A Due Process Primer: Litigating Government Benefits Cases in the Block Grant Era

By Nancy Morawetz

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I. Introduction

The prospect of block grant legislation that would transform federal benefit programs has dramatic implications for the litigation of basic issues of procedural fairness in the administration of those programs. Stripped of federal statutory and regulatory fairness claims, advocates are likely to turn to constitutional due process arguments in asserting their clients’ fairness rights. /1/ Although this line of case law is familiar to most, the overlay of statutory and regulatory protections has obscured questions of the degree to which constitutional claims, standing alone, can be relied upon to secure fair process. /2/ This article revisits this area of law, reviews recent case law that shapes the degree to which the courts will honor due process claims, suggests strategies for asserting procedural claims, and offers cautionary notes on how procedural claims may undermine client interests.

II. Basic Constitutional Framework

The Fourteenth Amendment provides that "no State shall deprive any person of life, liberty or property without due process of law." /3/ Under prevailing constitutional doctrine, a person claiming a due process violation must withstand a two-part inquiry. /4/ The first question is whether the individual has been deprived of an interest in "life," "liberty," or "property." This evaluation is categorical. The court does not look at whether the interest is important or the impact on the individual is severe. Instead it asks if the interest fits one of the designated categories. If the answer is no, there is no further inquiry into the fairness of the procedural protections. The second part of the inquiry, in contrast, is quite open-ended. In deciding what process is due, and whether the individual has received adequate process, courts apply a balancing test in which they consider the interest of the individual and the government, as well as the marginal value of additional procedural protections.

In addition to this basic framework, emerging doctrine in the context of prisoner rights requires a person asserting a due process violation to show that the violation is of sufficient importance to
warrant the court’s attention. /5/ Although it is unclear how this doctrine will be applied to
government benefit cases, advocates should be aware of this case law and be prepared to meet
arguments stemming from it.

Finally, when the state has procedures in place, but fails to follow them, federal courts may deny
relief under the Parratt doctrine. /6/

A. Triggering Due Process Protections

The first part of the due process inquiry is determining whether the person has a protected interest
in life, liberty, or property. Plaintiffs in government benefit cases have met this requirement
through evidence that they have a property interest in receiving benefits. /7/ The lead case on
property interests, Board of Regents v. Roth, /8/ provides:

To have a property interest in a benefit, an individual clearly must have more than an abstract need
or desire for it. He must have more than a unilateral expectation of it. He must instead have a
legitimate claim of entitlement to it. . . .

Property interests, of course, are not created by the Constitution. Rather, they are created and their
dimensions are defined by existing rules or understandings that stem from an independent source
such as state law. /9/

Under this analysis, the property interest in a government benefit is rooted in "the statute defining
eligibility" for the benefit. /10/ Recipients of the benefit need not show that they are in fact within
the standards for eligibility to establish their property interest; instead they have a right to
procedures through which they can establish their eligibility. /11/

Case law since Roth has relied increasingly on positive law -- as set forth in statutes or common
law -- to define property interests. In Bishop v. Wood, the Court rejected a police officer’s claim
that he was entitled to a pretermination hearing. /12/ The Court stated that "the sufficiency of the
entitlement must be determined by state law." /13/ Read literally, Wood provides no source of
property rights outside of positive law guarantees. This means that it is not enough for claimants to
show a general understanding or other basis to believe that they would be eligible under specified
conditions. Instead, claimants must show that eligibility workers were required to provide benefits
if specified conditions were met. /14/

The one clear doctrinal limit on the power of positive law to define entitlements is when a state
tries to defeat enforcement of a property interest by controlling the procedures through which it can
be enforced. In Cleveland Board of Education v. Loudermill, the Court considered whether the
Cleveland Board of Education had failed to provide a discharged employee with due process. /15/
The employee had stated on his job application that he had never been convicted of a felony. When
the board discovered that the employee had been convicted of a felony, it discharged him for
dishonesty. The employee was provided with the statutorily defined procedures for challenging his
termination, which did not include an opportunity to respond to the charges against him prior to his
removal from his job. The issue on appeal was whether these procedures -- which were grounded in
the same statute that provided the employee with his tenure rights -- were adequate to meet constitutional due process requirements. In its decision, the Court squarely rejected the notion that the person claiming the entitlement must take "the bitter with the sweet." /16/ Instead, it ruled that, while state law is the source of property interests, state law cannot trump the Constitution in determining the requirements of due process.

The point is straightforward: the Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. The right to due process "is conferred not by legislative grace, but by constitutional guarantee." /17/

**B. What Process Is Due**

Once due process rights have been triggered, the next question is what process is due. The basic doctrinal framework for determining what process is due is provided by Mathews v. Eldridge: /18/

[T]he specific dictates of due process generally require consideration of three distinct factors: first, the private interest that will be affected by the government action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. /19/

The Mathews test suffers from a number of conceptual problems. First, it requires the balancing of factors that are not really comparable. How is the court to compare a recipient’s private interest in receiving a government benefit with the government’s interest in saving funds? /20/ Second, the test offers a very instrumental view of due process that loses sight of the intrinsic value of fair procedures. /21/ Despite these conceptual weaknesses, Mathews remains the prevailing doctrinal standard for evaluating due process claims. /22/

Under Mathews, greater procedural protections are required for programs that implicate more serious private interests. As a result, need-based programs demand greater protection than insurance-based programs in which the recipients may have other sources of income. /23/ Greater procedural protections are also required when the issues at stake involve questions of fault or culpability. /24/ This is because the procedures are assumed to have a greater value in determining whether the individual is truly culpable. /25/

Advocates arguing under a Mathews analysis should not assume that their job is to overcome obvious governmental interests in saving money. Although courts are likely to afford deference to the procedures adopted by the government, /26/ strong arguments may exist that the government has interests that coincide with the claimants’ interests in greater procedural protections. For example, the government shares an interest in directing its resources toward those who are eligible for a program. Therefore, detailed notice requirements, which help ensure that correct decisions are made, serve the government’s interest as well as those of persons applying to a program. /27/ In addition, the governmental interests under a Mathews analysis should be restricted to legitimate
interests. Some issues, such as systems that permit ex parte communications, implicate no legitimate governmental interest to weigh in the Mathews balance.

The Mathews analysis has been applied by the courts to a wide range of procedural issues. Four basic questions are: What type of notice does the individual receive of the hearing? /28/ Is there a hearing, and, if so, how formal is it? /29/ When does the hearing take place? /30/ And before whom is the hearing held? /31/

Although Mathews provides an essential framework for the presentation of arguments about due process, advocates would do well to look also to pre-Mathews case law in arguing about what process is due. Unlike Mathews, much of this case law is based on an intrinsic view of the value of fair procedures. Certain basic due process principles -- such as the right to notice and an opportunity to be heard -- are rooted in this case law and its intrinsic approach to the meaning of due process. /32/ Although subsequent cases might shoehorn their results into the instrumental Mathews approach, the strongest statements of the reasons for these results are often found in these earlier decisions.

C. Importance Threshold

The Supreme Court’s recent decision in Sandin v. Conner suggests that due process claimants may have to overcome a third hurdle. /33/ In Sandin the Court rejected a prisoner’s argument that the prison’s failure to abide by its own regulations was sufficient in itself to implicate a liberty interest. The Court observed that the deprivation was neither "atypical" nor "significant." The Court noted that a contrary rule would discourage prison management from codifying rules for fear that every transgression of the rules would trigger due process protections.

Sandin is troubling for government benefit cases because it suggests that due process claimants may be required to surmount an additional "importance" test. Certainly the policy issue that animated the court’s decision -- discouraging codification of rules -- carries over to the government benefits context. However, Sandin may be distinguished on several grounds. First, it is a prison case, and arguably cases about prisoners are sui generis. The opinion itself looks to whether the particular deprivation altered the "basic conditions of Conner's indeterminate sentence." /34/ The Court emphasized how this issue differed from the liberty interests considered in prior cases in which the plaintiffs were not incarcerated. Second, Sandin concerns liberty interests, where the Constitution serves as a floor; state law can be read as playing a different role in defining entitlements with respect to liberty interests from what it does in property interest cases. Nonetheless, advocates would do well to recognize that Sandin could signal a return to an importance test in due process cases. /35/

D. The Parratt Doctrine

A final issue faced by due process advocates is the Parratt doctrine. /36/ Although this doctrine has largely been applied by courts outside the government benefits context, it has important implications for government benefits litigation.
In Parratt the court considered an inmate’s claim that he had been deprived of his property -- a hobby kit -- without due process of law. There was no question that the prisoner had suffered a deprivation of property. But, since the deprivation was the result of "random and unauthorized" negligence and the prisoner had an adequate postdeprivation tort remedy in state court, the Court found no due process deprivation.

Parratt’s reach is somewhat unclear. An argument limiting its scope can be built on the reasoning of Zinermon v. Burch. /37/ In Zinermon, the Court interpreted Parratt as "a special case of the Mathews v. Eldridge analysis in which post-deprivation tort remedies are all the process that is due because they are the only remedies the State could be expected to provide." /38/ Zinermon proceeded to hold that where a deprivation is predictable, and preventable, the state cannot hide behind postdeprivation remedies. But Zinermon’s status as a predictor of the Court’s direction is questionable. Three members of the Zinermon majority have left the Court, suggesting cause for caution in relying on Zinermon. /39/

The Seventh Circuit’s decision in Clifton v. Schafer illustrates the implications of Parratt for government benefit litigators. /40/ In Clifton the plaintiff suffered a two-month deprivation of welfare benefits despite his timely response to a termination notice. The evidence showed that his response had been received by his eligibility worker and that the eligibility worker was told by a supervisor to forward the response to the state and not to alter the computer code that would automatically cut off plaintiff’s benefits. The Seventh Circuit ruled that the ensuing deprivation of benefits was random and unauthorized from the state’s standpoint and that the state had set up adequate procedures to prevent the termination of benefits prior to a hearing. Clifton’s postdeprivation remedy -- an administrative hearing that restored his benefits -- was held to be all the process that he was due.

The Parratt doctrine underscores the need to look at procedural issues systemically rather than individually. Although individual deprivation is the basis for a due process challenge, the evaluation of due process necessitates a look at how cases of a certain type are handled as a general matter.

III. Applying Due Process Principles to Government Benefit Cases in the Block Grant Era

A shift to block grant programs will change radically the context in which due process issues are litigated. Should this shift occur, advocates can expect to face some of the following issues.

A. Does the Program Create a Property Interest?

The current welfare system, with its federally mandated requirements, has made the initial step of the due process inquiry easy. Because federal law defines who is eligible and requires states to make payments to all who meet those eligibility requirements, there has been no serious question that persons claiming to meet the statute’s standards had a property interest in being allowed to
prove their entitlement. /41/ Block grants would eliminate these federal requirements. As a result, advocates would be required to develop tailored arguments explaining how a particular state program establishes a property interest. /42/

Under Roth a critical inquiry in determining the applicability of due process guarantees will be whether the state program is rule based or discretionary. Where a program is rule based, a claimant who meets the criteria can legitimately expect to receive benefits. In contrast, where a program is discretionary, no applicant can expect to receive benefits under the program. /43/

Case law analyzing entitlement interests in federal housing programs provides a useful reference. In Eidson v. Pierce, for example, the Seventh Circuit concluded that applicants for privately run, federally subsidized housing had no property interest in receipt of housing. /44/ The court stated that the important question was whether the applicants "would be able to establish at a due process hearing facts which would entitle them to Section 8 benefits." /45/ Finding that the regulatory scheme allowed landlords to apply their own judgment in deciding which eligible applicants to accept, the court concluded that the applicants had no property interest in receiving housing.

Several circuits have followed the Eidson court’s approach. /46/ A contrary result was reached by the Ninth Circuit in Ressler v. Pierce. /47/ In Ressler the court looked to whether the regulations governing eligibility restricted the discretion of eligibility workers, rather than to whether they dictated the result of who would and would not receive subsidized housing. Following earlier Ninth Circuit precedent, it asked whether the regulations created a significant substantive restriction on the agency’s discretion. /48/ The Ressler court further found a property interest rooted in Ressler being a member of the class of individuals that Congress sought to benefit through the creation of the federal housing program. /49/

In some cases this conflict in the circuits may be bridged. The Eidson decision offers two limitations on its reach. First, the court notes that it does "not mean to suggest that any element of discretionary judgment in determining the receipt of public benefits would defeat an asserted property interest." /50/ It notes that discretion may be required in the application of legal criteria. Thus, a state law provision that sets up a broad standard to be applied by an eligibility worker should not be seen as defeating a property interest. Second, the Eidson court made clear that in order to establish a property interest plaintiffs need not prove that resources are available to enable all eligible persons to receive the benefit. The court cited with approval its prior decision, Davis v. Ball Memorial Hospital Association, in which it concluded that indigent hospital patients had a property interest in benefits created by the Hill-Burton Act. /51/ The court recognized that there were "probably more eligible indigent patients than the hospitals would be required to treat on an uncompensated basis." /52/ But it observed that the regulatory scheme at issue in Davis contained a clear rule on how the hospitals were required to allocate scarce Hill-Burton benefits, namely, on a first-come, first-served basis.

The Eidson court’s qualifications make clear that advocates should not be scared off by the court’s sweeping statement that "[a]t the heart of this case is the fact that there are not enough Section 8 housing units to accommodate all who are eligible and willing to take them." /53/ Even under the court’s restrictive approach, a property interest can be found where there is a standard that should be applied to determine which eligible persons will receive the benefit. In this situation, one can
think of the property interest as being a right to the statutory or regulatory process for distributing
the benefit, rather than a right to the benefit itself.

B. Is the Claimant in the Position of an Applicant or a Recipient?

Block grant programs will leave states with a great deal of leeway to determine how they structure
their benefit programs and the conditions under which benefits will be granted or continued.
Depending on how these programs are formulated, they could lead to questions about whether
particular claimants should be characterized as applicants or recipients. Resolving this question of
classification can have important implications for procedural due process claims. Although
applicants are generally in the same position as recipients for purposes of the threshold inquiry into
the existence of a property interest, /54/ they stand in very different shoes with respect to the
question of what process is due. Most important, recipients can claim a right to continued benefits
pending a hearing. /55/

States could adopt a variety of measures that would make recipients look more like applicants and
therefore limit their procedural rights. One approach would be to define the entitlement in a time-
limited way so that recipients would be required to reapply in order to obtain benefits for an
extended period. Two circuits have permitted this approach with respect to food stamp benefits. In
Banks v. Block, the Sixth Circuit ruled that the 30-day certification period for food stamps defined
the extent of the entitlement to benefits. /56/ It therefore concluded that when a person seeks to
recertify for food stamps, and food stamps are denied, the state has no obligation to continue food
stamps until a hearing is held. Banks predates the Supreme Court’s decision in Cleveland Board of
Education v. Loudermill, and advocates can make a good argument that it is inconsistent with this
later precedent. /57/ Under Loudermill, states are not at liberty to limit the constitutionally
mandated procedures that accompany an entitlement. Since pretermination hearings are a
recognized procedure, arguably the state cannot seek to define away the availability of this
procedure. /58/ Nonetheless, in two decisions that postdate the Loudermill ruling, the Fourth
Circuit followed the decision in Banks. /59/

Another approach states could take would be to separate their programs. For example, where a state
limited benefits to 24 months absent certain circumstances, the first two years of benefits could be
treated as falling under one program, while benefits for those unemployable at the end of the two-
year period would be labeled as a separate program. This approach poses a double danger. As
"applicants" for a new program, beneficiaries who were unemployable at the end of the two-year
period could lose their aid-continuing rights. At the same time, if the second program were limited
in scope and presented as "discretionary," recipients could even lose their claim to a property
interest entitling them to any procedural protection at all. Again, the best way to fight such an end
run around due process protections would be to show it as an effort to avoid due process guarantees
and a violation of Loudermill principles.

C. What Are the Implications of Federal and State Provisions Denying the
Existence of an "Entitlement"?
Some of the proposed legislation on block grants would explicitly provide that benefits paid through block grants would not constitute entitlements. The question for advocates is whether such a provision would defeat any effort to assert due process interests.

There is no authority on point, and the extant one is not encouraging. For example, courts have concluded that a state statute providing that employees serve at-will, absent specified circumstances, circumscribed when the employment could give rise to a property interest. /60/ Likewise, a federal or state statutory provision stating that a benefit program could not create an entitlement could be read as precluding any reasonable expectation for that program. Once again, the principal counterargument stems from Cleveland Board of Education v. Loudermill. Since Loudermill precludes states from defining away procedural rights, it should prevent efforts to avoid due process guarantees through "no entitlement" language. One argument would be that "no entitlement" language serves no independent purpose. Its only purpose would be to limit procedural rights. This is precisely what Loudermill forbids.

States might also seek to eliminate entitlements by stating that benefits are payable only "so long as resources permit." Here advocates can make a good argument that claimants have a right to prove their eligibility for the program, even though they would not be entitled to receive benefits if, in fact, there were no resources. /61/

D. How Much Procedural Protection Must States Afford?

Current statutory and regulatory provisions create a substantial overlay to constitutional guarantees. With these provisions eliminated, advocates will face clearly the question of how much procedural protection can be derived directly from the Constitution.

One vulnerable area is the degree to which states must offer pretermination hearings. Although Goldberg makes clear that such hearings are required for the termination of need-based welfare benefits, it is less clear whether they are required, as a constitutional matter, for any reduction of benefits. /62/ It is helpful here to return to the Court’s decision in Goldberg. The Court rested its decision requiring a pretermination hearing on the recognition that eligible recipients could be denied "the very means by which to live" while awaiting a decision on the propriety of terminating their benefits. /63/ Given the low level of benefits, an argument can be made that this statement is equally true of decisions to reduce benefits. /64/ A fruitful line of case law for making this argument is that considering motions for preliminary injunctions in benefit cases. /65/ In this case law, courts have often found irreparable harm from threatened reductions in benefits, even when the reductions were of relatively small benefit amounts. But advocates should not rely on such case law alone. Building a strong factual foundation for claims about the importance of the property interest at stake could be crucial to how these issues get decided.

Another potential area of dispute is the quality of the procedures that are offered. Under a Mathews test, it is harder to justify elaborate procedural protections when the private interest is smaller. Thus, when lesser sums are at issue, full face-to-face hearings, or other attributes of formal procedures, are arguably not justified.
Even courts that speak strongly about the importance to the poor of small deprivations can ratify disappointingly informal procedures. In Gray Panthers v. Schweiker, for example, the court rejected a lower court assumption that Medicare claims of less than $100 involved a minimal private interest. The court noted that a significant percentage of the claimants for these benefits were disadvantaged by poverty and disability. The court looked to congressional findings in establishing Medicare that recognized these claimants’ needs and observed that $100 was an important amount of money for them. Finally, the court recognized that Mathews dealt solely with the question of an uninterrupted flow of benefits, while Gray Panthers presented the question of what process is due prior to a final deprivation. Ultimately, however, Gray Panthers led to a system of telephone hearings in which 40 percent of persons would encounter busy signals on their first effort.

In arguing about procedural rights for relatively small deprivations, advocates should develop the factual record in the case to show why the deprivation is serious and why the requested procedures can be expected to make a difference in a substantial number of cases. This type of factual showing can be critical both to meet the requirements of the Mathews test and to lead the court to apply that inherently problematic test in a way that helps advocates’ clients.

IV. Rethinking Litigation Priorities

In addition to thinking through the strategic litigation issues posed by block grants, it is important for advocates to rethink litigation priorities. There has always been some tension between litigating for procedural fairness and litigating for better application of substantive standards. At some level, advocates have realized that greater procedural rights can come at a cost to resources devoted to substantive benefits. This trade-off, however, is far more stark in a block grant environment. It requires advocates to think about the value of various procedural safeguards and to what degree it is right to insist on such values, even if it means that a lesser overall amount of benefits will be distributed.

In this regard it is useful to recall the historical reasons why advocates pursued due process rights. As Ed Sparer recounted the strategy, a principal reason why advocates sought pretermination hearings in Goldberg v. Kelly was to protect welfare rights organizers from being punished by eligibility workers. Pretermination hearings took away an important level of discretionary power enjoyed by these workers. Other procedural protections serve values of equity and fairness. What is important is to keep track of the overarching goals of due process litigation and to ensure that litigation choices reflect the values of the relevant community.

Footnotes

/1/ Advocates would also do well to look to state laws that provide for review of arbitrary decisions. In many states, judicial review through mandamus proceedings can be used to achieve fairness in individual cases. These proceedings may lead to precedent regarding the procedures that the agency must follow to avoid a finding of arbitrariness. If the state agency fails to follow the
precedents from such judicial decisions, there may be violations of due process, equal protection, or state doctrines regarding the separation of powers. Cf. Lopez v. Heckler, 725 F.2d 1489 (9th Cir.), vacated and remanded on other grounds, 469 U.S. 1082 (1984) (Clearinghouse No. 33,630) (challenge to nonacquiescence by federal agency in binding judicial precedent); Stieberger v. Heckler, 615 F. Supp. 1315 (S.D.N.Y. 1985), vacated on other grounds, 801 F.2d 1079 (2d Cir. 1986) (Clearinghouse No. 39,839) (same). For a discussion of legal theories to combat nonacquiescence in binding precedent, see Matthew Diller & Nancy Morawetz, Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz, 99 Yale L.J. 801, 821 -- 28 (1990).

/2/ In one case, the Supreme Court avoided ruling on the precise contours of due process by assuming a "congressional solicitude for fair procedure, absent explicit statutory language to the contrary." See Califano v. Yamasaki, 442 U.S. 682 (1979) (Clearinghouse No. 10,500). Sometimes Congress has preempted the constitutional inquiry by explicitly requiring procedures that might be more than the courts would require. See, e.g., 42 U.S.C. Sec. 682(h) (statutory requirement that Goldberg v. Kelly, 397 U.S. 254 (1970) be applied in disputes under Job Opportunities and Basic Skills program).

/3/ Similarly, the Fifth Amendment provides that "[no] person shall . . . be deprived of life, liberty, or property without due process of law."


/7/ It may also be fruitful to consider whether particular provisions bear on liberty interests or the interest in life itself. Case law on liberty interests provides that a liberty interest may stem from state law or from the Constitution itself. In Board of Regents v. Roth, 408 U.S. 564 (1972) (Clearinghouse No. 3329), the Court stated:

While this Court has not attempted to define with exactness the liberty . . . guaranteed by [the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitively stated. Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Id. at 572 (quoting Meyer v. Nebraska, 262 U.S. 390 (1923)). Conceivably, punitive state action in a benefit program that would deprive an individual of a recognized liberty interest -- such as a person’s right to work or the person’s reputation -- could be read as triggering due process scrutiny. In this regard, note that the Court has required state licensing agencies to hold hearings on the
denial of licenses, such as admission to the bar, where the denial of the license would prevent the person from working in his or her profession. See Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). Of course, applying this type of case law to a benefit program would be difficult. As a general matter, the courts are loathe to read a benefit program as infringing on even the most fundamental rights since beneficiaries could choose not to participate in the program. See Harris v. McRae, 448 U.S. 297 (1980) (Clearinghouse No. 19,535) (no equal protection violation where Medicaid subsidized childbirth and denied payment for abortions).

/8/ Roth, 408 U.S. 564.

/9/ Id. at 577.

/10/ Id.

/11/ Id. (explaining the Court’s decision in Goldberg v. Kelly, 397 U.S. 254 (1970)). The Supreme Court has not considered a case in which the issue was whether applicants for a benefit program also have a property interest in proving their entitlement. See Gregory v. Pittsfield, 470 U.S. 1018 (1985) (Clearinghouse No. 34,370) (dissent from denial of certiorari) (noting that the Court has not considered the issue, but that the weight of lower court authority supports the conclusion that applicants have a property interest in receipt of benefits). The logic of Roth, however, extends to the circumstances of applicants. C.f. Schware, 353 U.S. 232 (bar applicant had a liberty interest in practicing his profession that required a hearing).


/13/ Id. at 344 (emphasis added).

/14/ Although advocates are well served to pay attention to this language and to try to show clear mandates, they should also bear in mind that the academic literature suggests that this is an area ripe for reinterpretation. See, e.g., Richard H. Fallon, Jr., Some Confusions About Due Process, Judicial Review and Constitutional Remedies, 93 Colum. L. Rev. 309 (1993). The Court’s decision in Sandin, discussed infra at section II.C, also shows a retreat from a purely positive law-based approach to interpreting the interests protected by the Due Process Clause.


/16/ Id. at 541.

/17/ Id. (quoting Arnett v. Kennedy, 416 U.S. 134, 185 (1974) (Powell, J., concurring in part and concurring in the result in part)).


/19/ Id. at 335. In Connecticut v. Doe, 111 S. Ct. 2105 (1991), the Court recognized that the due process inquiry is somewhat different where the interests of private parties conflict. Ruling in the
context of a prejudgment remedy statute, the Court restated the third Mathews factor as the "interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." Id. at 2112.


/21/ See Tribe, supra note 4, at 717 -- 18.

/22/ In some situations, however, the Court has inexplicably failed to conduct an analysis using the Mathews factors. In Atkins v. Parker, 472 U.S. 115 (1985), e.g., the Court considered the adequacy of notices issued to persons whose food stamps would be reduced as a result of legislative changes in eligibility rules. The Court ignored the Mathews analysis and looked instead to the legislative process to provide all of the process that was due. This decision is perhaps best understood as limited to mass changes in eligibility requirements.


/24/ See Yamasaki, 442 U.S. 682 (requiring some in-person hearing for overpayment cases where the issue is whether the person is "at fault," but not requiring in-person hearings on the issue of whether an overpayment occurred); Gray Panthers v. Schweiker, 716 F.2d 23, 36 (D.C. Cir. 1983) (Clearinghouse No. 21,452) (ruling that oral hearings are required for Medicare claims under $100 if a "sufficient number" of such claims involve issues of credibility or veracity). Although Yamasaki is a statutory case, the Court relied heavily on Mathews-style analysis in reaching its conclusions.

/25/ Greater protections may also be justified on the ground that the person’s reputation is at stake. Cf. Roth, 408 U.S. 564, 574 n.13 (noting that injury to reputation may require greater procedural protection).

/26/ See Mathews, 424 U.S. at 349.


/28/ A long line of precedent supports the basic right to notice that is "reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). What this means in any given situation depends on the circumstances of the case. Where the recipients of the notice can be expected to be less well informed, precedent holds that the notice must clearly set forth how and where the recipients of the notice can present their objections. See Memphis Light, Gas, & Water Div. v. Craft, 436 U.S. 1, 15 (1978) (Clearinghouse No. 12,216). Many successful challenges have been brought to the adequacy of the contents of governmental notices. See, e.g., Gonzalez v. Sullivan, 914 F.2d 1197 (9th Cir. 1990)
(Clearinghouse No. 42,747) (finding notice to be misleading); David, 591 F. Supp. at 1043 (finding notice to be "gobbledygook"); Ellender v. Schweiker, 575 F. Supp. 590, 603 -- 5 (S.D.N.Y.), appeal dismissed, 781 F.2d 314 (2d Cir.), cert. denied, 479 U.S. 914 (1986) (finding that notice illegally failed to inform recipients of available defenses). Challenges have also been brought to the timing of notices and whether they afforded sufficient notice to recipients to take necessary steps to prevent a reduction in benefits. See Vargas v. Trainor, 508 F.2d 485, 489 -- 90 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975) (Clearinghouse No. 11,122) (finding that notice gave recipients insufficient time and information to determine whether to object to reductions in benefits).

/29/ Courts have classified a wide range of procedures as "hearings." See Gray Panthers v. Schweiker, 692 F.2d 146, 148 n.3 (D.C. Cir. 1980) (Clearinghouse No. 21,452) (explaining that any kind of "confrontation," from an informal discussion to a trial, is a kind of hearing). In Goldberg, 397 U.S. 254, the Court set forth a series of formal requirements for hearings about the termination of welfare benefits. These include an opportunity to confront adverse witnesses, an opportunity to present arguments and evidence orally, the right to retain counsel (if the claimant so desires), a decision based solely on the legal rules and evidence adduced at the hearing, and an impartial decision maker. Subsequent cases, in which the Mathews factors played out somewhat differently, have permitted less formal procedures. See, e.g., Gray Panthers, 716 F.2d 23, 37 (approving a telephone hearing system in which 40 percent of callers could be expected to get a busy signal). In some cases, the courts have approved procedures with no oral hearing. E.g., in Yamasaki, 442 U.S. 682, the Court ruled that written submissions were adequate to determine whether a person was overpaid social security benefits because these cases did not ordinarily involve issues that would benefit from an in-person hearing.

/30/ The central issue here is whether there is a predeprivation hearing. See supra note 23.

/31/ Although a long line of case law requires that the hearing be before an impartial arbiter (see, e.g., Tumey v. Ohio, 273 U.S. 510 (1927)), recent cases have winked at this rule. Applying a "presumption" that the adjudicator will be unbiased, the Court has upheld a system in which the Social Security Administration allows insurance company personnel to preside over disputes about the company's own determinations of Medicare eligibility. See Schweiker v. McClure, 456 U.S. 188, 195 -- 97 (1982) (Clearinghouse No. 26,303). The Court justified this result on the ground that the insurance carriers did not have a clear pecuniary interest in the outcome of each individual case.

/32/ See, e.g., Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171 -- 72 (1951) (Frankfurter, J. concurring) (discussing how the validity and moral authority of a governmental decision depend on how it is reached).

/33/ Sandin, 115 S. Ct. 2293.

/34/ Id. at 2301.

/35/ Sandin also has a possible upside. In Sandin the Court expressed its distaste for a conception of liberty interests that discourages states from creating rules that curb prison administrators’ discretion. By analogy, to conceive of property interests in a way that discourages states from curbing welfare administrators’ discretion is troubling. If the alternative is to look to the importance
of the interest at stake, Sandin could mean that the Court would recognize a property interest in
benefits rooted in their central importance to the claimant’s basic survival. The critical question is
whether Sandin signals an additional "importance" test in due process cases or whether it leads to a
reinterpretation of the initial threshold inquiry of whether due process interests are triggered.

/36/ See Parratt, 451 U.S. 527.


/38/ Id. at 128.

/39/ The Zinermon decision was written by Justice Blackmun and joined by Justices Brennan and

/40/ Clifton v. Schafer, 969 F.2d 278 (7th Cir. 1992) (Clearinghouse No. 48,287).

/41/ Goldberg, 397 U.S. 254; Mathews, 424 U.S. 319 (recognizing due process interest in
termination of social security benefits, but concluding that pretermination hearing was not
required).

/42/ Of course, a program touted as a "block grant" could retain federal requirements, thereby
requiring an assessment of whether the federal program requirements created a sufficient property
interest to trigger due process protections.

/43/ A line of case law suggests that overly discretionary programs can be challenged for lack of
F.2d 262 (2d Cir. 1968); White v. Roughton, 530 F.2d 750 (7th Cir. 1976) (Clearinghouse No.
17,756). This case law is questioned in dicta in Pension Benefit Guarantee Corp. v. LTV Corp., 496
U.S. 633 (1990). Although this case law conforms with the commonsense notion that government
has a duty not to be arbitrary, it cannot be easily squared with post-Roth procedural due process
doctrine. See Davis v. Ball Memorial Hosp. Ass’n, 640 F.2d 30, 39 (7th Cir. 1980) (Clearinghouse

/44/ Eidson v. Pierce, 745 F.2d 453 (7th Cir. 1984) (Clearinghouse No. 32,097).

/45/ Id. at 459.

37,741); Phelps v. Housing Auth. of Woodruff, 742 F.2d 816 (4th Cir. 1984) (Clearinghouse No.
33,366).

/47/ Ressler v. Pierce, 692 F.2d 1212 (9th Cir. 1982) (Clearinghouse No. 25,595).

/48/ Id. at 1215.

/49/ Id. at 1216.
As noted in footnote 11, supra, the Supreme Court has not ruled on whether an applicant for a government benefit has a "property interest" in that benefit. The logic of Roth, however, clearly supports such a right. The one situation where applicants and recipients do not stand in the same position for purposes of triggering a property interest is where there is a transition to a new benefit program. In this situation, applicants may lack any property interest because the new program is too discretionary to create an expectation. At the same time, recipients can be seen as having a property interest in continuing to receive their benefits. For an argument that this entitles recipients to adequate transitional procedures, see John Bouman, "Due Process for Welfare Beneficiaries Subject to Changing Program Rules: An Illinois Case Study," in this issue.

See Goldberg, 397 U.S. 254. The availability of this procedural right, of course, depends on a balancing of interests. See Mathews, 424 U.S. 319 (concluding that social security recipients do not have a right to a pretermination hearing).


Loudermill, 470 U.S. 532. The Loudermill decision is discussed supra notes 15 -- 17 and accompanying text.


Jackson v. Jackson, 857 F.2d 951 (4th Cir. 1988); Holman v. Block, 823 F.2d 56 (4th Cir. 1987) (Clearinghouse No. 39,954). Neither decision discusses the relevance of Loudermill.

See Hollister v. Forsythe, 22 F.3d 950 (9th Cir. 1994) (personnel manual did not create a property interest due to state statute that set forth when an employee would be considered at-will).

See section III.A, supra.

Goldberg, 397 U.S. 254.

Id. at 264.

I have elsewhere argued that low benefit levels mean that even small reductions in benefits raise a risk of severe harm from homelessness and consequently require greater procedural


/66/ Gray Panthers, 692 F.2d 146.

/67/ Gray Panthers, 716 F.2d 23, 37.


/69/ Procedural cases are always easier to litigate than substantive cases. See Barbara Sard, The Role of the Courts in Welfare Reform, 22 Clearinghouse Rev. 367, 378 -- 80 (Aug. -- Sept. 1988). It is therefore easy to emphasize such an approach, even if such an approach does not best serve the interests of the relevant community.