dissent.\footnote{Fuentes, 407 U.S. at 97 (White, J., dissenting); see also The Oxford Companion to the Supreme Court of the United States, supra note 261, at 977.} Thus, for all its silver lining, Fuentes carried its share of clouds.

4. Returning to Goldberg

It was not long before those clouds asserted themselves. On June 29, 1972 the Court handed down opinions in \textit{Morrissey v. Brewer},\footnote{408 U.S. 471 (1972).} \textit{Board of Regents v. Roth},\footnote{408 U.S. 564 (1972).} and \textit{Perry v. Sindermann}.\footnote{408 U.S. 593 (1972).} \textit{Morrissey} involved the due process rights of parolees threatened with reincarceration for alleged parole violations.\footnote{Morrissey, 408 U.S. at 479-80.} \textit{Roth} and \textit{Sindermann} were companion cases that considered whether untenured university professors were entitled to notice and a hearing before not being rehired.\footnote{Roth, 408 U.S. at 569; Sindermann, 408 U.S. at 596.} In those cases, Stewart joined with White and the Nixon appointees, all four of whom were serving by now.\footnote{Burger, Blackmun, and Rehnquist participated in all three cases, while Powell participated only in Morrissey v. Brewer, 408 U.S. 471 (1972).} On the due process side, the Court used the cases to abandon the presumption approach and reassert a more conservative balancing.\footnote{Id. at 483-84.} Meanwhile, on the property side the Court deflated the broad language of Fuentes\footnote{Fuentes v. Shevin, 407 U.S. 67, 90 (1972).} with respect both to the type of interests that could become property and to the scope of those interests once they became property. Two of the three Goldberg\footnote{Goldberg v. Kelly, 397 U.S. 254 (1970). For the text of their opinions, see the companion case, Wheeler v. Montgomery, 397 U.S. 280, 283 (1970) (Burger, C.J., dissenting), and id. at 285 (Stewart, J., dissenting).} dissenters wrote for the majority in the three cases; Stewart wrote for the Court in both \textit{Roth}\footnote{Board of Regents v. Roth, 408 U.S. 564 (1972).} and \textit{Sindermann},\footnote{Perry v. Sindermann, 408 U.S. 593 (1972).} while Chief Justice Burger wrote for the Court in

\textbf{\textit{Morrissey v. Brewer}, 408 U.S. 471 (1972).}

\textbf{\textit{Board of Regents v. Roth}, 408 U.S. 564 (1972).}

\textbf{\textit{Perry v. Sindermann}, 408 U.S. 593 (1972).}
The first issue that the three cases presented was whether the Due Process Clause required separate determinations of property, deprivation, and due process as the Court had been doing since *Sniadach* or whether a single balance could determine all three elements at once as Stewart's majority opinion had done in *Cafeteria Workers*. The issue arose because the district court in *Roth* had followed the *Cafeteria Workers* approach to determine that the professor's "interest in the re-employment at Wisconsin State University-Oshkosh outweighed the University's interest in denying him re-employment summarily." Ironically, it fell to Justice Stewart, the author of *Cafeteria Workers*, to reject this approach. He did so because in blending the elements into a single balance, the approach failed to consider the interest at stake in the appropriate light. To determine initially whether a property interest was present, "we must look not to the 'weight' but to the 'nature' of the interest at stake."

In all three cases then, the Court began its analysis by determining whether a "life, liberty, or property" interest was present. To do so, the Court looked both to state law and to the Constitution. Stewart began this discussion in *Roth* with the sort of broad language that one would associate with his opinion in *Fuentes*. Quoting a Frankfurter dissent, Stewart described the scope of the "'broad and majestic terms'" of "liberty" and "property" as encompassing "'the whole domain of social and economic fact.'" In addition, this broad scope was not limited to historical tradition but had been "purposely left to gather meaning from experience."
Stewart's application, however, was less broad than his rhetoric. Despite vigorous dissents by both Justice Marshall and Justice Douglas,¹⁵¹ Stewart chose to decide that the renewal of a one-year teaching contract was not part of that "whole domain of social and economic fact," which the term "liberty" encompassed.¹⁵⁷ Thus, the Court appeared to be predictably less aggressive in expanding substantive due process in the economic arena than it had been in the family arena in Stanley ⁵¹⁸ and Boddie.⁵¹⁹ Stewart indicated in both Roth and Sindermann that the nonrenewal of such an employment contract could implicate liberty interests if the nonrenewal were to discourage the exercise of constitutional rights such as speech ⁵²⁰ or if the nonrenewal harmed one's reputation or ability "to take advantage of other employment opportunities."⁵²¹ Stewart distinguished these situations, however, from one where the State simply arbitrarily chooses not to renew and gives no reason for doing so.⁵²²

Marshall and Douglas took offense to alternative portions of this analysis.⁵²³ Marshall attacked directly the notion that Roth had no property or liberty interest in renewal. Marshall's position was that "every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment."⁵²⁴

U.S. at 571 n.9. The citing of the cases upon which Goldberg relied was curious, not only because, as noted earlier, Brennan used the cases inaccurately, see supra notes 151-72 and accompanying text, but also because Stewart, himself, in Sindermann used these cases for their actual holdings, which did not undermine Bailey. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

¹⁵⁶ See infra notes 523-33 and accompanying text.
¹⁵⁷ Roth, 408 U.S. at 574.
¹⁵⁸ Stanley v. Illinois, 405 U.S. 645 (1972) (recognizing property interest in parenthood even for unmarried fathers).
¹⁶⁰ Roth, 408 U.S. at 574. Stewart indicated that it was not ripe for the Court to consider Roth's allegations that his nonretention resulted from his exercise of his First Amendment rights. Id. at 574. In Sindermann, however, the Court held that the professor's cause of action along these lines must be allowed to proceed. Perry v. Sindermann, 408 U.S. 593, 597-98 (1972).
¹⁶¹ Roth, 408 U.S. at 573. Stewart indicated that in such a situation the procedures would be available to clear the individual's name not to facilitate his re-employment. Id. at 573 n.12.
¹⁶² Id. at 575.
¹⁶³ Justice Brennan also dissented but without significant explanation. Sindermann, 408 U.S. at 604 (Brennan, J., dissenting).
¹⁶⁴ Roth, 408 U.S. at 588 (Marshall, J., dissenting). If Professor Reich's work was
Reminiscent of *Cafeteria & Restaurant Workers Union v. McElroy*, Marshall supported the creation of this property interest by balancing, and the factors he balanced were the *Goldberg* due process factors which the Court had reembraced that same day in *Morrissey*. Thus, in a way, Marshall offered an algebraic rationale for *Cafeteria Workers*’s one step approach to property and due process. By using the due process factors as he did, Marshall sought to show that the interest in public employment was entitled to notice and hearing protection; furthermore, if the interest was sufficient to require notice and hearing protection, then it must be property, because only property is entitled to such protection. Marshall was basically reversing the steps set forth in *Goldberg* and *Morrissey*. The Court had said if it is property, we must balance to determine if it is entitled to notice and a hearing, thus, recognizing that only property could be entitled to such protection. Marshall's point was that if anything considered property was entitled to the due process determined by the balance, then anything entitled to due process had to be property.

Marshall's argument depended on interests becoming property solely because they were sufficiently weighty. When personal interests became heavy enough, they became property, and the more weighty they were, the more procedural protection was due them. Because all the steps in due process analysis, therefore, depended on the weight of the interest,

truly the foundation for this evolution, Marshall's position would seem to be an odd species in the evolutionary chain. While Reich bemoaned the expanding dependence on the public largesse, *Reich, supra* note 19, at 733, Marshall seemed to be inviting people to the trough. Furthermore, on the deprivation requirement, one might find a tension between Marshall's position and Brennan's language in *Bell v. Burson* that there is no property interest in the expectation of the issuance of an entitlement. *Bell v. Burson*, 402 U.S. 535, 539 (1971).


526. In performing this balance, Marshall noted that "[e]mployment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life." *Roth*, 408 U.S. at 589 (Marshall, J., dissenting). Therefore, he found a great personal interest. Marshall next acknowledged the "burden on the machinery of government" that would be created by providing "procedural due process to all public employees or prospective employees." *Id.* at 591. He minimized this interest, as had Brennan in *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970), by noting the government's ability to devise efficient procedures, *Roth*, 408 U.S. at 591 (Marshall, J., dissenting), and also by noting that "it is not burdensome to give reasons when reasons exist." *Id.* at 591. Finally, Marshall noted the state's own interest in preventing "'those blunders which leave lasting stains on a system of justice . . . .'" *Id.* at 592 (quoting *Summary of Colloquy on Administrative Law*, 6 J. Soc. Pub. Teachers of Law 70, 73 (1961)).
one might as well just weigh everything once and do all the steps together. Thus, one has the Cafeteria Workers-Marshall approach. While that approach carried the day in 1961 when Cafeteria Workers had been decided, it could not carry this day because in both Morrissey527 and Roth528 the Court held that property was not so much a function of the weight of the personal interest but of its nature. Thus, even a very weighty interest, which could justify great protections if it could reach the balancing stage, might not be property if it lacked the proper historical529 or statutory,530 pedigree.

Douglas, on the other hand, sought to attack Stewart's position on the liberty interest by linking it to Stewart's acknowledgment that the state "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests, especially, his interest in freedom of speech."531 For Douglas, it was not enough that Roth could pursue his First Amendment claim as it currently stood in his complaint.532 Unless the due process claim forced the school to turn over their alleged reasons for nonrenewal, Roth would have no meaningful opportunity to show their real reasons in the effort to support his First Amendment claim. Douglas put it like this, "When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution."533

To extend the notice requirement to a notice and hearing requirement, Douglas, like Marshall, turned to a balancing of interests to justify the renewal as a property interest.534 Although less encompassing than Marshall's balance, Douglas's balance, like Marshall's, stressed the

527. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment.").
528. Roth, 408 U.S. at 570-71 ("[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the 'nature' of the interest at stake.").
529. Id. at 572-75.
530. Id. at 577-78.
531. Perry v. Sindermann, 408 U.S. 593, 597 (1972). Stewart went on to explain the rationale behind this: "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." Id.
532. See supra note 520.
534. Id. at 584-85.
magnitude of the individual interest. As noted in response to Justice Marshall, however, this was not a day when mere weight could catapult an interest into the property category. Without the proper nature, no interest, no matter how weighty, would warrant due process protection.

Stewart provided one final opportunity for the renewal to obtain the proper nature. Although none of the other opinions of the day followed this lead, Stewart appeared to confine the meaning of "liberty" to interests recognized within the Constitution and then used "property" to represent interests created and 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." Having shown that the renewal was not an interest recognized within the Constitution and therefore not a liberty interest, Stewart turned to the question of whether the renewal grew out of a rule or understanding stemming from state law and, accordingly, could be considered property.

As Stewart perceived the relevant rules and understandings in Roth's case, "the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year . . . Nor, significantly, was there any state statute or university rule or policy that secured his interest in re-employment or that created any legitimate claim to it." Thus, neither contract, nor statute, nor university policy gave Roth an entitlement to future employment. Therefore, he had no property interest.

Stewart indicated in Sindermann that the search through these rules or understandings need not be "limited by a few rigid, technical forms." In Sindermann's case, for example, there was room for the Court to believe that state contract law could imply a contractual right in Sindermann's renewal from his school's faculty guidelines, from guidelines adopted by the Coordinating Board of the Texas College and

535. Id. Specifically, Douglas noted that "[n]onrenewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Nonrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State." Id. at 585.

536. See supra notes 527-30 and accompanying text.

537. Roth, 408 U.S. at 572-75.

538. Id. at 577.

539. Id. at 578.

University System, and from the ten years of service that Sindermann had in the system. However, any contract right, and, hence, any property interest, remained a question of state law.

From this perspective, the absence of a property interest here is consistent with earlier opinions in this series. If one assumes, as did Stewart, that the employee's interest ends with the end of the last contract and does not begin again until he receives the next one, then Roth fits neatly within the language of Bell v. Burson that there is no property interest in the expectation of the issuance of an entitlement. Furthermore, the Court was much more willing in Sindermann to provide the lower courts room to find a state law contract right in renewal than it was in Lindsey v. Normet to defer to the Oregon state courts to determine the mutuality of promises in landlord-tenant agreements.

In Morrissey v. Brewer, the Court followed the same basic approach in finding a liberty interest in a parolee's conditional freedom; however, Burger did add a pair of twists. Following the path charted by Stewart, Burger found a liberty interest both textually and under state law. First he found a liberty interest encompassed within the text of the Constitution because imposing on the conditional freedom of a parolee implicates "many of the core values of unqualified liberty." Second, he found a liberty interest within state law because "[t]he parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions."

The first of the twists that Burger added to Stewart's approach to this requirement went to the examination of the personal interest implicated. Burger agreed with Stewart that the presence of a property or liberty interest went "to the 'nature' of the interest at stake," but for Burger, nature was not enough. An interest of the right nature also had to be of sufficient weight before it could be constitutionally protected. For Burger, although the parolee's interest in conditional freedom, both textually and under state law, was of the right nature, the interest did not

541. Id. at 600-02.
542. Id. at 602 n.7.
544. Lindsey v. Normet, 405 U.S. 56, 90 (1972) (Brennan, J., dissenting in part); see also supra note 63.
545. 408 U.S. 471 (1972).
546. Id. at 482.
547. Id.
549. Morrissey, 408 U.S. at 481.
rise to the level of liberty or property until Burger found additionally that "its termination inflicts a 'grievous loss' on the parolee and often on others."\textsuperscript{550} Thus, Burger required as much as Marshall and Stewart combined\textsuperscript{551} and also kept alive the grievous loss issue that Stewart had attempted to put to rest in \textit{Fuentes v. Shevin}.\textsuperscript{552}

The second twist was substantive rather than structural and created a paradox between \textit{Morrissey} and \textit{Roth}. As just noted, Burger found that with the state's decision to grant parole, came an implicit promise that "parole will be revoked only if the [the parolee] fails to live up to the parole conditions."\textsuperscript{553} In \textit{Gagnon v. Scarpelli},\textsuperscript{554} the Court extended this to probationers, and in that extension lies the rub. In \textit{Roth}, Stewart quoted regulations that indicated that Professor Roth was "employed on probation."\textsuperscript{555} Thus, while the Court could find that the state made an implicit promise to criminals on probation, it could not find a similar promise to teachers on probation. Had the Court found such a promise, Professor Roth's interest would have been protected by the Due Process Clause just as the interests of parolees and probationers are.

\textit{Roth} and \textit{Sindermann} required the Court to say little about due process. \textit{Morrissey}, however, offered the Court much to consider on that issue. Burger responded by bringing back Brennan's test from \textit{Goldberg}. If Burger seemed committed to following the structure of \textit{Goldberg}, however, some of the case's spirit seemed to be lost in his application of it.\textsuperscript{556}

Burger weighed the three Goldberg factors to determine if parolees were entitled to some form of hearing before losing, even temporarily,

\begin{itemize}
\item \textsuperscript{550} \textit{Id.} at 482.
\item \textsuperscript{551} \textit{See supra} notes 525-31 and accompanying text.
\item \textsuperscript{552} 407 U.S. 67, 89 (1972).
\item \textsuperscript{553} \textit{Morrissey}, 408 U.S. at 482.
\item \textsuperscript{554} 411 U.S. 778 (1973).
\item \textsuperscript{555} Board of Regents v. Roth, 408 U.S. 564, 566 n.2 (1972).
\end{itemize}
their conditional freedom.\textsuperscript{557} Presumption cases, like \textit{Fuentes},\textsuperscript{558} had come to take at least that much process for granted. Still, the balance yielded what the presumption would have: "an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior."\textsuperscript{559} In addition, tucked into a pair of \textit{Roth} footnotes, Stewart had indicated that the presumption approach might still have life despite \textit{Morrissey}'s balancing.\textsuperscript{560}

Having determined the need for an informal hearing, Burger then set out to determine the parameters of that hearing. Although he sought to do so by "bearing in mind . . . the interest of both State and parolee,"\textsuperscript{561} the previous balance of those interests proved to be of little guidance in setting these parameters. Much like Brennan's discussion of specific procedures in \textit{Goldberg},\textsuperscript{562} Burger's discussion here focused on identifying a usefulness of each particular procedure.\textsuperscript{563} Although Burger attempted to anchor most of his procedural choices with analogies in \textit{Goldberg},\textsuperscript{564} the overall effect, as Black had predicted,\textsuperscript{565} was a feeling that the procedures required by due process were identical to whatever procedures could muster five votes on the Court.\textsuperscript{566}

\textsuperscript{557} \textit{Morrissey}, 408 U.S. at 483-84. In balancing the factors, Burger found a personal interest that allowed the parolee to "be gainfully employed . . . to be with family and friends and to form the other enduring attachments of normal life," \textit{id.} at 482; "an overwhelming [State] interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole," \textit{id.} at 483; and societal interests in treating parolees fairly rather than arbitrarily, avoiding erroneous decisions, and restoring parolees "to normal useful life within the law." \textit{Id.} at 484.

The State interest in returning the individual to imprisonment was unique in this case because it did not stem from economic considerations. In fact Burger noted that the cost of imprisonment was much greater than the cost of maintaining the individual on parole. \textit{Id.} at 483 n.10. Rather, this interest stemmed from the State's interest in protecting society from antisocial behavior. \textit{Id.} at 483.


\textsuperscript{559} \textit{Morrissey}, 408 U.S. at 484.

\textsuperscript{560} \textit{Board of Regents v. Roth}, 408 U.S. 564, 570-71 nn.7-8 (1972).

\textsuperscript{561} \textit{Morrissey}, 408 U.S. at 484-85.

\textsuperscript{562} \textit{Goldberg v. Kelly}, 397 U.S. 254, 268-71 (1970); \textit{see also supra} notes 84-90 and accompanying text.

\textsuperscript{563} \textit{Morrissey}, 408 U.S. at 485-88.

\textsuperscript{564} \textit{See, e.g., id.} at 486 (recognizing a need for an independent decisionmaker); \textit{id.} at 487 (stating a need for an informal opinion).


\textsuperscript{566} Thus, while many of the \textit{Goldberg} procedures were embraced by the \textit{Morrissey} (continued)
One procedure in *Morrissey* stood out from the rest. This procedure was the "preliminary hearing"—a procedure with which a dissenting Justice Douglas took issue. The preliminary hearing was an informal hearing prior to the initial detainment. At some point after that detainment, a more formal hearing was to follow necessarily. Cases like *Bell* and *Fuentes* had already foreclosed an argument that detentions were not deprivations and, therefore, could be implemented without due process. The preliminary hearing, however, allowed for the state to implement a detainment with a much lower level of due process than one might have inferred from *Goldberg*. In a way, this approach could be justified through the balancing test as the Court was using it in *Morrissey*: an individual had less of a personal interest in a temporary detainment and, therefore, less procedural protection was needed in response to a detainment. Still, the addition of the preliminary hearing option suggested a different spirit than one had felt in the earlier detainment cases.

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Court, Burger's majority chose, for no apparent reason, to leave out the right to retain counsel, *Morrissey*, 408 U.S. at 489, despite the objection of Brennan and Marshall. *Id.* at 491 (Brennan, J., concurring in the result).

568. *Id.* at 497 (Douglas, J., dissenting).
569. *Id.* at 488.
572. The Court captured this contrast in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985), where it described the *Goldberg*-type hearing as "a full adversarial evidentiary hearing prior to adverse governmental action," *id.* at 545, while the preliminary hearing was described as a hearing which "need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 545-46.

Interestingly, despite the extensive procedural protections the Court embraced in *Goldberg*, the Court saw that hearing as only "to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

573. Alternatively one could argue that streamlined initial hearings require a duplication of costs with the later more comprehensive hearing, and, therefore, the government's efficiency interest is not strongly furthered by them.

574. The Court's adoption of the preliminary hearing was not an aberration but became a fixture in the due process arsenal. For example, in Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973), the Court permitted its use with probation violators, and then in *Loudermill*, 470 U.S. at 542, the Court endorsed its use during the process of terminating school employees with a property interest in continued employment.
The trio of cases, *Morrissey*,575 *Roth*,576 and *Sindermann*,577 marked the end of an era in due process analysis. During that era, beginning with *Goldberg*,578 the Court freely jumped from test to test. To determine property, one could look to the nature of the interest, the weight of the interest, or both. The nature of the interest could be defined exclusively in traditional constitutional terms or in various forms of state law. To determine due process, one could presume certain protections or one could balance. If one balanced, one could rigidly abide by a set of predetermined factors or select the factors as one felt inclined. If one chose to abide by a set of factors, there were at least three sets to choose from.

Despite any consensus on structure and often in the face of great swings in rhetoric, the Court always seemed to find a majority in these cases, and the results in these cases could at least be seen as consistent without straining too far beyond the realm of credulity. One might then have characterized all the bounding about as harmless, but harmless or not, it was about to come to an end. The time had come to end the experimenting and settle on an approach. Thus, the Court began a second era and set off "on the road to find out."579

B. *On the Road to Find Out*580

"I left my folk and friends
with the aim to clear my mind out.
Well I hit the rowdy road,
and many kinds I met there,
many stories told me of the way to get there."581

1. Arnett v. Kennedy: *A time to clear the mind out*

Although *Arnett v. Kennedy*582 was not the next procedural due process case583 to follow *Roth*,584 *Sindermann*,585 and *Morrissey*,586 it was

580. Id.
581. Id.
the next case to signal both a new approach and a new attitude on the Court. The new approach was Justice Rehnquist's "bitter with the sweet" deference to legislatively devised procedures. The new attitude was reflected in the justices' refusal to reach a majority coalition. The case generated instead five opinions and a three justice plurality. Absent a majority, the Court in *Arnett* acknowledged that it had no clear vision of what it wanted to do in procedural due process. Instead, five justices each took a shot at resolving what had been going on since *Goldberg*.Ironically, Justice Brennan who started it all in *Goldberg* was not among the five. In fact, while *Goldberg* was freely mentioned throughout the opinions, its procedural due process test was, like its author, completely silent.

In *Arnett*, the plaintiff, Wayne Kennedy, had been dismissed from a federal government position from which he could only be removed by statute "for such cause as will promote the efficiency of the service." Congress had granted Kennedy's position this "for cause" only status in the Lloyd-La Follette Act. In that act, Congress had not only created a substantive "for cause" interest in the position, but it had gone on to identify the procedures required to show cause. Thus, Congress had attempted to set not only the extent of the substantive right, but also its procedural due process protection. Upon his termination, Kennedy had considered the legislatively mandated protections insufficient and had sued for additional protections. Lurking around in the midst of all this due process concern was also a First Amendment free speech claim because the "cause" for which Kennedy was dismissed stemmed from public charges he had made against his supervisor.

Justice Rehnquist, joined by Justice Stewart and Chief Justice Burger, wrote for the plurality. Rehnquist held that "[t]he employee's statutorily

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589. *Arnett*, 416 U.S. at 140 (quoting 5 U.S.C. § 7501(a) (1972)).
590. *Id.*
591. *Id.* at 140-41 (quoting 5 U.S.C. § 7501(b)).
592. In particular, Kennedy felt that "he had a right to a trial-type hearing before an impartial hearing officer before he could be removed from his employment." *Id.* at 137. For a discussion of the importance of an impartial hearing officer, see Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 475-90 (1986).
defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause." Thus, because the property right itself was created by statute, the parameters of that right could be limited by the procedures created by the statute for that right. Consequently, the Due Process Clause could not require additional procedures because the statute created no property interest once its own procedures were exhausted.

The plurality saw this as the natural extension of what Justice Stewart had said in *Roth*. If, as Justice Stewart had said, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law," an individual could hardly expect that statutorily created property extended beyond its statutorily created procedures. After all, "Congress chose to enact what was essentially a legislative compromise, and with unmistakable clarity granted governmental employees security against being dismissed without 'cause,' but refused to accord them a full adversary hearing for the determination of 'cause.'" The individual freely accepted the benefit of that compromise but then sought to circumvent what Congress had sought to retain to protect itself. The results of Congressional compromise could not be dissected so neatly. As Justice Rehnquist put it, "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of [Kennedy] must take the bitter with the sweet."

Although Justice Rehnquist's ultimate conclusion, that Kennedy had received adequate procedural protection, captured another two votes to carry the day, his vision of property was rejected by all six remaining justices who battered it for two reasons which were interwoven in the remaining four opinions. These reasons were first, that Congress did not have the power to set procedural ceilings and second, that Congress


595. *Arnett*, 416 U.S. at 151 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

596. *Id.* at 154.

597. *Id.* at 153-54.

598. *Id.* at 164 (Powell, J., along with Blackmun, J., concurring in part and concurring in the result in part).
could not use entitlements to buy people's rights.

Perhaps the simpler of these reasons came most explicitly from the opinions of Justices Powell\(^{599}\) and White\(^{600}\) who maintained that Congress could not assume the job of setting procedural ceilings because such ceilings were not Congress' to set. As Justice Powell argued, due process "is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without procedural safeguards."\(^{601}\) Put more simply, Powell's position was that the legislature need not create an interest at all, but once it chose to create one, it had to provide for it in a procedurally adequate manner. Fifteen years later, in his dissent in *DeShaney v. Winnebago County Department of Social Services*,\(^{602}\) Justice Brennan took a similar stand in arguing that although a state need not create an interest, once it chose to create one, it had to provide for it in a substantively adequate manner.\(^{603}\) Brennan's

599. *Id.* at 167 (Powell, J., concurring in the result).
600. *Id.* at 171 (White, J., concurring in part and dissenting in part).
601. *Id.* at 167 (Powell, J., concurring in part and concurring in the result in part).
603. In *DeShaney*, Brennan argued that a State grants a child a property interest in his protection when that State creates a child welfare program and through that program removes from "ordinary citizens and governmental bodies . . . any sense of obligation to do anything more than report their suspicions of child abuse to" that program. *Id.* at 210 (Brennan, J., dissenting).

While such a position reflects a stronger sense of community than does Powell's, it does not reflect as deep a sense of community as Brennan displayed in *Goldberg*. In fact, after *Goldberg*, some commentators hoped that the Court would use the Constitution to guarantee basic material needs. See, e.g., Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); see also White, supra note 250, at 874 n.55. Other commentators even believed the Court had gone that far in *Goldberg*. See, e.g., Anthony Taibi, *Politics and Due Process: The Rhetoric of Social Security Disability Law*, 1990 Duke L.J. 913, 930-31 (associating property interest with grievous loss or indignity). But see David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 872 (1986) (arguing that *Goldberg* can be viewed as the State's attempt to deprive an individual of a pre-existing right only "in the most traditional sense").

Ironically it is Powell's partner in *Arnett*, Justice Blackmun, who picks up the Brennan sword of community and "compassion," *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting), and recognizes the State's loss when it is forever denied the meaningful participation of one of its children. *Id.* Anyone disposed to idealistic romanticism might see in this a parallel to the scene in *Man of La Mancha* where Aldonza discovers her better self as Don Quixote is dying. *Dale Wasserman et al., Man of La Mancha* 117-23 (Laurel Leaf ed., 1969); John Bettenbender, *Introduction, in Wasserman et al.*, (continued)
stand would not, however, be embraced by the Court as warmly as was Powell's.604

White offered support for Powell's position by noting that traditionally when Congress had delegated authority to the executive branch to establish procedures to protect a statutory entitlement, the Court had not deferred to the agency's determination of due process. Instead, the Court had "'assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process,' and it has been 'the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers.'"605

Certainly one could have considered the procedures created by the Lloyd-La Follette Act indicative of "explicit action," but White would still have been unmoved. He was convinced that, in fact, prior to Arnett, the Court had already extended its protection beyond the explicit action requirement and beyond the facts in Arnett.606 Like Powell, White was convinced that while the State could set the parameters of its statutory rights on a substantive level, once having done so, the procedural ceiling was not theirs to set: "The fact that the origins of the property right are with the State makes no difference for the nature of the procedures required. While the State may define what is and what is not property, once having defined these rights the Constitution defines due process."607

It should come as no surprise that the other justices did not provide Rehnquist room to maneuver within the explicit action language.

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604. At least one lower court has found Brennan's premise appealing. In LaShawn A. v. Dixon, 762 F. Supp. 959 (D.D.C. 1991), aff'd on other grounds, 990 F.2d 1319 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 691 (1994) the court found that a department providing youth services could not use inadequate funding to justify a failure to provide adequate services.

Alternatively, the Tenth Circuit held that the Constitution did not require the Oklahoma Bar Association to investigate complaints of unethical conduct by lawyers even though the state had entrusted the Bar with that responsibility. Doyle v. Oklahoma Bar Ass'n, 998 F.2d 1559, 1569 (10th Cir. 1993).


606. Id. at 184.

607. Id. at 185.
Perhaps as early as *Sniadach*, 608 but certainly by *Goldberg*, 609 the Court had indicated that it had no desire to alter its test depending on whether the procedures applied were created by statute or regulation. 610 In addition, during this time, the procedural due process test had not varied depending on whether a state or the federal government was the actor. 611 Thus, it took little imagination to see that once in place, the "bitter with the sweet" approach would undermine every holding granting procedural protection from *Goldberg* to *Morrissey*. 612 This was so because in each case, just as in *Arnett*, the government was providing a benefit but attempting to limit the scope of procedural protection upon which the recipient could rely.

Rehnquist acknowledged that the cases would be threatened, but distinguished them because they implicated different interests. 613 Such a distinction might have seemed more solid had his opinion not spoken so freely of legislative compromise and benefits as general concepts not limited to the facts of *Arnett*. 614 Rehnquist might have appeared more credible had he just addressed the tension with the *Goldberg* line more directly and indicated that he wanted to lead the Court back to the days of *Bailey v. Richardson*. 615 Certainly the similarities in effect between the bitter with the sweet approach and *Bailey's* vision that benefits were charity rather than property did not escape the other justices. 616 Rehnquist, however, chose to avoid such a direct confrontation with

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610. In fact, the state sometimes received more deferential treatment for its regulations than for its statutes. For example, the regulations in *Morrissey v. Brewer*, 408 U.S. 471 (1972), received review under the balancing approach while procedures created by statute were rejected under a presumption approach in *Fuentes v. Shevin*, 407 U.S. 67 (1972).
611. In *Richardson v. Wright*, 405 U.S. 208 (1972), a case involving federal SSA regulations, the Court remanded the case for the lower court to reconsider its findings in light of new SSA regulations and *Goldberg*, which had reviewed state welfare regulations. *Id.* at 209.
613. *Id.* at 155.
614. *Id.* at 153-54.
615. 182 F.2d 46 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951) (per curiam); *see supra* note 17 and accompanying text.
616. *Arnett*, 416 U.S. at 186 n.7 (White, J., concurring in part and dissenting in part); *id.* at 210-11 (Marshall, J., dissenting).
more recent precedent. 617

The second reason for attacking Rehnquist's approach called to mind Professor Reich 618 and the line of cases Brennan had seemed to misapply on the property issue in Goldberg. 619 Although it was Justice Marshall who actually mentioned Reich 620 and Justice White who brought back the line of cases, 621 it was Justice Douglas who best captured the spirit of the notion that governments should not be using entitlements to buy people's constitutional rights. 622 Douglas clearly echoed Reich's sentiments as he described a civil service system that uses job security to suppress individuality. 623 Reich described the same dynamic in the use of government benefits generally. 624 Although Douglas acknowledged that ordinarily governmental attempts to orchestrate such a "great leveling of employees" 625 are outside the Court's control, he maintained that once the state uses job security to discourage the exercise of constitutional rights, the Court must get involved: "It is, of course, none of a court's problem what the employment policies may be. But once an employee speaks out on a public issue and is punished for it, we have a justiciable issue." 626

Although Douglas saw the case as government using a job to leverage the individual's right to free speech, he could just as appropriately have seen it as the government using a job to leverage the individual's right to fair play or due process. Quite simply the Lloyd-La

617. Interestingly the other justices were as forgetful of the true nature of Bailey's demise as Rehnquist was near-sighted about the implications Arnett would have for Goldberg and its progeny. With respect to Bailey's view of benefits as charity, Justice Marshall, joined by Justice Brennan, said for example that "[o]bviously this Court rejected that reasoning in Goldberg," id. at 210 (Marshall, J., dissenting), and noted further that the approach had been "thoroughly discredited." Id. at 211. Such was a strange way to describe what really had happened in Goldberg. It is hard to reject a doctrine that was never actually argued in the case and equally hard to thoroughly discredit a case without ever acknowledging its existence. As noted earlier, see supra notes 149-50 and accompanying text, in Goldberg the State chose not to contest that welfare was property. Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970). Furthermore, Brennan never cited Bailey, although he did cite a number of cases whose relevance on this issue was questionable. See supra notes 151-75.

618. See supra text accompanying notes 19-40.
619. See supra notes 149-77 and accompanying text.
621. Id. at 183-84 (White, J., concurring in part and dissenting in part).
622. Id. at 206 (Douglas, J., dissenting).
623. Id. at 205-06.
624. Reich, supra note 19, at 733; see also supra text accompanying notes 29-33.
625. Arnett, 416 U.S. at 206 (Douglas, J., dissenting).
626. Id.
Follette Act was saying, "If you want this job, you've got to let us play by our rules, arbitrary as they may be." Therefore, just as Douglas saw the individual who sought to speak freely facing the threat of penalty, he saw the individual who expected to be treated fairly facing the same penalty.

In fact, the implications were worse for the individual who expected to be treated fairly. This can be seen by comparing Arnett to the Speiser-Sherbert line of cases which Brennan referred to in Goldberg. When the Government says, as it effectively did in Speiser v. Randall, "If you exercise your right to speech, you will be denied a tax exemption," the Government has at least pinpointed the right it seeks to threaten and has put citizens on notice. When the Government says, however, "If you want to exercise your right to due process, you cannot have this job," the Government reserves the power to threaten all rights by masking its arbitrariness behind a veil of inadequate procedures. Without due process to protect here, the individual must change her behavior to guard against arbitrary attacks that she may fuel by her exercise of a host of different rights. Not only must she watch what she says, but what she does, how she worships, and with whom she associates. This is so because once she has offended her supervisor through her actions in one of these areas, she risks charges, and she will not have the arena of adequate due process to defeat those charges. Consistent with this, when Justice White applied Slochower v. Board of Education, a case in the Speiser-Sherbert line, to Arnett, he emphasized this danger of arbitrariness rather than the penalized right.

630. Id. at 518.

In Slochower, supra, New York law provided that a tenured employee taking the Fifth Amendment before a legislative committee inquiring into his official conduct could be fired. Quite apart from the Fifth Amendment "penalty" assessed by the State, the Court was concerned with the arbitrariness of drawing a conclusion, without a hearing, that any employee who took the Fifth Amendment was guilty or unfit for employment.
While the plurality, having found no property interest, did not go beyond the property issue, Powell, White, Douglas, and Marshall all advanced to the deprivation and due process issues. All four opinions featured an integration of the presumption and balance approaches, although each opinion had its own vision of what those approaches should look like. These integrations not only brought the two approaches together, but they did so in a way that worked more cleanly than the previous balancing cases. For example, in Morrissey\(^6\) and Goldberg\(^6\), the Court balanced to determine whether a pretermination hearing was required but then seemed mystically to recognize the nature of that hearing. In Arnett, the opinions recognized from previous cases a presumption of a right to a hearing and then balanced interests to determine the nature of that hearing. Despite the opinions' unity on this integration, three areas of structural difference appeared in the four opinions: first, the level of the guarantee provided by the presumption; second, the significance of the deprivation being a temporary detention rather than a permanent denial; and third, the interests to be included in the balance.

First, the four opinions offered four views of the level of procedural protection to be presumed guaranteed once a property interest has been established. For Powell, that presumed level was "notice and a hearing."\(^6\) Marshall placed the presumed level at notice and a hearing "held 'at a meaningful time and in a meaningful manner.'"\(^6\) White agreed with the latter level at least as applied to private property.\(^6\) Douglas also agreed with the Marshall level so long as it was clear that for the individual's "vital stakes," meaningful time required that the hearing occur before the stake "is destroyed by government."\(^6\) Furthermore, Douglas believed that to occur before that destruction, the hearing had to occur even prior to detention of the stake.\(^6\)

\(^6\) Id. at 471 (1972).
\(^6\) Arnett, 416 U.S. at 166 (Powell, J., concurring in part).
\(^6\) Id. at 212 (Marshall, J., dissenting) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
\(^6\) Id. at 178 (White, J. concurring in part and dissenting).
\(^6\) Id. at 203 (Douglas, J., dissenting).

Although each of the opinions concede the necessity for some level of balancing, such a concession could be argued to be both unwise and unnecessary. For a discussion seeking "to raise enough questions about the form and implications of balancing (continued)
Had the opinions in *Arnett* set a different context, the question whether the presumption required simply a hearing, a meaningful hearing, or a pretermination hearing might well have been one merely of semantics. Whatever procedural protection did not flow naturally from the presumption could have been added in the subsequent balancing. The opinions in *Arnett*, however, signaled two trends that elevated the importance of the presumption. First, the opinions of Rehnquist, Powell, and White all indicated that the Court would not be as eager as it once had been to extend procedural protection and, therefore, discretionary balances were more likely to tip in favor of the state. Second, although at odds on this with the opinions of Marshall and Douglas, the opinions of both White and Powell followed a path Burger had set in *Morrissey v. Brewer*. Both White and Powell recognized that the interests calling for procedures to protect against the temporary detention of property are less than those calling for the procedures to protect against a permanent denial. Thus, six justices in *Arnett* appeared to be signaling that in the future those who would argue for a pretermination hearing would have a less sympathetic audience on the Court, and they would have less powerful interests to work in their favor. Given such a setting, any


At the other extreme, some have criticized any presumption of a hearing arguing that while some "procedure" may be necessary, a hearing will not always be useful or necessary. See, e.g., William H. Lawrence, *A Restatement of the Roth-Fuentes Analysis of Procedural Due Process*, 11 GA. L. REV. 477, 509 (1977).


642. *Arnett v. Kennedy*, 416 U.S. 134, 169 (1974) (Powell, J., concurring in part and concurring in the result in part) ("Since appellee would be reinstated and awarded backpay if he prevails on the merits of his claim, appellee's actual injury would consist of a temporary interruption of his income during the interim."); *id.* at 192 (White, J., concurring in part and dissenting in part).

643. Because they never reached the procedural due process issue, the three justices in the plurality did not indicate their position on protecting against detentions. Given their willingness to defer to the legislature on due process issues generally, one could assume they would not be likely to weigh interests protecting against detentions any more heavily than were White and Powell.

644. In *Goss v. Lopez*, 419 U.S. 565 (1975), the Court endorsed very informal procedures to protect students from temporary suspension from school. These included oral notice of the charges and evidence against the student and an opportunity for the
level of protection that could be removed from debate and mandated by presumption would be assured, while procedures left to be decided by balancing were likely to be lost.

Beyond the detention and presumption in each opinion was a familiar balance. Douglas limited his balance to the two factors implemented in Cafeteria Workers. In Reichian fashion, he emphasized the weightiness of a personal interest both in job and in individuality and then discounted a governmental interest that too often centered more on covering up incompetence than on fostering efficiency.

Powell, meanwhile, chose the three Wyman factors. Like the Cafeteria Workers balance, the Wyman factors included the personal and governmental interests but also added the probability of erroneous termination. Under the government's interest, Powell spoke more reverently than did Douglas of both the government's need to manage and discipline its employees and its need to avoid any procedures that "would impose additional administrative costs, create delay, and deter warranted discharges." Powell described this interest as "the Government's interest, and hence the public's interest." Thus, while Brennan had stressed in Goldberg that the state had an interest in furthering the interests of its people, here Powell indicated instead that the people's interest was in furthering the interests of the State. Furthermore, in evaluating the personal interest, Powell considered the student, without counsel, to respond to these charges. Id. at 581. While it may be only marginally more difficult for one to label such procedures as "meaningful notice and hearing" rather than simply as "notice and hearing," it is possible that this marginal difficulty might be enough to call such informality as found in Lopez into question. On the other hand, in Cleveland Bd. of Educ. v. Loudermill, the Court was comfortable that a hearing nine months after suspension occurred at "a meaningful time." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547 (1985).

Professor Morgan noted in cases after Arnett "a disturbing deference to positive law in determining what process is due," suggesting that the Court was not primarily motivated by the presence or absence of "meaningful." Martha I. Morgan, The Constitutional Right to Know Why, 17 HARV. C.R. - C.L. L. REV. 297, 321 (1982).

646. Arnett, 416 U.S. at 203, 206 (Douglas, J., dissenting).
647. Id. at 205-06.
650. Id.
typical public employee rather than this particular one and assessed only the impact of a "temporary interruption of his income" without reference to how long temporary could be. Finally, he discussed current procedures to show a sufficiently reduced probability of error.

Marshall also seemed drawn to the Wyman factors, although he did not seem to embrace them as willingly as did Powell. In Marshall's hands, these factors tilted the scale in the opposite direction. Furthermore, while Powell had used these factors to determine what procedures were required before detention of public employment, Marshall used the factors to determine what constituted a meaningful hearing and whether that meaningful hearing needed to occur before or only after detention of the employment.

To determine what constituted a meaningful hearing, Marshall looked at only two of the factors: the personal interest in the employment and the probability of erroneous deprivation without added procedures. Having determined that the meaningful hearing required both an opportunity for cross-examination and an independent hearing officer, Marshall looked at all three Wyman factors to determine that the meaningful time for this hearing was prior to any detention of the employment.

Initially, Marshall resisted the second balance and insisted that previous cases had "embraced a general presumption that one who is constitutionally entitled to a hearing should be heard before the deprivation of his liberty or property takes place." Marshall moved quickly from the presumption claim, however, and began the balance by reasserting the personal interest and the probability of erroneous termination from the first balancing test. In this balance, Marshall also

652. Arnett, 416 U.S. at 169 (Powell, J., concurring in part and concurring in the result in part).
653. Id.
654. Id. at 170.
655. Id. at 212-16 (Marshall, J., dissenting).
656. Id. at 214, 216.
657. Id. at 226-27.
658. Id. at 217.
659. Marshall, like Powell, considered the personal interest as it applied to employees generally, but to re-enforce his views on the weight of that interest, he discussed the particular facts of the effect of Kennedy's job loss. Id. at 220. This use of facts distinguishes the approach of this opinion from Brennan's in Goldberg. See supra text accompanying notes 122-38.
acknowledged the government's interest in avoiding the pretermination hearing. Marshall saw this interest as two-fold: first, preserving the efficient operation of the dismissal process, and second, maintaining "the discipline and efficiency of the whole office." Given the government's ability to control the speed of processing claims and the working environment of its offices, Marshall found this interest unpersuasive.

Consistent with the approach Justice White had been developing throughout this period, his balance was a free-wheeling, all-encompassing one. Although White had endorsed a presumption of a hearing "at a meaningful time and in a meaningful manner" to protect private property interests, in the public employment context, White would only go so far as to presume that "a full hearing must be provided at some juncture." With this as his starting point, White then began to balance to determine whether the full hearing was required before detention of the benefit, and if not, what procedures were required before detention.

White's balance reflected a respect for the complexity of these situations. He articulated six non-exclusive factors that could affect the balance. From the Wyman test, White pulled the recipient's personal

661. Id. at 223.
662. Id. at 225.
663. Id. at 223-25. Marshall also indicated that this interest was lessened because "providing an evidentiary hearing before the discharge might well obviate the practical and constitutional need for a full post-termination proceeding." Id. at 225. This reference to the possibility of both pre- and post-termination hearings may seem to contradict the timing presumption with which Marshall began. The reference and the presumption, however, could be consistent. For example, litigants in a lawsuit are entitled to multiple hearings before their process rights are exhausted. What Marshall may have seen in his due process analysis, then, is an initial step to determine that a meaningful hearing occur before detention, and, even after that meaningful hearing, hearings or appeals similar to those available in the judicial branch. Given the temperament of the Court at this time, there would have been little need to reach that subsequent step.

664. Id. at 225. Marshall's timing discussion provides an interesting contrast to Douglas's timing concern in Lindsey v. Normet, 405 U.S. 56 (1972). Here Marshall argued that the state could minimize its own problems by holding a hearing within thirty days. Arnett, 416 U.S. at 225 (Marshall, J., dissenting). Meanwhile in Lindsey, Douglas was concerned that hearings may occur too quickly. Lindsey, 405 U.S. at 85 (Douglas, J., dissenting in part).

666. Id. at 186.
interest and the probability of an erroneous deprivation factors. To the personal interest, he added a related factor: the time that the recipient might have to wait between detention and a full hearing. Also related to the Wyman factors, White considered the government's interest in getting a proper resolution early and consequently, eliminating the need for subsequent hearings. This interest was analogous to Justice Marshall's response to the government's interest in efficiency.

White also placed on the scale two factors unique to his approach. The first was "[t]he danger that the purpose of the action may be defeated, or made exceedingly difficult, by requiring a prior hearing." Although this factor is most readily apparent in a case like Fuentes v. Shevin, where notice of hearing and subsequent delay would give the debtor time to hide or destroy the property at issue, White found it relevant in the employment context where the government faced the dangers "of keeping a person on the scene who might injure the public interest through poor service or might create an uproar at the workplace."

The second was the parties' relative abilities to make one another whole after the outcome of the hearing was decided. Thus, a group of recipients would be less likely to be entitled to a pretermination hearing if they would customarily be unable to repay the government prehearing benefits in the event they lost at their full hearing. Similarly, the group would be more likely entitled to a pretermination hearing if the government had proved itself unwilling to pay back benefits to recipients found entitled to benefits at a post termination hearing. Although this factor was unique to White's approach, the concern was not without precedent. Back in Goldberg v. Kelly, Justice Black argued that welfare recipients were less justified in receiving prehearing benefits

667. Id. at 190-92.
668. Id. at 194.
669. Id. at 192. This concern was not unique to Justice White. In Marshall's dissent in Arnett he considered this concern within the scope of the personal interest factor. Id. at 219 (Marshall, J., dissenting).
670. Arnett, 416 U.S. at 198 (White, J., concurring in part and dissenting in part).
671. Id. at 215 n.27 (Marshall, J., dissenting).
672. Id. at 189 (White, J., concurring in part and dissenting in part).
673. 407 U.S. 67 (1972). The Court in Fuentes did not appear to consider this a danger and required a hearing before detention of personal property.
674. Arnett, 416 U.S. at 199 (White, J., concurring in part and dissenting in part).
675. Id. at 189-90.
because the government would never be able to recover these payments from the recipient once the government prevailed at the hearing.677

The legacy of Arnett is that it marked the introduction of the bitter with the sweet test and that six members of the Court rejected that introduction.678 Arnett represents much more than that, however. Through the five opinions, one can get a sense of what was truly at stake in the Court's battle over words and structures in its due process analysis.

Prior to Goldberg's elevation of statutory entitlements to property, procedural protection of government benefits was determined by the political process of the legislative branch and, when so delegated, the executive branch. After Goldberg elevated these interests and established its balancing test, the degree of procedural protection became an issue for the political process of the Court. The issue remained part of a political process because its resolution was controlled by a subjective and variable process of obtaining votes rather than by any fixed legal constraints. It became an issue for the political process of the Court because the degree of procedural protection an entitlement received became a function of what five members of the Court would vote for. Subsequently, as the Court tried to press the notion of a pretermination full hearing into a presumption, it sought to remove the issue from the political process of the Court and set it as a legal constant.

Without expressly overruling Goldberg, Rehnquist sought to overrule Goldberg by returning the level of procedural protection to the political process of the legislative branch. He would have done this by allowing the legislature to limit procedural protections simply by limiting the procedural aspects of the property interest. White and Powell, meanwhile, would have agreed with Rehnquist that Goldberg and its progeny had not granted sufficient deference to the political processes of the legislative and executive branches. However, for Powell and White, the solution was not to remove the issue from the political process of the Court. Rather, their solution was to recognize that the make-up of the Court now made it possible for the Court to exercise its political voice with greater deference to the procedural decisions of the other branches, both state and federal. Thus, in Arnett, six members of the Court indicated that the Court would be less aggressive in its review of

677. Id. at 277-78 (Black, J., dissenting).

678. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 540 (1985) ("[The bitter with the sweet approach] garnered three votes in Arnett, but was specifically rejected by the other six Justices.").
procedural protections of state created property. For them, the only issue was whether this would occur through judicial removal or judicial self-restraint.

Marshall and Douglas presented similar choices at the other extreme. In the early cases in the *Goldberg* line, the choice was between balancing and presumption, but because the Court appeared eager to grant procedural protection to nontraditional property interests, the choice between the two would affect the outcome of very few Supreme Court cases. The real effect of the presumption choice was to be felt in the lower courts and in future Supreme Courts.

By dictating a blanket requirement of a pretermination *Goldberg*-like hearing for all entitlements, the presumption approach effectively removed the issue of procedural protection from the political process of both the Supreme Court as well as the lower courts. This is so because the presumption left little, if anything, for courts to decide. While this mattered little to a Supreme Court where the justices would balance interests to grant the same degree of protection in each case anyway, it became important as one recognized first, that not all procedural due process cases would reach the Supreme Court\(^679\) and second, that the Supreme Court was bound to change. Thus, under the presumption approach, a lower court that was not so amenable to granting procedural protection would lose its discretion to deny such protection in a particular case just as a later, reconstituted Supreme Court would, at least to the degree that the Court felt moved to abide by precedent.

Although both Douglas and Marshall seemed to give credence to the presumption approach in *Arnett*, the positioning of the other justices sent a clear sign that this option was no longer on the table, and thus, the two dissenting justices displayed an ability to reach their desired result through balancing.\(^680\) *Arnett*, then, marked an end to the presumption as

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\(^{679}\) William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. Chi. L. Rev. 473, 477-83 (1973) (discussing the Court's screening out cases for subsequent review). One might question, however, the degree to which the lower federal courts would challenge the implicit tone of the Supreme Court even recognizing the unlikelihood of one of their cases being reviewed by the Supreme Court. See, e.g., Alan W. Houseman, *The Vitality of Goldberg v. Kelly to Welfare Advocacy in the 1990s*, 56 Brook. L. Rev. 831, 840 (1990) (noting the response of the federal courts to the Supreme Court's approach to poverty law in the 1980's). One might also limit the importance of this by arguing that the Court has great discretion in what cases it actually does review. See Burns, supra note 269, at 816-17.

\(^{680}\) Legal commentators, such as Reich, might criticize the movement away from the presumption as not recognizing sufficiently the importance of protecting the liberty (continued)
a politically viable alternative in the Court's search for a procedural due process test. It did not, however, mark the end of the debate about the appropriateness of the approach. In fact, when Justice Stevens arrived on the Court in 1975,681 he brought with him a commitment to that philosophy which would assert itself, though in dissent, during the 1980s.682

Those who would remove the courts from procedural due process analysis constituted a plurality of the Court as a whole and a majority of the new, more deferential majority. However, six members of the Court were still signaling continued involvement through some form of balancing. Of the two balancing tests receiving support in Arnett, the more rigid Wyman balance was the dominant one. It garnished the support of at least four justices, while White's more free-flowing balance had the support of only its author.

and individuality of the benefit recipient. Such a view, however, fails to recognize that the exercise of the right to due process is somewhat unique because the State frequently must pay for the individual to exercise that right. Therefore, one can only protect the liberty and individuality of the benefit recipient by taxing the resources, and hence diminishing the liberty, see Reich, supra note 19, at 733, of other citizens. This, in fact, was a concern of Black in Goldberg v. Kelly, 397 U.S. 254, 272-73 (1970) (Black, J., dissenting). If one accepts, however, the philosophy behind Brennan's governmental interest in providing a benefit, then this concern for taxpayers can be offset. This is so because taxpayers would want to sacrifice their liberty to the extent they recognized it would ensure meaningful participation in the community rather than societal malaise. See supra notes 223-31 and accompanying text.

681. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, supra note 259, at 1721.


The plurality's willingness to sacrifice due process to the Secretary's obscure suggestion of necessity reveals the serious flaws in its due process analysis. It is wrong to approach the due process analysis in each case by asking anew what procedures seem worthwhile and not too costly. Unless a case falls within a recognized exception, we should adhere to the strongest presumption that the Government may not take away life, liberty, or property before making a meaningful hearing available.

Id.; see also Lassiter v. Department of Social Servs., 452 U.S. 18, 59-60 (1981) (Stevens, J., dissenting) (arguing that the Court need not balance interests to determine that a parent is entitled to an attorney at a parental rights termination hearing). But see Walters v. National Assoc. of Radiation Survivors, 473 U.S. 305, 364 (1985) ("Lawyers may not be needed in most cases, but should be permitted in appropriate [Veterans Administration] cases.").
At first glance, this support for the Wyman factors makes sense. As noted previously, the test is based on the Hand test, so it is a test which both courts and advocates would be more familiar with and also a test whose merit has withstood the test of time. Furthermore, because it uses the same three factors in every case, the Wyman test would appear to provide the lower courts with more structure and guidance. Thus, one would expect that the Wyman test would lead to more consistency and more predictable outcomes than would the seemingly open-ended White balance.

More careful reflection suggests, however, that in time, the White balance may well have proven itself the better balance. Although the test may have initially seemed potentially ambiguous because of its multitude of factors, many of which might have been applicable to some cases but not to all, over time the courts would have worked out the full scope of interests implicated in evaluating procedural due process as well as the kinds of situations that implicated each set of interests. Once that occurred, the White balance would have been the more predictable test because it would have been the one that helped people see what would really be moving a court in a given case, not only consciously but also subconsciously.

In addition, once the courts had fleshed out all the relevant factors, the White balance would have been more accurate than the Wyman balance. Mashaw, for example, has suggested that the Wyman test is vulnerable to inaccuracy because it fails to consider moral vision, individual dignity, and the interests of participatory democracy. In

683. See supra notes 194-99 and accompanying text.
684. At the time Arnett v. Kennedy, 416 U.S. 134 (1974), was decided, Learned Hand’s test from United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), was 27 years old.
685. The Wyman test actually has not been used as rigidly as its structure may suggest. Instead, the nature of the Government and personal interests have varied depending on the type of case and the justice using them. For example, in Arnett, Marshall included in the personal interest prong the length of time someone might be required to wait for a post-detention hearing, Arnett, 416 U.S. at 219 (Marshall, J., dissenting), while Justice Powell, on the other hand, did not consider that in his discussion of the personal interest prong of the test. Id. at 169 (Powell, J., concurring in part and concurring in the result in part).
addition, though the Court showed no interest in distinguishing cases on notions of federalism during this evolutionary period, White's test would have provided an opportunity to do so. More importantly, given the Court's interest in deference to the legislative process, White's balance could have invited attention as to the issue of whether a given procedural structure was a product of the people's elected representatives or of insulated governmental bureaucrats in the executive branch. Finally, White's balance gave the Court the flexibility to return at some point to Brennan's notions of community.

Whatever long term promise White's balance may have had, the promise would never be fulfilled. White's test, like Brennan's before it, was about to become extinct. The demise would not be complete: White would occasionally slip his additional interests within the umbrellas of the Wyman factors. The Court itself, however, was poised to bring its procedural due process wanderings to an end. The Court would settle on a balance structured around the Wyman factors. The balance also would be infused with a greater sense of deference to the procedural views of the legislative and executive branches. Thus, not only would White's approach disappear, but Rehnquist's notion of procedural due process abstinence would become unnecessary.

Gray Panthers v. Scheiker, 652 F.2d 146, 162-63 (D.C. Cir. 1980). Redish and Marshall would add other interests to this list, such as the appearance of fairness and equality. Redish & Marshall, supra note 592, at 483, 485. Others have argued, however, that one cannot assume that these goals are necessarily furthered by additional process. Smith, supra note 275, at 460-61.

687. In Vitek v. Jones, 445 U.S. 480 (1980), the Court at least acknowledged that federalism issues could have implications on procedural due process issues. Id. at 491 ("[M]inimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."); see also Santosky v. Kramer, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting) ("By passing the New York scheme and holding one narrow provision unconstitutional, the majority invites further federal-court intrusion into every facet of state family law.").


689. In Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985), White, writing for the majority, applied the Wyman factors, but gave the governmental interest a broad reading. Within that factor he included interests in avoiding delays and burdens in the procedural system itself, and, reminiscent of Brennan's government interest, in avoiding erroneous terminations. Id. at 544. This latter interest included "avoiding disruption," continuing "to receive the benefits of employee's labor," and "keeping citizens usefully employed" rather than on "the welfare rolls." Id.
2. Mathews v. Eldridge: A time to get there

The Court settled on the Wyman approach in 1976 in Mathews v. Eldridge. Justice Powell wrote for the majority in an opinion tracing closely his concurrence in Arnett v. Kennedy. Mathews put before the Court the same issue it had postponed reviewing in Richardson v. Wright. That issue was whether SSI, or disability benefits, could be terminated without a hearing. In choosing a case so factually similar to Goldberg, both to settle on a test and to deny a pretermination hearing, the Court eliminated any doubts about its direction which may have naively survived Arnett. While the Court may continue to use a balancing test, it would tip the scale on the side of protecting the status quo in government procedures.

The plaintiffs in Mathews had prevailed in both lower courts prior to arriving at the Supreme Court. This was a function of values and timing. The district court had decided the case after Fuentes but before Arnett, and, therefore, relied heavily on a presumption of a pretermination hearing. Reminiscent of the presumption cases, the district court concluded the following: "It is the opinion of this court that the defendant has not demonstrated that the termination of disability payments is such an 'extraordinary situation' that the basic notions of fairness encompassed in the Due Process Clause should be excepted in this case." The district court then pointed out that both the Supreme Court and the lower courts had consistently found that these basic notions of fairness required prior hearings even "in cases of interests which are seemingly less substantial than receiving disability benefits."

This is not to say that the district court did not consider the Wyman factors, but when the district court considered those factors, it was more

690. 424 U.S. 319 (1976). For a brief discussion of some intervening cases between Arnett and Mathews with procedural due process implications, see Rubin, supra note 18, at 1071-73.
694. See supra notes 678-80 and accompanying text.
699. Id. at 527-28.
in search of a reason to overcome the presumption rather than to balance. For example, although the district court determined that the personal interests in SSI and welfare were comparable, it indicated ultimately that under *Fuentes*, the degree of personal interest would not affect the outcome of the case. Similarly, although the district court indicated that subjective factual judgments are just as likely to affect the outcome of SSI determinations as welfare determinations, it determined that under *Fuentes*, the probability of erroneous terminations was also not determinative. Finally, the district court indicated that the government's interest in avoiding the disruption that could be created by additional procedural protections was not as great as the government would indicate. The Court then relied on *Bell v. Burson* and *Fuentes* to show, consistent with the presumption approach, that in any event, this governmental interest was not sufficiently extraordinary to "justify postponing notice and opportunity for a hearing." 

Given the course Powell was to set in *Mathews*, he did not need to disagree with much of this language. Powell and the majority had no problem with allowing a pretermination hearing so long as one defined "hearing" in the appropriate fashion. The error of the lower courts was not, then, in insisting on an opportunity for a pretermination hearing; it was in requiring the government to hear more than was necessary.

If there was a tactical error in the presumption cases, it was that they had failed to define the type of hearing they required. Powell seized on

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700. *Id.* at 523. The court stated the following:

Although disability beneficiaries are not by definition dependent on benefit payments for their livelihood, they are by definition unable to engage in substantial gainful activity, and to cut off payments erroneously may create a loss as "grievous" as that which concerned the Supreme Court in the cases of welfare and old age beneficiaries.

*Id.*

701. *Id.* at 523-24 ("In any case, in the recent case of *Fuentes v. Shevin*, 407 U.S. 67 (1972) the Supreme Court specifically rejected a narrow reading of *Goldberg* that would limit the due process requirement of a prior hearing to cases involving necessities.").

702. *Id.* at 524 ("Thus there will be a resolution of factual issues in disability cases, and the exercise of subjective judgment to resolve conflicting evidence of a factual nature makes the value of a hearing self evident.").

703. *Id.* at 525-27.


the omission to distinguish cases\textsuperscript{706} such as \textit{Sniadach}\textsuperscript{707} and \textit{Fuentes}.\textsuperscript{708} In indicating what due process presumably required, Powell distinguished between hearings and evidentiary hearings.\textsuperscript{709} In setting the ceiling for what due process required, Powell indicated that only in \textit{Goldberg}\textsuperscript{710} had the Court required anything resembling a "judicial trial."\textsuperscript{711}

For the Powell majority, however, it was not enough to distance themselves, before balancing, from any presumption of an evidentiary hearing.\textsuperscript{712} To align the opinion completely with the course Powell tried to set in \textit{Arnett},\textsuperscript{713} Powell announced further that the sympathies of the balance needed to be with the state regardless of whether the legislative or executive branch generated the procedures: "In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals."\textsuperscript{714}

\textsuperscript{708.} Fuentes v. Shevin, 407 U.S. 67 (1972). Powell maintained that in \textit{Fuentes}, "the Court said only that in a replevin suit between two private parties the initial determination required something more than an \textit{ex parte} proceeding before a court clerk." \textit{Mathews}, 424 U.S. at 334.
\textsuperscript{709.} \textit{Mathews}, 424 U.S. at 325 n.4. Redish and Marshall maintain that, in fact, the \textit{Mathews} Court eroded the presumption entirely and left no floor, below which constitutional due process rights could not fall. Redish \& Marshall, \textit{supra} note 592, at 472.
\textsuperscript{711.} \textit{Mathews}, 424 U.S. at 333. After \textit{Mathews}, the distancing from the \textit{Goldberg} notion of a pretermination hearing continued. In Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985), for example, the Court said that such a hearing "need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." \textit{Id.}
\textsuperscript{712.} One could read a bleaker procedural tone into Powell's opinion. At one point, for example, he suggested that all that might be presumed is that "some form of hearing is required before an individual is finally deprived of a property interest." \textit{Mathews}, 424 U.S. at 333. If that were all due process required, then detentions would cease to be protected under due process.
\textsuperscript{713.} \textit{See supra} text accompanying notes 648-54.
\textsuperscript{714.} Mathews v. Eldridge, 424 U.S. 319, 349 (1976). Mashaw maintained that in \textit{Goldberg} the Court justified the procedural rights of the individual, in part, through the (continued)
Given this narrow presumption and deference to the other branches while balancing, Powell did not need Rehnquist's bitter with the sweet approach\textsuperscript{715} to reach his desired outcome. Indeed, he did not even acknowledge that approach in \textit{Mathews}.\textsuperscript{716} There was, however, one curious acknowledgment in \textit{Mathews}, and that was when Powell attributed his balance of the Wyman factors to \textit{Goldberg v. Kelly}.\textsuperscript{717} Needless to say, the cite was presented quite generally.\textsuperscript{718}

Three important tendencies can be seen in Powell's application of the Wyman balance. First, consistent with what he had done in \textit{Arnett},\textsuperscript{719} Powell evaluated the factors not as they appeared in this particular termination, but as they would appear in the typical case.\textsuperscript{720} This could well have affected the outcome in \textit{Mathews} because there was reason to believe that the probability of error in Mr. Eldridge's case was higher than in the typical case.\textsuperscript{721} Additionally, Mr. Eldridge's personal interest state's need to provide those rights. He believed that this justification allowed the Court in \textit{Mathews} to say that when the state considers itself to have less interest in providing procedural protection, less weight exists to justify the right. As Mashaw put it, in \textit{Mathews}, "[t]he coalescence of individual and social interests seems to devour the individual rights ideals of \textit{Goldberg} and metabolize them into a diaphanous tissue of social cost accounting." Jerry L. Mashaw, "Rights" in the Federal Administrative State, 92 \textit{Yale L.J.} 1129, 1151 (1983).

\textsuperscript{715} Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974) (plurality opinion).

\textsuperscript{716} Instead, Powell cited his own concurrence in \textit{Arnett} for the proposition that governmental entitlements are property. \textit{Mathews}, 424 U.S. at 332. Although \textit{Mathews} indicated the Court preferred Powell's manner of limiting due process to Rehnquist's, the bitter with the sweet approach did not die officially until Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).


\textsuperscript{719} \textit{Arnett}, 416 U.S. at 169 (Powell, J., concurring in part and concurring in the result in part).

\textsuperscript{720} \textit{See}, e.g., \textit{Mathews}, 424 U.S. at 342 n.26 (discussing the median and mean resources of SSI beneficiaries); \textit{id.} at 344 (discussing the nature of evidence "in most cases").

\textsuperscript{721} The state had already wrongfully terminated Mr. Eldridge's benefits once (continued)
was not only probably greater than that of the typical recipient but also probably comparable to that of Mrs. Velez, one of the plaintiffs in *Goldberg v. Kelly.*

The other two tendencies both dealt exclusively with the governmental interest and, like the first tendency, both were consistent with Powell's approach in *Arnett.* First, within the government's interest in avoiding administrative burden, Powell indicated that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances." Thus, Powell increased the scope of the burden by maintaining that procedures not only created a burden by creating an expense but also created a potential burden through "gumming up" the smooth operation of government. For the final tendency, again within the governmental context, Powell assumed, as he had in *Arnett,* that if an interest was "the Government's interest," then it would also be "that of the public."

Joined by Justice Marshall, Justice Brennan filed a dissenting opinion. The opinion focused exclusively on criticizing the way in which the majority considered the *Wyman* factors. The opinion did not attempt to reintroduce Brennan's original *Goldberg* test nor did it attempt to strengthen the presumption. The opinion did raise two interesting points. The first was Brennan's challenge to Powell's conclusion that the personal interest here was only limited. At the heart of this was Brennan's observation that "the very legislative determination to provide disability benefits [sic], without any prerequisite determination of need in

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722. In his dissent in *Mathews,* Justice Brennan noted that "because disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed." *Mathews,* 424 U.S. at 350 (Brennan, J., dissenting.). Similarly, as a result of the termination of her welfare benefits, Mrs. Velez and her children lost their apartment, had to move into another apartment with relatives, and had to sleep "in two single beds in a small room." *Kelly v. Wyman,* 294 F. Supp. 893, 899 (S.D.N.Y. 1968), rev'd sub nom. *Goldberg v. Kelly,* 397 U.S. 254 (1970).


fact, presumes a need by the recipient which is not this Court's function to denigrate." 727 Thus, Brennan noted effectively that while the majority was eager to defer to the government's determination of procedure, something normally a specialty of the courts, the majority would not defer to the legislature's determination of need, normally a specialty of the legislature. The second, was Brennan's assertion of the reality of the hardship suffered by denied recipients 728 in the face of Powell's abstract consideration of the issue. 729 This assertion is ironic in light of Brennan's own abstract presentation in Goldberg. 730

Mathews closed an era of procedural due process analysis for the Court because it brought to an end the Court's search for a procedural due process test. Moreover, it also marked closure, much as Morrissey had, 731 by bringing the Court back to Goldberg. If Morrissey had brought the Court back to the Goldberg test, however, Mathews returned the Court to Goldberg's less pleasant side. Again, one found oneself reading a Supreme Court case and seeing one case cited to support a test that was not in that case at all. One could wonder how much of the opinion was precedent and constitutional theory and how much of the opinion was the moral vision of the majority. Furthermore, one could question the degree of abstractness with which the opinion was written. 732 Such a return was instructive: it taught that no particular judicial ideology had a monopoly on candor. Thus, just as the progeny of Goldberg invited curiosity, so would the progeny of Mathews.

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728. Mathews, 424 U.S. at 350 (Brennan, J., dissenting) ("[B]ecause disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed.").

729. Id. at 341-43.

730. See supra notes 122-38 and accompanying text.


732. See supra notes 122-256 and accompanying text. In addition, for a discussion of how the Court in Mathews may have applied the Mathews test inaccurately, see Carolyn A. Kubitschek, A Re-Evaluation of Mathews v. Eldridge in Light of Administrative Shortcomings and Social Security Nonacquiescence, 31 Ariz. L. Rev. 53 (1989).
C. Lassiter v. Department of Social Services: *A lot of nice things turn bad out there*\(^{733}\)

Among the descendants of *Mathews v. Eldridge*,\(^{734}\) *Lassiter v. Department of Social Services of Durham County*\(^{735}\) is not the case with the greatest impact on the determination of procedural due process. In fact, within a year of that decision, the Court handed down another that limited the effect of *Lassiter* both structurally and substantively.\(^{736}\) The point of discussing *Lassiter*, then, is not to indicate the course procedural due process was to take after *Mathews*, but to demonstrate the frailty of the *Mathews* test. In many ways, one can see *Lassiter* as a case where the *Mathews* test did turn bad out there.

In *Lassiter*, the Court held that, subject to appellate review, trial courts must determine on a case-by-case basis whether due process requires the appointment of counsel for indigent parents in any particular proceeding to terminate parental rights.\(^{737}\) The Court went on to hold that in the particular case of Ms. Lassiter, appointed counsel was not necessary given the apparent simplicity of the case and her lack of interest in the child.\(^{738}\)

Justice Stewart wrote the majority opinion. The opinion was almost a reverse image of his opinion in *Fuentes v. Shevin*,\(^{739}\) both in structure and in outcome. Stewart began by acknowledging a presumption, but unlike *Fuentes* where he presumed certain procedures must be provided,\(^{740}\) here he presumed that appointed counsel must be denied

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733. Now that I've lost everything to you,
You say you want to start something new,
And it's breaking my heart you're leaving,
Baby, I'm grieving.
But if you wanna leave take good care,
Hope you have a lot of nice things to wear,
But then a lot of nice things turn bad
Out there.


734. 424 U.S. 319 (1976). For a discussion of how the concepts of liberty and property were dealt with during this time by those descendants of *Mathews*, see Rubin, supra note 18, at 1074-92.


738. *Id.* at 32-33.


740. *Id.* at 80.
unless "if he loses, [the litigant] may be deprived of his physical liberty."\textsuperscript{741} Stewart then weighed this presumption against the Wyman factors,\textsuperscript{742} and an additional government interest similar to Brennan's Goldberg interest in avoiding wrongful terminations,\textsuperscript{743} to see if these factors could overcome the presumption.

Given Stewart's initial analysis of the factors, it appeared the presumption was overcome. Stewart characterized the personal interest as "extremely important," the government interest in avoiding wrongful terminations as similarly strong, the government interests in saving money and employing informal procedures as relatively weak, and the risk of erroneous terminations as often "insupportably high."\textsuperscript{744} Stewart, however, had a new course to chart. Instead of concluding that indigent parents were entitled to appointed counsel, Stewart announced that this analysis merely required that trial judges determine the appropriateness of counsel on a case-by-case basis because "the Eldridge factors will not always be so distributed, and . . . 'due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.'"\textsuperscript{745} Stewart then determined that in Ms. Lassiter's case, appointed counsel was not constitutionally required because "the weight of the evidence that she had few sparks of such interest was sufficiently great that the presence of counsel for Ms. Lassiter could not have made a determinative difference."\textsuperscript{746}

Stewart varied from the Mathews approach, then, in two ways: first, he added a presumption against procedural protection, and second, he switched the result of the balance from a blanket rule to a case-by-case determination. Both variations were questionable in terms of precedent and in terms of policy.

The more defensible of the two was the presumption. Although since Sniadach,\textsuperscript{747} procedural due process presumptions had almost always been discussed as protection for the beneficiary,\textsuperscript{748} some language had occasionally invited the idea of a presumption favoring the state. For

\textsuperscript{741} Lassiter, 452 U.S. at 27.
\textsuperscript{742} Id. at 27-31.
\textsuperscript{743} Id. at 27-28.
\textsuperscript{744} Id. at 31.
\textsuperscript{745} Id. (quoting Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973)).
\textsuperscript{746} Id. at 32-33.
\textsuperscript{748} Fuentes v. Shevin, 407 U.S. 67, 91 (1972). In fact, while the majority was attempting to create this new presumption, Justice Stevens, in dissent, was trying to rekindle the old one. Lassiter, 452 U.S. at 59-60 (Stevens, J., dissenting).
example, the Court in *Morrissey* had said that they would "begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."\(^{749}\) Although the Court began with that proposition there, it was not, however, a proposition to which the Court returned, and the Court clearly did not use that proposition to overcome the results of its balance in *Morrissey*\(^{750}\) as it did in *Lassiter*.

Rather than responding to a presumption, both *Morrissey* and *Gagnon v. Scarpelli*\(^{751}\) worked from a notion that people who have been convicted of a crime have less of a personal interest in personal liberty than do people who have not been convicted.\(^{752}\) Similarly, the criminal Sixth Amendment cases upon which Stewart relied are more personal interest than presumption cases. For example, in *Scott v. Illinois* the Court noted that among the various personal interests implicated by criminal prosecution, imprisonment but not fines could justify appointing counsel.\(^{753}\)

Thus, what Stewart sought to do structurally as a presumption would have fit more appropriately within the balance of the *Wyman* factors. Furthermore, it would have made more sense to fit it there on two levels. First, if the Court were to have placed the issue in the personal interest portion of the balance, that placement would have required the Court to consider the relative weights of personal interests in parenthood and personal liberty rather than just presuming that the interest in personal liberty is greater. Needless to say, there are parents who would go to jail rather than lose their child.\(^{754}\) Furthermore, the Court did not address this issue either in *Morrissey* and *Gagnon* or in the Sixth Amendment cases. In *Morrissey* and *Gagnon*, the Court compared the personal interests in personal freedom before and after criminal conviction, but the Court was not called upon to compare the interest in personal freedom to other personal interests. Similarly, in the Sixth Amendment cases, the

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750. Id. at 484.
751. 411 U.S. 778 (1973) (concerning the right to appointed counsel at probation revocation hearing).
752. Gagnon, 411 U.S. at 789; Morrissey, 408 U.S. at 481-82.
Court compared the interest in personal freedom to other personal interests threatened by criminal prosecution, but the interest in parenthood is not one of the interests that is so threatened.

In fact, had the Court been required to make the comparison explicitly, it might well have acknowledged that the interests are comparable. As the Court had previously said in Stanley v. Illinois, and as Stewart quoted in Lassiter, "a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"755 In Santosky v. Kramer, decided a year after Lassiter, the Court found this personal interest to be potentially even greater than those threatened in juvenile delinquency, civil commitment, and deportation hearings,756 all of which have personal freedom implications. Finally, Goldberg v. Kelly757 is the civil case associated with the most extensive procedural protections,758 and that opinion was fueled by a personal interest that sought to avoid the kind of need that would reduce a family to sleeping together in a single room.759 If the Court in Goldberg weighed so heavily that interest in a family having its space, how much greater should the protection be of an interest in a family remaining as a family.760

Apart from this substantive level, the second level which would have been furthered by avoiding the presumption is the Supreme Court's

756. Santosky v. Kramer, 455 U.S. 745, 759 (1982). In Santosky, the Court limited both the presumption against protections, id. at 754, and the case-by-case determination of due process rights, id. at 757, to the right to counsel cases. In Santosky, the Court used a more conventional Mathews analysis to hold that the Due Process Clause guarantees parents the protection of a "clear and convincing evidence" standard at termination hearings. Id. at 769.
758. Mathews v. Eldridge, 424 U.S 319, 340 (1976) ("Only in Goldberg has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence.").
760. Mother Teresa of Calcutta tells of an Indian child whose family had no shelter and no personal property. They lived by finding food in the streets and preparing it whenever they could find space. In spite of this, the child believed she had a home: "Her mother was her home." MOTHER TERESA, WORDS TO LOVE BY 59 (1983). Implicit in this story is a recognition that a person's interest in the parent-child relationship may transcend all the other interests, fulfilled and unfulfilled, in her life.
control over constitutional interpretation. As noted earlier, a presumption is a vehicle by which a present Supreme Court thinks it can discourage lower courts and future Supreme Courts from exercising their judgment on an issue. In the earlier presumption cases, the Court used the presumption to shield the procedural rights of the individual from potential insensitivity by such courts. Here, however, the presumption was presented to the state as a shield to protect itself when such courts might seek to protect the rights of the individual. Whatever may be the merits of the first presumption, it is at least as meritorious as the second; therefore, if the Court felt a need to distance itself from the first, it should not have been so eager to embrace the second.

Stewart's movement to case-by-case analysis of procedural due process rights has even less to speak for it. On a precedential level,
except for *Gagnon* and an occasional atypical passing remark, the Court since *Goldberg* had always balanced on the basis of the typical case rather than on the basis of the facts of the particular case before it. Furthermore, looking to the typical was often essential to the outcome of the case. As noted earlier, this was true even in *Mathews* in which the *Wyman* factors became rooted. There, because of the particular plaintiff's heightened need and the appearance of a greater likelihood of error in his case, if the Court had looked to balance the facts as applied to Mr. Eldridge rather than as applied to the typical recipient, the Court might well have been compelled to grant a pretermination hearing.

From an analytical standpoint, the case-by-case approach also comes into question in at least two ways. First, the Court noted in *Morrissey* that society has an interest in treating people with fairness and "avoiding reactions to arbitrariness." Nothing, however, invites the impression of arbitrariness more than treating similarly situated people differently.

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764. *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973). *Gagnon* may have been aberrational for two reasons. First, the Court perceived the probation revocation hearing as being particularly "attuned to the rehabilitative needs of the individual probationer" and, therefore, less property-threatening than the typical termination apparatus. *Id.* at 787-88. Second, in *Gagnon*, the Court was concerned about creating a system where the individual had counsel, but the State did not. *Id.* at 787. Neither reason would apply to *Lassiter*.

765. In *Lindsey* v. *Normet*, 405 U.S. 56 (1972), White suggested the possibility that some Oregon renters might be entitled to procedures to which others were not: "Of course, it is possible for this provision to be applied so as to deprive a tenant of a proper hearing in specific situations, but there is no such showing made here, and possible infirmity in other situations does not render it invalid on its face." *Id.* at 65. Case-by-case analysis necessarily follows from such an observation because such analysis would be the only way to separate those specific cases where tenants were deprived of "a proper hearing."

The language, however, is atypical not only of the Court generally but even of White in particular. See, e.g., *Fuentes* v. *Shevin*, 407 U.S. 67, 98 (1972) (White, J., dissenting) (relying on the dynamics of the "typical installment sale").

766. Stewart, himself, had said in *Fuentes* v. *Shevin*, "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." 407 U.S. at 87. But see *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 896 (1961) (describing personal interest as "the opportunity to work at one isolated and specific military installation").


768. See supra notes 720-22 and accompanying text. For an interesting discussion of how facts of the particular case can affect due process analysis even in the "typical case" approach, see Jane E. Jackson, *Risk of Error Analysis*, 14 U. Tol. L. Rev. 1, 11-26 (1982).

and the case-by-case approach does just that. Under that approach, some people will get a lawyer, but others will not. Conceivably, some might even be allowed to cross-examine witnesses, but others would not depending on what procedures fell within the case-by-case approach. This is particularly significant because the recipient of benefits will often believe first, that favoritism, rather than rule, fuels the distribution of procedural protection, and second, that had the recipient received the same process afforded others, the result in his case would have been different. Thus, the case-by-case approach invites the appearance of favoritism and unfairness that the Due Process Clause itself seeks to avoid.\(^\text{770}\)

Second, it goes without saying that a major purpose of due process protection is to guard against incorrect decisions. The case-by-case approach, however, is built on the premise that the value of a particular process in a particular case can be determined before the process has been used. Such a premise stands due process on its head. If one could determine the value of a procedure before it was provided, there would be no need to provide the procedure because its value would already have been revealed.

*Lassiter* provides an example of this. There, Stewart assumed that "the presence of counsel for Ms. Lassiter could not have made a determinative difference"\(^\text{771}\) despite the fact that "hearsay evidence was no doubt admitted,"\(^\text{772}\) "Ms. Lassiter no doubt left incomplete her defense that the Department had not adequately assisted her in rekindling her interest in her son,"\(^\text{773}\) and Ms. Lassiter "apparently did not understand that cross-examination required questioning."\(^\text{774}\) Because Ms. Lassiter had no lawyer, the hearsay opinions admitted against her\(^\text{775}\) never had to be tested for authenticity or for merit. Additionally, the state did not

\(^{770}\) Redish & Marshall, *supra* note 592, at 483, 485. One could rationalize cases like *Mathews*, which denied additional procedural protections to recipients more deserving than the typical recipient, by arguing that the need for procedural consistency was so great that these more deserving people had to sacrifice to consistency. Stewart threatened this at a very fundamental level by effectively suggesting that procedural consistency was important when it allowed the government to deny procedures to the better than typical recipient but that it was not important when it would require comparable procedures for the less than typical recipient.


\(^{772}\) *Id.* at 32.

\(^{773}\) *Id.*

\(^{774}\) *Id.* at 54 (Blackmun, J., dissenting).

\(^{775}\) *Id.* at 53.
have to identify what it did to meet its legal obligation to make "diligent efforts . . . to strengthen her relationship to the child" nor explain the adequacy of those efforts. Therefore, we have lost the information that would have been obtained by a lawyer's probing into those areas. For Stewart, this did not create a problem because just as Powell in Mathews saw a legitimacy in deferring to the state's expertise in matters of procedure, Stewart apparently saw a legitimacy in deferring to the state's veracity in matters of substance. If such deference, however, could, in fact, be legitimately given, the Constitution would not have needed a Due Process Clause.

Stewart, no doubt, would have argued that he was willing to defer not to the veracity of the state but to the body of other evidence. Even if this were true, however, it would not justify his case-by-case approach. This is so because that approach would be used primarily by hearing officers before the evidence has been presented rather than by appellate court judges years later. Sniadach and many of the cases in the Goldberg line elevated detentions to the level of deprivation and emphasized the need for pretermination protection because even the temporary loss of property injures its owner. Thus, the problem raised here cannot be solved simply by saying that the denial of procedures before the hearing can be justified subsequently by evidence produced during the hearing itself. If the injury is to be prevented, a meaningful and accurate determination about procedures must be in place before the hearing begins.

Neither can the problem be solved by speculating on the creation of a prehearing evidentiary review to determine to what procedures the property holder should be entitled. Apart from the added burden Justice Blackmun saw this placing on the system, such a review cannot protect

776. Id. at 45.
777. In Lassiter, Stewart said, "[T]he weight of the evidence that she had few sparks of such an interest was sufficiently great that the presence of counsel for Ms. Lassiter could not have made a determinative difference." Id. at 32-33.
778. Ms. Lassiter, for example, had her hearing in 1978 and got her decision from the Supreme Court in 1981. Id. at 21.
779. See supra note 365.
781. Lassiter, 452 U.S. at 51 n.19 (Blackmun, J., dissenting). In addition to the burden Blackmun saw just in holding these reviews, one could add the loss of efficiencies of scale in processing cases. For better or for worse, agency workers can move through cases more efficiently when they are all handled in the same way rather than each one having its own procedural contours. Furthermore, with so much potential for variation in (continued)
the interests of the property holder. While one might compare this process to the criminal process of a grand jury followed by a trial, the two are in fact complete opposites. In the criminal model, the sufficiency of the state's evidence is initially reviewed by a grand jury, but that review is merely to see whether that evidence merits being challenged by the elaborate procedural mechanisms of a criminal trial. Here, the sufficiency of the state's evidence would also be initially reviewed, yet the purpose of that review would be to determine whether the evidence could escape procedural challenges. In the criminal model, a good liar is either tossed out or challenged, but in the case-by-case approach, the quality of his lying may well protect him from ever being challenged.782

Perhaps the most promising structural change from Mathews in Stewart's opinion is the variation on the Brennan governmental interest factor, and even that ends on a sour note. In Goldberg, the governmental interest unique to Brennan's approach was in fostering "the dignity and well-being" of citizens so that each citizen could "participate meaningfully in the life of the community."783 Thus, the state in
Goldberg had an interest not only in protecting the majority but in protecting the property holder and ensuring her dignity as well. In Lassiter, Stewart indicated that there the state shared the "parent's interest in the accuracy and justice of the decision," but this was not because Stewart saw the state having any interest in the parent or her dignity. Rather, it was because coincidentally the state and parent both shared "an urgent interest in the welfare of the child."

The significance of this difference becomes apparent as one sees how the judicial system treated Ms. Lassiter throughout her attempts to keep her child. At the trial level, the judge "expressed open disbelief" at Ms. Lassiter's testimony, interrupted her to announce that her testimony was "just wasting time," and seemed to belittle her mother's testimony. The judge, himself, engaged in the questioning of Ms. Lassiter and her mother, but then when Ms. Lassiter obviously did not understand how to cross-examine the social worker for the state, the judge simply pointed out her inadequacy rather than trying to help her formulate questions. Justice Stewart also chose to contribute to the demeaning of Ms. Lassiter by quoting in his opinion a statement of Ms. Lassiter that reflected problems with the English language.

In Goldberg, the state's interest in the dignity of its citizens was so deep that a citizen could not be denied welfare benefits, even temporarily, without first having a full evidentiary hearing. In Lassiter, that interest was so shallow while the state was taking her child that the

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784. Lassiter, 452 U.S. at 27.
785. Id.
786. Id. at 55, & n.23 (Blackmun, J., dissenting).
787. Id. at 55 n.25.
788. Id. at 55 n.24.
789. Id. at 54, & n.22. After reporting this behavior, Justice Blackmun tried to offer some explanation for it saying, "It is perhaps understandable that the District Court Judge experienced difficulty and exasperation in conducting this hearing." Id. at 56. Blackmun then added, however, that "both the difficulty and the exasperation are attributable in large measure, if not entirely, to the lack of counsel" created by the State. Id.
790. The passage quoted by Stewart was "Children know their family . . . . They know their people, they know their family and that child knows us anywhere . . . . I got four more other children. Three girls and a boy and they know they little brother when they see him." Id. at 23.

Elsewhere in the proceeding, Ms. Lassiter said, "He knows my mother and he knows all of us." Id. at 54 n.22 (Blackmun, J., dissenting). Thus, if it were important to Stewart to quote her rather than paraphrase, he could have selected this latter quote, which said the same thing as did the first one without appearing to belittle Ms. Lassiter's speech.
citizen was not even entitled to the respect of the state let alone entitled to an attorney. The picture that Justice Stewart painted of Ms. Lassiter's life was not pretty, and, therefore, termination of her parental rights may well have been appropriate given the state's "interest in the welfare of the child." But even if that were true, the state being right on the merits is hardly an excuse for degrading a citizen.

Given this behavior of government officials, a question arises necessarily about the legitimacy of Brennan's governmental interest. To the extent that the community Brennan described was influenced by Christian perspectives, that notion of community would not have been designed to function within a system of rights and duties but within a system founded on love and submission. What Brennan seemed to

791. Stewart pointed out that Ms. Lassiter had been convicted of second-degree murder and faced "a sentence of 25 to 40 years of imprisonment." Id. at 20. Her defense had been that her mother, with whom she wanted to leave her children, had actually killed the victim. Id. at 33 n.8. Stewart also pointed out, for whatever reason, that Ms. Lassiter had not been married to her son's alleged father, who in fact, denied paternity. Id. at 24 n.2.

792. Id. at 27.

793. For a sense of how far Ms. Lassiter's treatment was from the ideal, compare that treatment to that called for by Professor White in White, supra note 250, at 884-87 (calling for lawyers to listen more to what poor people have to say and to work for poor people to have more forums in which to speak). See also Redish & Marshall, supra note 592, at 487 (arguing for the balance to encourage participation by affected citizens).

In a nonlegal context, the treatment Ms. Lassiter received could remind one of the response that Dorothy and the Scarecrow, Tin Man, and Lion received from the Wizard of Oz when they first sought his help. After the Wizard had done everything he could do to intimidate Dorothy's companions, Dorothy stepped forward and told the Wizard "You should be ashamed of yourself: frightening him like that when he came to you for help." The Wizard was unmoved by Dorothy's reproach but ultimately had to admit to the group that he was "a very bad wizard." THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

794. Communities can be structured in many different ways. Among those structures are first, rights and duties and, second, love and submission. To the extent that Brennan's vision of community reflected a love-based structure, that would not make it Judeo-Christian. Atheist or humanistic attempts at community can certainly be love-based. However, a notion of community that was Christian would be love-based.

The clearest indication that the relationship of God with His people is not built on rights appears in the Book of Job. Job is described as "blameless and upright, one who feared God, and turned away from evil." Job 1:1. In spite of Job's merit, God allows Satan to destroy all Job's property, kill all his children, and cover his body with "loathsome sores." Job 1-2. When Job questions his fate, God tells Job that despite his merit, it is not for Job to question God:

Gird up your loins like a man;
I will question you, and you declare to me.
suggest was that the poor had submitted to a society that had imposed upon them "forces not within the control of the poor" which contributed to their poverty. Brennan then saw welfare as the "loving" response to that submission, and if it were in fact the loving response, then it needed to be interpreted as broadly as love would require. At the very

Will you even put me in the wrong?
Will you condemn me that you may be justified?
Have you an arm like God,
And can you thunder with a voice like his?


Job is not the only Biblical figure expected to submit to the will of God without explanation. Abraham had to submit through the offering of his "beloved son" Isaac on the mountain, Genesis 22:1-18, and Jesus had to submit in the Garden of Gethsemane. Luke 22:42 ("Father, if you are willing remove this cup from me; yet not my will but yours be done.").

Despite the lack of rights, the people of God in the Bible find themselves protected by the love and mercy of God. As a frustrated Jonah puts it after God refrains from destroying the people of Nineveh, "I knew that you are a gracious God and merciful, slow to anger, and abounding in steadfast love, and ready to relent from punishing." Jonah 4:2. Such expressions are present in the Gospels as well. See, e.g., John 3:16-17 ("For God so loved the world that he gave his only Son, so that everyone who believes in him may not perish but may have eternal life. Indeed, God did not send his Son into the world to condemn the world, but that the world might be saved through him.").

None of this denies that God in the Bible imposes rules. See, e.g., Exodus 20:3-17. Rules alone, however, do not prove a system based on rights and duties. Job reflects that clearly. Here, when one follows the rules, it does not obtain for him rights before God. Rather, it is a sign that one abides in God's love. John 15:10. Job reflects the trust necessary to do such abiding when he says, "The Lord gave, and the Lord has taken away; blessed be the name of the Lord." Job 1:21.

Of course, different people take from Scripture different things, and one could question this view of Christian relationships being built on a system of love and submission. Professor Anthony J. Fejfar, for example, might well say that such a view does not give sufficient attention to the exercise of "interactive critical judgment." See generally Anthony J. Fejfar, In Search of Reality: A Critical Realist Critique of John Rawls' A Theory of Justice, 9 ST. LOUIS U. PUB. L. REV. 227 (1990); Anthony J. Fejfar, A Road Less Traveled: Critical Realist Foundational Consciousness in Lawyering and Legal Education, 26 GONZ. L. REV. 327 (1990).

796. Id.
797. Id. at 265. This could reduce Brennan's view of welfare to the "charity" which Black used to describe it. Goldberg, Id. at 275 (Black, J., dissenting). This would be the case, however, only if by "charity" Black meant something more than the majority giving away that which they do not want or do not need. Love or charity here means not to insist on one's own way, 1 Corinthians 13:5, but to "lay down his life for his friends." John 15:13.
least, love listens,\textsuperscript{798} and beyond that, love acts.\textsuperscript{799} Therefore, before terminating welfare, the government needs, at least, to listen.

In \textit{Lassiter}, we find the government not listening and, therefore, not loving. When the government does not love, the individual will be wounded if he simply submits to the majority will.\textsuperscript{800} Thus, when the

\textsuperscript{798} For example, in a record for due process tolerance well beyond anything any judge in \textit{Lassiter} was asked to bear, God listens to Job and his friends for 35 chapters before stepping in. \textit{Job} 3-37; see also \textit{Matthew} 6:8 (indicating God has heard even before we speak).

\textsuperscript{799} \textit{James} 2:14-26 ("If a brother or sister is ill-clad and in lack of daily food, and one of you says to them 'Go in peace, be warmed and filled,' without giving them the things needed for the body, what does it profit?").

\textsuperscript{800} From a prison in Nazi Germany, Dietrich Bonhoeffer discussed the dynamic of Christian submission to the authorities around us and the dangers when those authorities lose all moral direction:

In a long history, we Germans have had to learn the need for and the strength of obedience. In the subordination of all personal wishes and ideas to the tasks to which we have been called, we have seen the meaning and the greatness of our lives. We have looked upwards, not in servile fear, but in free trust, seeing in our tasks a call, and in our call a vocation. This readiness to follow a command from 'above' rather than our own private opinions and wishes was a sign of legitimate self-distrust. Who would deny that in obedience, in their task and calling, the Germans have again and again shown the utmost bravery and self sacrifice? But the German has kept his freedom—and what nation has talked more passionately of freedom than the Germans, from Luther to the idealist philosophers?—by seeking deliverance from self-will through service to the community. Calling and freedom were to him two sides of the same thing. But in this he misjudged the world; he did not realize that his submissiveness and self-sacrifice could be exploited for evil ends. When that happened, the exercise of the calling itself became questionable, and all the moral principles of the German were bound to totter.

\textbf{DIETRICH BONHOEFFER, LETTERS AND PAPERS FROM PRISON 6 (1975) [hereinafter BONHOEFFER, LETTERS & PAPERS].}

The passage is in many ways autobiographical. Prior to meeting the full fury of Nazism, Bonhoeffer had written uncompromisingly of the call to obedience:

To resist the power is to resist the ordinance of God . . . , who has so ordered life that the world exercises dominion by force and Christ and Christians conquer by service. Failure to realize this distinction will bring a heavy judgment on the Christian . . . : it will mean a lapse into the standards of the world. How then is it so easy for Christians to find themselves in opposition to the powers? Because they are so easily tempted to resent their blunders and injustices.

\textit{(continued)
government does not love, the individual needs protection from the government, and that protection comes as Justice Black would point out, in the form of rights. If those rights are denied, then the individual must either submit and be wounded or, as Brennan might frame it, resort to "societal malaise." No other alternatives are available. In the face of the treatment Ms. Lassiter received, it is naive to expect that she will be protected either substantively or procedurally solely by a theoretical government interest in her well-being. These dynamics are played out in other due process contexts as well. One can see it in the conflicting opinions over juvenile proceedings in *In re Gault* and over parole proceedings in *Gagnon v. Scarpelli*. The government calls to the individual to submit, to trust, and to grant the government the flexibility it needs to do good. The idealist responds that only love is entitled to that submission, and love puts in place mechanisms to hear those it loves. The more cynical simply demands the rights the individual will need to respond to a hostile government. Although the goals of each may look the same, the relationships from which they arise are very different, and these differences may well define who we are or who we want to be as people. Do we long to be people bound together and striving to form "a more perfect [u]nion," or is it enough that we just live together or, 

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DIETRICH BONHOEFFER, *THE COST OF DISCIPLESHIP* 293 (1983) (citations omitted). Faced with the "injustices" of the Nazis, these principles of Bonhoeffer began "to totter," and he found himself in opposition to the German Government. *Id.* at 16-17. He was arrested in 1943, imprisoned, and "was executed by special order of Himmler at the concentration camp at Flossenburg on April 9th, 1945, just a few days before it was liberated by the Allies." *Id.* at 17, 21. One could well believe that Bonhoeffer still held in his heart the earlier position even as he lived the latter one. Certainly, he recognized that "intolerable conflicts have worn us down and even made us cynical," and longed for the day when his inward power of resistance and honesty with himself could help him "find our way back to simplicity and straightforwardness." BONHOEFFER, LETTERS & PAPERS, supra, at 16-17. Bonhoeffer also expressed concern that the "free and responsible action" to which he felt called would lead to becoming "a sinner in that venture," *id.* at 6, a concern reminiscent of that of Nehemiah, who felt compelled to action to reform the Temple and the Jewish Community. *See, e.g.*, Nehemiah 13:14 ("Remember this to my credit, O my God! Let not the devotions which I showed for the house of my God and its services be forgotten!").

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802. *Id.* at 265.
806. U.S. CONST. pmbl.
even more comfortably perhaps, apart? Although this is a question entitled to a more thoughtful answer than what it can receive here, some final contextual thoughts on it will be offered in the last section.

IV. GOLDBERG AT TWENTY-FIVE: "THE WAY I’VE ALWAYS HEARD IT SHOULD BE"?

Is there life for Goldberg v. Kelly at twenty-five? Certainly, there remains little reason to cite it. Beyond that, one would hardly retain it as a tribute to Brennan’s skill as a legal writer. Its use of authority is at best misguided, its use of facts is shallow, and its use of terms is ambiguous. In addition, the opinion, along with the cases that followed it, do little to enhance Justice Brennan’s legacy on the Court and his

807. No definition of “community” or any other social organizing structure can be limited to only a single criterion, such as love or rights. For example, the Christian dynamic is overly-simplified by a picture only of love and submission. More accurately, the picture must acknowledge the propensity for failure and include patience, repentance, forgiveness, reconciliation, redemption and a number of other traits as well. See generally Luke 15:11-32 (telling parable of the prodigal son). For a discussion of how the constitutional tension between communitarianism and individualism may play out on the African continent, see Adrien K. Wing, Communitarianism vs. Individualism: Constitutionalism in Namibia and South Africa, 11 WIS. INT’L L.J. 295 (1992).

808. “You say we’ll soar like two birds through the clouds,
But soon you’ll cage me on your shelf —
I’ll never learn to be just me first
By myself.

[But you say] it’s time we moved
In together
And raised a family of our own,
You and me —
Well, that’s the way I’ve
Always heard it should be, . . . ”

CARLY SIMON, That’s the Way I’ve Always Heard It Should Be, on THE BEST OF CARLY SIMON (Elektra Records 1975).


810. See supra notes 112-93 and accompanying text.

811. See, e.g., Charles G. Curtis, Jr. & Shirley S. Abrahamson, Brennan, William Joseph, Jr., in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, supra note 259, at 86-87 (“Justice Brennan played a singular role in the constitutional revolution of the past two generations . . . Brennan’s judicial philosophy remains the subject of spirited controversy, but his supporters and critics agree that he ranks as one of the great justices in the nation’s history.”).
role as one of its most successful leaders.\textsuperscript{812} In fact, rather than appearing here as the great consensus builder,\textsuperscript{813} Brennan emerges from this line as just another spoke in the wheel of confusion.

Having acknowledged this much, one can still say not only that there could be life for \textit{Goldberg} at twenty-five but also that we must go back and come to grips with what it tells us about the Constitution and our nation. We are a nation in the midst of a constitutional and structural crisis that has us simultaneously bemoaning our inability to move with a common vision\textsuperscript{814} and priding ourselves on splintering into a pluralistic society.\textsuperscript{815}

Our problem is not a paradox but simply a puzzle to which \textit{Goldberg} holds the answer. That answer lies in the recognition that both Brennan and Black are right. Our Constitution is both a call to a community that "foster[s] the dignity and well-being of all persons within its borders" by bringing everyone "to participate meaningfully in the life of the community"\textsuperscript{816} and a proclamation of individual autonomy that commands to government, "'thus far and no farther shall you go.'"\textsuperscript{817}

Such a coexistence should not seem counterintuitive in an age where even marriages may be laced with prenuptial and antenuptial agreements.\textsuperscript{818} Just as the marriage creates a union, even while those agreements create boundaries for the union, the Constitution creates both a union and boundaries. When the Preamble states, "We the people of the United States, in order to form a more perfect Union,"\textsuperscript{819} it recognizes a union of the people, and it empowers that union with each

\textsuperscript{812} Id.
\textsuperscript{813} Id. at 87-88.
\textsuperscript{814} Brian Dickinson, \textit{Diversity When Tribe Pride Becomes Separatism}, \textit{PITT. POST-GAZETTE}, June 18, 1993, at B3 ("In a pluralistic society such as ours, however, diversity can grow costly if pursued too far.").
\textsuperscript{815} New Jersey captured the tension here in its 1993 High School Lincoln-Douglas Debate topic: \textit{Resolved: that emphasizing the ideal of cultural diversity benefits American Society more than emphasizing the idea of the melting pot.} Teresa M. McAleavy, \textit{Bulletin Board, N. J. REC.}, March 9, 1993, at B6.
\textsuperscript{817} Id. at 273 (Black, J., dissenting).
\textsuperscript{818} It should not be surprising that our civil relationships can be modeled after family relationships. Recently, Pope John Paul II described the family unit as "the 'school of life' where the tensions between independence and communion, unity and diversity are lived out on a unique and primary level." Bill Reck, \textit{International Conference on Population & Development}, \textit{BLUE LETTER}, May 1994, at 2 (quoting letter from Pope John Paul II to the Secretary General of the United Nations (Mar. 19, 1994)).
\textsuperscript{819} U.S. CONST. pmbl.
power that it entrusts to that union through the elected representatives. The Constitution, however, is not all empowerment of the union. Both in the original document and in the amendments, there are boundaries where the individual may tell the union thus far and no farther. For example, just as some couples may choose to separate their checking accounts during the marriage, the Constitution has separated our religious beliefs. Thus, in the very pages by which we seek to embrace one another, we also seek to build the fences that will keep us "good neighbors." In this way, the American constitutional experience becomes a process of determining how complete the union can be and where the walls of separation need to be built.

Black's notion of walls and rights is not unique in American jurisprudence nor is Brennan's notion of community. The two, 

822. See, e.g., U.S. CONST. amend. I.
823. Id.
824. Robert Frost, Mending Wall, in ROBERT FROST: A TRIBUTE TO THE SOURCE 83 (1979). In the poem Mending Wall, Frost provides an interesting discussion of whether we need walls between good neighbors and why the process of maintaining such walls is so unceasing. Although humbling, it is worth the attention of the constitutional lawyer to follow Frost's lead in wondering:

What I was walling in or walling out,
And to whom I was like to give offense.

Id. at 83-84. Further, one may wonder what "cows" exist in American society that require restraint. Id. at 83. It is also worth pondering if it is true within the American majoritarian process that:

Something there is that doesn't love a wall,
That sends the frozen—ground—swell under it
And spills the upper boulders in the sun,
And makes gaps even two can pass abreast.

Id. at 83. This is not the first time that Frost's Mending Wall has been connected to constitutional theory. See Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995).
825. Professor Mashaw, for one, has noted how difficult this process can be. Mashaw, supra note 714, at 1150-62.
826. This would be a premise to support the common notion that all people of the state benefit from the universal education of the citizenry. See, e.g., Susan J. Germanio, When College Begins and Child Support Ends: An Analysis of the Pennsylvania Legislature's Response to Blue v. Blue, 3 WIDENER J. PUB. L. 1109, 1146, (1994); Gregory Gelfand, Of Monkeys and Men—an Atheist's Heretical View of the Constitutionality of Teaching the Disproof of a Religion in the Public Schools, 16 J.L. & EDUC. 271, 282 (1987) (noting the American response to the Soviet launching of the
however, draw upon very different values and structures. Community, at least in one view, proceeds from two recognitions: first, that each has been given her talents not simply for her own autonomous gain but "for the common good" 827 and second, that one does not suffer or celebrate solely as a function of her own status but "[i]f one member suffers, all suffer together with it; if one member is honored, all rejoice together with it." 828 These recognitions would allow Brennan to say that one is injured when her neighbor cannot "participate meaningfully in the life of the community" and that "malaise" is not personal but "societal." 829

In this view, community is more than bringing "political outgroups to the table and ensur[ing] their effective participation in a dialogue among political equals." 830 More than a call to empathy, community is a call to action, action which would not take place within the traditional political dialogue of power and rights. 831 Community, as it is used here, requires "Sputnik" Satellite in 1957); Maureen K. O'Connor, Support Obligations of the Noncustodial Parent for Private Secondary and College Education: Toward a Uniform and Equitable Resolution, 16 SUFFOLK U. L. REV. 755, 773 (1982); Enid L. Vernon, Parental Support of Post-Majority Children in College: Changes and Challenges, 17 J. FAM. L. 645, 649 (1978-79).

829. Goldberg v. Kelly, 397 U.S. 254, 265 (1970). In this light "societal malaise" is more consistent with Mother Teresa's vision, see supra note 250, than with the riot vision. See supra notes 240-50 and accompanying text.
830. Cynthia V. Ward, A Kinder Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature, 61 U. CHI. L. REV. 929, 932 (1994) (rejecting empathy as a community value as a substitute for liberalism). The point here is that, as Professor Ward argues, community defined by empathy is not a viable option to rights-based social organizations. Id. at 954. It remains to be seen, however, whether the same can be said for community defined by love and action.
831. MOTHER TERESA, WORDS TO LOVE BY 25 (1983).

I had the most extraordinary experience once in Bombay. There was a big conference about hunger. I was supposed to go to that meeting and I lost the way. Suddenly I came to that place, and right in front of the door to where hundreds of people were talking about food and hunger, I found a dying man.

I took him out and I took him home.

He died there.

He died of hunger.

And the people inside were talking about how in 15 years we will have (continued)
that we give to others" and "not insist on [our] own way." Even though such insistence is at the core of a rights-based society, community values patience, kindness, and humility. Central to community is a call to act lovingly rather than a call to be right.

Even the images of the two approaches are different. For Brennan's community, the "State" is "We the people." It is Abraham Lincoln's "of the people, by the people, for the people" and Robert Frost's "salvation in surrender." Ultimately, it allows for President John F. Kennedy's instruction: "Ask not what your country can do for you—ask what you can do for your country." Meanwhile for Black, "State" was an entity inclined toward "unrestrained powers to make life miserable for [its] citizens," a white marble monster posed on the Potomac to strike the little guys.

One might well wonder if these approaches are so different, how they have managed to coexist so long. While many answers may explain it, the first is necessity—a necessity bred by two conditions. The first condition is a recognition on the part of the individual that in some so much food, so much this, so much that, and that man died.

See the difference?

*Id.*; *James* 2:14 ("What does it profit, my brethren, if a man says he has faith but has not works?").

833. *I Corinthians* 13:5.
835. *James* 3:13 ("[W]ho is wise and understanding among you? By his good life let him show his works in the meekness of wisdom.").
840. Goldberg, 397 U.S. at 272 (Black, J., dissenting).
841. To see the two images at work in a single case, see *In re Gault*, 387 U.S. 1 (1967), where Justice Fortas insisted procedural protections were necessary to protect juveniles from the State, and Justice Stewart insisted the State needed room to help the juvenile.
areas he cannot submit, or does not want to submit, himself to the majority's will. The second condition is a recognition that the majority will not always respond with compassion toward the individual. When either condition is present, the community model erupts into conflict, and we must resort to identifying rights and building walls to settle the conflict.

These conditions help to explain how a justice such as Brennan could be the standard-bearer for community when he had been described by his critics as epitomizing "an unrestrained federal judiciary that had arrogated unto itself the ultimate control over virtually every facet of daily life, thus demeaning the right of citizens to govern themselves through representative democracy." In an ideal world, Brennan might well have longed for a "more perfect," in the sense of more complete, union. In the world as it is, however, Brennan may have felt that boundaries needed to be set to maintain a less complete union with limits on the rights of democratic governance either because he sensed in the majority a lack of compassion in a certain area or because he did not want to force the submission of individuals who were unwilling to submit in a given area.

One might wonder also how Brennan could be tied to such a comprehensive vision of Constitution as community, when he described the rights established in the Constitution as "a sparkling vision of the supremacy of the human dignity of every individual." Dignity, individuality and self-worth, however, are not exclusively functions of either a community-based or a rights-based social order. Some notions of community emphasize the need of each individual to appreciate and nurture his own personal gifts and to bring them to the community and, consequently, to recognize the necessity of others doing the same.

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842. See Colossians 3:18 (recognizing a need for subordinance in marriage).
843. See Colossians 3:19 (recognizing a need for compassion in marriage).
844. This article is not the first to associate Justice Brennan with community although it may associate him with a more radical definition of that term. See, e.g., Frank I. Michelman, Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought, 77 VA. L. REV. 1261 (1991).
847. See, e.g., I Corinthians 12:4-11. Paul presents this notion of the need for diversity in this way:

For the body does not consist of one member but of many. If the foot should say, "Because I am not a hand, I do not belong to the body,"
Thus, one could advance that the Constitution protects individuality to guarantee that a diversity of gifts will be brought to the union.\footnote{848}

Such a notion would be important for today because twenty-five years after \textit{Goldberg v. Kelly},\footnote{849} the challenge to creating "a more perfect union" is no longer recognizing equality, as perhaps it was after the Civil War, or facilitating assimilation, as it was at the time of \textit{Brown v. Board of Education}.\footnote{850} Today, the challenge is dealing with a population that seems intent on asserting its diversity. In \textit{Goldberg}, Brennan gave us a vision of the Constitution that would call that diversity into community, that would rejoice in the meaningful participation of a wide range of gifts shared for the common good, and that would suffer societal frustration when even one person was discovered who had been excluded from the that would not make it any less a part of the body. And if the ear should say, "Because I am not an eye, I do not belong to the body," that would not make it any less a part of the body. If the whole body were an eye, where would be the hearing? If the whole body were an ear, where would be the sense of smell?

\textit{I Corinthians} 12:14-17.

Alternatively there are advocates of liberalism who would argue that "[m]inimal, but necessary, assumptions about the sameness of all human individuals, an identity of being that justifies equal treatment under the rules established by liberal law, are fundamental to liberal equality." Ward, \textit{supra} note 830, at 954.

\footnote{848} Similarly, one might wonder how a majoritarian like Black would find himself arguing that the Constitution is a wall to government. Here one must recognize that the property right that Black sought to protect in \textit{Goldberg} was not the welfare of the beneficiary but the financial resources of the taxpayer, and he sought to protect it not from the community but from the community's Big Brother on the Supreme Court. \textit{Goldberg} v. Kelly, 397 U.S. 254, 275-79 (1970) (Black, J., dissenting). Black noted a dynamic that escaped Professor Reich, see \textit{supra} notes 19-40 and accompanying text, that being that when one shifts a wall to grant greater protection for one person, she necessarily intrudes further into the personal autonomy of someone else. Extending Reich's work in this light, one can see that even if Government has threatened personal autonomy by replacing private property with public largesse, \textit{Reich, supra} note 19, at 733, one cannot grant greater protection to those dependent on the public largesse without expending more public money. That in turn sets off a chain reaction. If the Government is to spend more, it must take more, which means the public largesse must grow more and taxpayers' private largesse must shrink more. Thus, the independence of the one dependent citizen was bought with some of the independence of the taxpayer.

Reich, by the way, was a former law clerk of Justice Black's, and Black followed his work although Black did not agree with Reich on the degree to which the values underlying American individualism had been undermined by the 1970's. \textit{Memory of Justice Black}, \textit{supra} note 78, 405 U.S. at xii-xiii (comments of Griswold).


\footnote{850} 347 U.S. 483 (1954).
general welfare.

Such a community, however, does not come cheaply, nor can it be bought simply by additional tax dollars. Rather, what is needed is a taxing of the heart, for it is only from the heart that resources can flow sufficient to sustain the union. 851 We must be willing to follow when submission is called for but then govern only with compassion when we are called to lead. 852 We must learn to be humble, and recognizing our limitations as a people, we must learn to be patient. Such taxing, however, may not sound attractive when one is being offered personal autonomy and rugged individualism, nor can it sound safe in light of the treatment of Ms. Lassiter. 853

The challenge facing the nation today is not so different from the one that separated Black and Brennan. Then, as now, it had to be determined how much we want to create opportunities for all "to participate meaningfully in the life of the community" 854 and how much we want to say, "Thus far and no farther shall you go." 855 Today, the challenge is sometimes seen as a house divided or as a nation of neighbors seeking the courts to walk the line to mend their fences. Lincoln told us that a house divided against itself will fall, 856 and Robert Frost said that these fences between neighbors will always need mending. 857 Lincoln, however, did not live in the age of condominiums, and Frost probably never had to get his neighbor's cow out of his yard.


852. Lincoln described this approach to government in his Second Inaugural Address delivered March 4, 1865:

With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on . . . to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow, and his orphan—to do all which may achieve and cherish a just, and a lasting peace.

Abraham Lincoln, Second Inaugural Address in The Literary Works of Abraham Lincoln, supra note 837, at 274.

853. See supra notes 786-92 and accompanying text.


855. Id. at 273 (Black, J., dissenting).


857. See supra note 824.
No matter which road we choose to travel, the road will have its problems. If the Constitution, however, can be seen as defining a relationship among "We the People," then perhaps there is room to be optimistic despite those problems. This is so because for all our failures and frustrations in the area of personal relationships, somehow people continue coming up with new energy, imagination, and resourcefulness to try to make personal relationships work in their lives.\textsuperscript{858} The calling is simply to try in the same way to bring new imagination, energy, and resourcefulness to our relationship as a nation. Ultimately, perhaps, the more important issue is not whether we can come up with some new vision of social organization. More likely, what matters most is whether we remain a people "who, for all their conflicting interests," still care enough about remaining one people to invest what is necessary to "presume freely to govern ourselves."\textsuperscript{859} That is, anyway, the way I've always heard it should be.

\textbf{CONCLUSION}

Black was right when he tried to pare away the verbiage of Brennan's opinion in \textit{Goldberg}.\textsuperscript{860} There is much there in need of paring, however, that is almost always true of people's words. And it has been worth taking the time to pare away the aura with which history has surrounded the case because history sometimes deceives. Even reduced to its core, however, or perhaps particularly because it has been reduced to its core, \textit{Goldberg}, as well as its progeny, still has much to say even after twenty-five years.

The last section suggested that perhaps what matters most is not the answer reached but the commitment to finding the right answer.\textsuperscript{861} Although the Court ultimately may not have embraced the best test for procedural due process analysis, the justices certainly committed themselves to finding such a test. In hindsight, it is easy to find fault in their inconsistencies, their ideological agendas, and even their writing. Such fault finding, however, shows simply that the members of the Court are mortals subject to human weakness. That should come as no great revelation. More important than such weakness, however, is the commitment that can be found in the hundreds of pages of multiple majority, plurality, concurring, and dissenting opinions that make up this

\textsuperscript{858} \textit{ANNIE HALL} (United Artists 1977).
\textsuperscript{859} \textit{ROBERT FROST: A TRIBUTE TO THE SOURCE}, \textit{supra} note 824, at 153.
\textsuperscript{861} \textit{See supra} text accompanying notes 858-59.
line of cases. Faced with losses like Mrs. Lett's welfare, Mr. Roth's job, and Mr. Stanley's children, the justices repeatedly sought diligently, persistently, and often even passionately for answers that could withstand the test of time, even when it was obvious that the time for a particular answer would not be the present. It is reassuring that the most powerful lawyers in the country can still recognize the importance of the everyday problems affecting the lives of ordinary citizens, even if their solutions are not the ones each of us might select.

862. Professor Tushnet called Goldberg v. Kelly, for example, "one of the last great decisions embodying the humane instincts of the Warren Court." Tushnet, supra note 15, at 1077.