THE RIGHT TO A PRE-DEPRIVATION HEARING UNDER THE DUE PROCESS CLAUSE—
CONSTITUTIONAL PRIORITIES AND A SUGGESTED METHOD FOR MAKING DECISIONS

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For the past eight years, the United States Supreme Court has been intensely concerned with the question of whether the due process clause requires a prior hearing before an individual can be deprived of his “property.” The Court’s initial decisions greatly expanded the extent of the predeprivation protection. However, in more recent decisions, the Court has not only refused to expand the right, but seems to have implicitly overruled some of its earlier holdings. The amount of attention which the Court has given to the due process question has produced a wealth of conflicting

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viewpoints which could provide the basis for a more general and consistent set of principles for determining the right to a pre-deprivation hearing. The purpose of this article is to review the Court's decisions, examine the arguments presented, and suggest a more general basis for granting a prior hearing.

MAJOR DEVELOPMENTS IN CASE LAW

THE EXPANSION OF THE RIGHT TO A PRE-DEPRIVATION HEARING

In 1969, the United States Supreme Court decided in *Sniadach v. Family Finance Corp* 4 whether Wisconsin's garnishment procedure met the requirements of the due process clause. The Wisconsin statute allowed a creditor to obtain a summons from the clerk of the court and to serve the garnishee—the alleged debtor's employer—who was then required to hold half of the debtor's wages subject to the outcome of the main action. No hearing was required prior to the garnishment.

In striking down the statute for failing to provide a prior hearing, Mr. Justice Douglas first noted the Court's authority to deal with the state's garnishment procedure as "a taking of property without that procedural due process that is required by the Fourteenth Amendment." 5 Although Mr. Justice Douglas pointed out that the taking in question fell within the scope of the due process clause, he took a restrained, even a restrictive, view of the class of protected property interests. He confined such interests to those the loss of which would involve serious injury or deprivation to the owner or holder of the property taken. 6

Turning to the issue of whether a prior hearing was required under the due process clause, Mr. Justice Douglas focused on the seriousness of the injury which an individual might suffer from the garnishment of his wage, "a specialized type of property presenting distinct problems in our economic system." 7 As the seriousness of the deprivation increases, so does the need for a prior hearing. The person whose garnished wages are ordinarily used to support himself and his family must choose whether to live at a subsistence level or to pay off a possibly fraudulent debt and collection costs in order to regain his full income. Such a serious tak-

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5. *Id.* at 339. The fourteenth amendment states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. U.S. Const. amend. XIV § 1.
7. *Id.*
ing where no prior hearing or notice or any kind was given could hardly be considered "due process."\(^8\)

Finally, Mr. Justice Douglas considered the adequacy of the procedure provided by statute. Since, in the \textit{Sniadach} case, the deprived party was not given any formal access to the decision by which his property was taken and was given no notice or prior hearing of any kind, the statutory procedure was clearly inadequate.\(^9\) Generally, as the adequacy of a given procedure for determining the validity of a taking decreases, the need for a prior hearing increases.

Mr. Justice Black's dissenting opinion was based on the jurisprudential argument that the best way to avoid excessive judicial interference with legislative policy-making is to adhere closely to the language of the due process clause.\(^10\) Since "not one word"\(^11\) in that clause or the documents relating to its passage implies any authority to strike down Wisconsin's garnishment procedure, the procedure chosen by the Wisconsin legislature must be considered constitutionally valid, according to Mr. Justice Black's dissent. Concepts such as "fundamental fairness"\(^12\) or traditional principles of the "Anglo-American legal heritage"\(^13\) are too vague to prevent arbitrary judicial interference with legislative policy-making.

Mr. Justice Black's argument rested on three dubious assumptions: (1) there is a clear linguistic test for restricting the meaning of the due process clause; (2) such a test would be effective in preventing members of the Court from reading their own values into the Constitution; and (3) because a legislature can make better decisions in regard to certain policies, the Court has no authority over such policies.\(^14\) Whether a clear linguistic test exists for guiding judicial restraint is highly doubtful. Mr. Justice Black, for example, did not provide one in his dissent in \textit{Sniadach}. He merely concluded that "not one word"\(^15\) in the due process clause implies any authority to strike down the Wisconsin law. It is also

\(^8\) \textit{Id.} at 342.  
\(^9\) \textit{Id.} at 341-42.  
\(^10\) \textit{Id.} at 345.  
\(^11\) \textit{Id.}  
\(^12\) \textit{Id.} at 350.  
\(^13\) \textit{Id.} at 343, 350.  
\(^14\) Mr. Justice Black's argument is similar to that raised by H.L.A. Hart in his famous debate with Lon L. Fuller, except that Mr. Justice Black is arguing that much less than the ordinary meaning of the due process clause should be used to guide judicial interpretation or, more precisely here, judicial restraint. Compare Hart, \textit{Positivism and the Separation of Law and Morals}, 71 Harv. L. Rev. 593 (1958) with Fuller, \textit{Positivism and Fidelity to Law—A Reply to Professor Hart}, 71 MARV. L. Rev. 630 (1958).  
\(^15\) 395 U.S. at 345.
doubtful that such a test would prevent the members of the Court from pursuing higher values, either their own or those assigned to the Court by the Constitution. In addition, it is not likely that legislatures will subordinate their own policy objectives to those policy objectives or values which the Constitution assigns to the Court for protection. It certainly does not follow that, because a legislature is competent or knowledgeable in dealing with some of the values involved in a policy, that the Supreme Court is incompetent and lacks the authority to deal with other important values involved in the same policy. In particular, it would be very difficult to deny the Court's special competence in determining whether a certain procedure is fair or constitutes "due process of law."

It is unfortunate that the Court's opinion in *Sniadach* is often seen as resting the right to a prior hearing on the seriousness of the deprivation. The extent of the deprivation is only an effect of the system of substantive rights and decision-making procedures by which property is taken. This system, in turn, is a product of other social systems. An imbalance of substantive rights or an inadequate decision-making procedure may merely reflect more basic inequalities between the parties. Mr. Justice Douglas, in fact, did point out the mal-distribution of substantive rights created by the Wisconsin statute and the unequal economic abilities of the parties to obtain a fair result under its procedures. A garnishment statute, as Mr. Justice Douglas noted, places a creditor in such a strong legal and economic position *vis-a-vis* a wage earner that the wage earner may be forced to pay fraudulent debts and even the legal expenses of collecting them. Thus, *Sniadach* implies that the distribution of substantive and remedial rights between the parties and their relative ability to participate in post-deprivation procedures aimed at correcting an invalid taking are factors which must be considered in determining the right to a prior hearing.

In the later case of *Goldberg v. Kelly*, the Court examined the decision-making procedure involved in the termination of payments to welfare recipients. In *Goldberg*, the termination could not occur until the recipient had been offered a nonevidentiary hearing by the welfare agency.

It is worth noting that this protective procedure was not one which the local agency imposed on itself. It came about as a re-
sponse to an amendment of the Social Security Act which required that a "fair hearing" must be given before aid could be terminated in a federally assisted program. Federal, state, and local regulations were then written to implement the requirement, although there was apparently some reluctance by state and local agencies to accept even the modest procedural standards set at the federal level to implement the concept of a fair hearing.

The procedure used by the local welfare agency called for a caseworker to decide if a recipient was ineligible for further support and to make a recommendation to the supervisor of his or her unit. If the unit supervisor agreed that the recipient was ineligible, the supervisor was to send a letter notifying the recipient of: (1) the reasons for the proposed termination; (2) the right to request a review of the decision from a higher agency official; and (3) the right to submit a statement, prepared with or without the aid of an attorney, showing why aid should not be terminated. If the reviewing official affirmed the finding of ineligibility, aid was terminated immediately, and the recipient was notified by letter of the reasons for the termination. A post-termination hearing which approximated a full trial-type hearing was also available. At this hearing, the claimant could appear personally before an independent state hearing officer, present oral evidence, cross-examine witnesses, and make a record of the proceedings.

In the majority opinion, Mr. Justice Brennan dealt with the conflicting economic interests between the individual claimant and the government and elaborated on the higher human and societal values by which these interests could be weighted in determining the need for a prior hearing. According to Mr. Justice Brennan, the interest of the state in conserving the cost of an additional hearing and the cost of largely nonrecoverable payments made to ineligible claimants is outweighed by the extent to which the claimant may be injured by denying a hearing prior to the termination of payments. "[T]ermination 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." Moreover, the interests of the state extend beyond merely reducing costs. The state also has an overriding interest in insuring the accuracy of ter-

19. Id. at 257 n.3; 42 U.S.C. § 602(a) (4) (1970).
20. As the Court's discussion in the footnotes indicates, the local procedure provided for less protection than the state regulations required and the state regulations were objected to by federal officials. See 397 U.S. at 259-60 nn.4 & 5.
21. Id. at 259-60.
22. Id. at 264.
minations. "From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders." Welfare not only meets the subsistence needs of citizens who through no fault of their own require support, it also "guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity." Therefore, according to the majority opinion, the state's primary interest is in avoiding erroneous termination of the rights granted to its citizens, not in efficient, summary adjudication. If the state also wants to reduce the cost of such programs, it can do so "by developing procedures for prompt pre-termination hearings and by [making] skillful use of personnel and facilities."

In other words, social priorities are established by a political process which involves citizens in the whole society as well as in the highest decision-making level of the society. These priorities or commitments develop in response to long term conflicts or long term deficiencies in the system such as the inability of the private sector to employ all citizens or guarantee their security. However, the programs developed to meet social priorities are implemented by organizations which break down these tasks and assign them to workers performing routine activities. The demands of the organization for efficient procedures conflict with the need to correctly decide the rights guaranteed by the nation to its citizens. The social goal of human dignity, to paraphrase Mr. Justice Brennan, should not be displaced by the organizational goal of operating efficiency.

After considering the timing of the hearing, Mr. Justice Brennan turned to the question of the extent of the hearing required. Although the primary focus of this article is on the question of whether a prior hearing is required, it is worth following Mr. Justice Brennan's argument as to the completeness of the hearing required by due process. There are two good reasons for doing so. Later decisions of the Court merged the two issues by granting a prior hearing, but only after sharply reducing the completeness of the hearing. Additionally, in order to determine the adequacy of the procedure offered to the deprived party, it is important to have a set of general criteria for determining whether the method of decision-making was one designed to determine if the taking was fac-

23. Id. at 266.
24. Id. at 264-65.
25. Id. at 265.
26. Id. at 266.
27. Id.
Mr. Justice Brennan began by considering the effectiveness of a hearing based on written submissions. Written submissions do not allow the claimant to "mold his argument to the issues the decision maker appears to regard as important," nor do they allow the decision maker to judge "credibility and veracity." In any case, they are an "unrealistic option" for uneducated welfare recipients who cannot afford expert assistance. Since the evidence against a claimant may be based on the reports of persons who are biased or upon faulty memory, due process requires that claimants be given the right to confront and cross-examine adverse witnesses. Due process also involves the right to retain an attorney because of his expertise in cross-examination as well as all of the other aspects of presenting a case. Finally, the decision maker must be impartial, and the decision must be based on rules of law and the evidence presented. Thus, most of the major elements in a full trial-type hearing were incorporated into the pre-termination procedure to be given to welfare recipients.

Although we may complain about the Court's imposition of a trial-type hearing as the means of insuring fair ineligibility decisions, it is more difficult to argue with the Court's implicit view of the general requirements for a decision-making method designed to determine the validity of claims. Certainly these would include: a means of obtaining information, on both sides of the issue; a means of testing the accuracy of this information; knowledge of the rules to be applied to the issues and skill in their application; and a method of insuring that decision makers use this decision-making procedure. Hereafter, we will refer to a method of decision-making designed to test the factual and legal validity of a claim as a validatory procedure.

There is a close connection between the decision-making method and the organizational structure and resources needed to implement it. As more complex and accurate methods of testing factual information and applying legal rules are desired, the need for skilled personnel such as lawyers and hearing officers increases. Nevertheless, the employment of skilled personnel to
make decisions can produce a net savings. Increasing the accuracy of determinations raises administrative costs because more labor and skill is given to each decision, but the accuracy being purchased could reduce the more substantial costs of overpayments and subsequent litigation. Realizing these savings, though, depends upon using an accurate method of determination at the earliest, not the later, stages of the sequence of procedures offered to a claimant. Thus, the fairest and, in the long run, least expensive procedure is to provide a valid pre-deprivation determination.

The organizational structure required for making better decisions is clearly not the kind of structure which a local welfare agency uses for deciding ineligibility, nor is it one which the agency is likely to impose upon itself. The volume of clients served by the agency, the limited number of caseworkers employed, the level of skill required of employees, and the various tasks required of caseworkers, all suggest that the organization, left on its own, would attempt to process ineligibility determinations in a very routine manner. The goal of such a system would be to dispose of claims efficiently, with the least time and effort, rather than effectively, by insuring that terminations are empirically and legally correct.

In essence then, Goldberg accomplished three things. First, to the notion that very severe deprivations required a hearing, it added the proposition that guarding against a severe deprivation outweighs the costs of an additional hearing and possible overpayments. Second, it took a more inclusive and prioritized view of governmental interests by holding that higher values or program goals had to be considered at least as important as operating efficiency and the reduction of determination costs. Third, at least in the case of severe deprivations, Goldberg set a much higher standard for evaluating procedural due process adequacy than had previously existed. The method of decision-making had to include the gathering and testing of facts and the skillful and impartial interpretation of rules. Moreover, the ability of the deprived party to effectively

35. Various studies of organizational behavior show that variables such as the number of clients served and the specificity of the roles performed by employees are related to measures of work routineness. See, e.g., P. Blau & R. Schoenherr, The Structure of Organizations 97-107 (1971); Hage & Aiken, Routine Technology, Social Structure, and Administrative Goals, 14 Ad. Sci. Q. 366, 373 (1969).

36. Highly specific roles and routine work are associated with the goal of efficiency. See Hage & Aiken, supra note 35, at 373; D. Simet, A Causal, Dynamic Model of the Effects of Role Specificity on Job Satisfaction and the Goal of Efficiency (1977) (Working Paper 77-35, Division of Research, College of Administrative Science, The Ohio State University, Columbus, Ohio).
participate and defend his interests had to be taken into account in designing a fair procedure.

Sniadach and Goldberg concerned direct deprivations of livelihood. A later case, Bell v. Burson,37 dealt with the loss of a driver's license by a minister who used his car to serve three rural communities. The Georgia statute38 under review in Bell provided that an uninsured operator of a motor vehicle involved in an accident would lose his license unless he filed some form of security indemnifying the victim in case of a recovery or obtained a release of liability from the victim.39 The petitioner asked to be allowed to present evidence at the suspension hearing that he was not liable for the accident. The agency refused and, in addition, argued that the petitioner was not entitled to have this issue considered prior to the suspension of his license.40

In Bell, Mr. Justice Brennan again wrote the majority opinion. "Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood."41 The petitioner was also entitled to a presuspension hearing, on the specific issue of liability. Since the statute made a release from liability a ground for avoiding suspension, "the State [could] not, consistent with due process, eliminate consideration of that factor in its prior hearing."42 Moreover, the requirement of a prior hearing before the deprivation of property represented the general rule, not the exception:

[I]t is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" before the termination becomes effective.43

Thus, Bell not only extended the range of cognizable interests entitled to the protection of a prior hearing beyond those which involved very severe individual injuries; it also implied a much broader basis for granting such protection. Indeed, the Court seemed to be saying that the "fundamental"44 meaning of the words "[n]o State shall . . . deprive any person . . . of . . . prop-

39. 403 U.S. at 535-36.
40. Id. at 537-38.
41. Id. at 539.
42. Id. at 541.
43. Id. at 542. The Chief Justice and Justices Black and Blackmun concurred in the result without an opinion. Id. at 543.
44. Id. at 542.
erty, without due process of law”45 was that fair process or procedure, “except in emergency situations,”46 was due before any deprivation of property could take place.

Still, the Bell decision was couched in the language of serious, if not severe, injury—the deprivation of any means which “may become essential in the pursuit of a livelihood.”47 Fuentes v. Shevin48 made it clear that even relatively small property interests were subject to protection. Fuentes involved the seizure of goods purchased under conditional sales contracts under Florida’s and Pennsylvania’s replevin statutes.49 The statutes allowed a plaintiff who claimed a right to certain property to post a bond and obtain a writ ordering law enforcement officers to seize the property.50 No notice or prior hearing had to be given to the person in possession of the property being seized.51 After the seizure, however, possession could be recovered by posting a similar bond within a period of three days from the time of the seizure.52 Although the Florida statute required the plaintiff to file suit in order to obtain the replevin writ,53 the Pennsylvania applicant did not have to do so.54 Instead, the deprived person had to bring an action against the seizing party to obtain a determination of the validity of the seizure.55

In a plurality opinion, Mr. Justice Stewart held that a hearing was required before goods could be replevied or seized. He began with the premise that a “high value, embedded in our constitutional and political history”56 is assigned to the enjoyment of property “free of governmental interference.”57 Requiring a plaintiff to post a bond before the seizure was no substitute for a prior hearing because it tested “no more than the strength of the applicant’s own belief in his rights.”58 Nor did the return provisions offer adequate protection to the person deprived of possession. The return bond was nothing more than the surrender of one form of property for

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45. U. S. CONST. amend. XIV § 1.
46. 402 U.S. at 542.
47. Id. at 539 (emphasis added).
49. FLA. STAT. ANN. § 78.01 (West 1964); PA. STAT. ANN. tit. 12 § 1821 (Purdon 1967).
50. 407 U.S. 73-78.
51. Id. at 79-70.
52. Id. at 74.
53. Id. at 77.
54. Id. at 78.
55. Id.
56. Id. at 81.
57. Id.
58. Id. at 83.
another. In any case, the deprived person might not have "the funds, the knowledge, and the time needed to take advantage"\textsuperscript{59} of the return provisions. Even though a return could be effected within three days, "the length and consequent severity of a deprivation . . . is not decisive of the basic right to a prior hearing of some kind."\textsuperscript{60} A subsequent hearing or the later awarding of damages would not suffice because they could not "undo the fact that the arbitrary taking that was subject to the right of procedural due process [had] already occurred."\textsuperscript{61}

Mr. Justice Stewart addressed the argument that a prior hearing should not be granted where there was little probability that the deprived property holder could establish any valid claim to the seized goods:

The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits" . . . . It 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{62}

Finally, Mr. Justice Stewart made it clear that entitlement to a prior hearing did not depend upon the gravity of the deprivation. Citing \textit{Sniadach} and \textit{Goldberg}, Mr. Justice Stewart stated: "Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect."\textsuperscript{63} After all, Mr. Justice Stewart argued, the due process clause speaks of "property" in general. To base the right to a prior hearing on the degree of deprivation would create a test that could not be applied objectively.\textsuperscript{64}

The \textit{Fuentes} decision may be examined in terms of the due process criteria extracted from previous cases:

1. Was the pre-deprivation procedure designed to determine the validity of claims?

\textsuperscript{59} \textit{Id.} at 85.
\textsuperscript{60} \textit{Id.} at 86.
\textsuperscript{61} \textit{Id.} at 82.
\textsuperscript{62} \textit{Id.} at 87 (citations omitted).
\textsuperscript{63} \textit{Id.} at 88.
\textsuperscript{64} \textit{Id.} at 89-90.
2. Did the statute or rules in question create a distribution of formal power in terms of the substantive and remedial rights given to the parties which biased the result of the decision-making process?

3. Was the actual participation of the parties in the decision-making process made to depend upon their relative resources and abilities?

4. Was the added cost of a prior evidentiary hearing outweighed by more important governmental or social values?

The deprivation procedure in *Fuentes* was not designed to test the validity of the taking. Indeed, as in *Sniadach*, the deprived party was given no formal access to the decision by which his property was taken. Even the initial post-deprivation procedure, the return provisions of the statute, was not *validatory* in nature.

Instead, the replevin statutes embodied a distribution of remedial rights which favored the taking party. Without any showing of entitlement, the taking party could realize a net gain—the value of the property less the cost of attorney fees and the indemnity bond. Moreover, the financial and legal burden of recovering the property was shifted to the deprived party. The return provisions of the statute left the deprived party in the position of sustaining a net loss—the cost of the indemnity bond and possible attorney fees. Allowing the deprived party an eventual trial suffers from the same defects only to a greater extent. The party deprived not only loses possession for a longer period of time but is likely to bear much higher attorney fees in order to recover the property. Whether these elements would be fully included in a subsequent award of damages is doubtful. Even if it is assumed that the parties should be given an *equal* chance of obtaining the property, such a system of prior dispossession, coupled with the severe burdens placed upon recovery, would not meet this standard. The due process clause does not regard the rights of the depriving party to be equal to those of the property owner who is to be protected from deprivation.

Even where the deprived party was allowed some formal participation in the return procedure, actual participation was made to depend heavily upon the relative resources and abilities of creditors and debtors. The return provisions required a bond worth twice the value of the property, a rapid response (within three days of the taking), and the possible expense of engaging an attor-

65. See text following note 34 *supra.*
ney. The expenses of a trial would be even higher. The effect of such obstacles to a debtor, who is likely to be without resources and capacities, may be to prevent his participation in the post-deprivation procedures made available to him. At least as to other forms of social and political participation, various studies have shown that participation declines as income and education decrease.\textsuperscript{66}

One point the opinion did not address was whether any interest was served by not having a prior hearing. Presumably, the state has no interest in avoiding the cost of such a hearing unless the creditor's interest in a cheap collection procedure is also a state interest. In fact, however, the higher interest of the state is that of bearing the minimal cost of a prior hearing in order to guarantee its citizens the right not to be deprived of their property without due process of law.

Moreover, the constitutional rights being protected in the present case extended beyond the due process clause. The property deprivations authorized by these statutes appear to involve unlawful searches and seizures under the fourth amendment. For example, the Florida statute directed the executing officer, after publicly demanding delivery, to cause such house, building, or enclosure to be broken open, and . . . make replevin according to the writ. . . .\textsuperscript{67} Mr. Justice Stewart affirmed the premise that a "high value, embedded in our constitutional and political history,"\textsuperscript{68} is assigned to the enjoyment of property "free of governmental interference."\textsuperscript{69} Just as in \textit{Goldberg}, then, any balancing of the interests of the individual and the government must take place within a hierarchy of rights or values. Constitutional rights such as freedom from search and seizure and the right to procedural due process take priority over the policies of state laws and the organizational goal of reducing administrative costs.

Mr. Justice White wrote the dissenting opinion in which Mr. Chief Justice Burger and Mr. Justice Blackmun joined.\textsuperscript{70} The thrust of the opinion was that a mistaken replevin would be highly unlikely. Mr. Justice White stated he "could be quite wrong"\textsuperscript{71} but

\textsuperscript{67} 407 U.S. at 75 (quoting FLA. STAT. ANN. § 78.10 (West Supp. 1978)).
\textsuperscript{68} Id. at 81.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 98 (White, J., dissenting).
\textsuperscript{71} Id. at 100.
it would not seem to be in the creditor's best interests to repossess mistakenly property upon which payments are being made. Furthermore, a prior hearing would add little to the statutory protection the debtor had been given. Creditors could "withstand attack under today's opinion simply by making clear in the controlling credit instruments that they may retake possession without a hearing, or, for that matter, without resort to judicial process at all." Thus, the Court's decision represented "no more than ideological tinkering with state law."

The dissenting opinion seems open to a number of criticisms. As Mr. Justice White admitted, it is not known whether the person deprived of possession has a valid claim to the property or not. The only way actually to determine that question is to test the facts involved through a prior hearing or other fact finding procedure. Even if it is granted that seventy-five percent of all replevins are valid, this says nothing about the remaining twenty-five percent where property is wrongfully taken (in the present case, three of the four debtors appeared from the stipulations or otherwise to be in default). However, the due process clause is not a guarantee extended to some unknown percentage of property holders; rather, it guarantees each individual that his property will be protected.

In addition, Mr. Justice White's statement to the effect that creditors can rewrite conditional sales contracts to include a waiver of "a hearing, or, for that matter, [any] resort to judicial process" is an admission of the creditor's power to determine the terms of the contract, even to the point of retaking the property where a single payment is overdue. This happens despite the fact that the debtor may have made all but the last payment. Nor can it be assumed that the creditor's economic self-interest will prevent a wrongful retaking. The economic optimum for a creditor is to retake the property when the paid installments and the salvage value are at their maximum. Moreover, to focus on the creditor's contractual rights as a justification for the taking is to overlook the warranty and other rights which the debtor may have. These, of course, are not assertable in a procedure which excludes the debtor's participation. That the law, in effect, grants the creditor a stronger bargaining position may also indicate a more general inequality—creditors as a group have historically had more power than debtors to obtain favorable or special legislation. In contrast, the due process clause treats all property owners equally, is not so

72. Id. at 102.
73. Id.
74. Id.
easily changed, and does not assume that property rights are subordinate to some special interest such as the interest of vendors in the ready collection of alleged debts.

The Withdrawal from Fuentes

Mr. Justice Rehnquist and Mr. Justice Powell did not participate in the Fuentes decision.\textsuperscript{75} Two years later, however, they joined the dissenters to uphold the constitutionality of Louisiana's sequestration procedure in the 1974 case of Mitchell v. W.T. Grant Company.\textsuperscript{76} The Court relied upon three principal differences in the Louisiana sequestration procedure to distinguish it from the replevin procedures considered in Fuentes. The writ could only be issued where, in the words of the statute, "the nature of the claim and the amount thereof, if any, and the grounds relied upon ... appear from specific facts shown by a verified petition ... .\textsuperscript{77}

The writ in this particular parish of the state had to be issued by a judge, whereas in all other parishes it could be issued by a court clerk.\textsuperscript{78} The person whose property was seized could file a motion, after the seizure, to have the writ dissolved "unless the creditor 'proves the grounds upon which the writ was issued.'"\textsuperscript{79} Attorney fees for the dissolution of the writ were allowed as an element of damages to the defendant.\textsuperscript{80}

Writing for the majority this time, Mr. Justice White concluded that each of these distinctions made a difference. The "facts relevant to obtaining [the] writ of sequestration are narrowly confined . . . documentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default.\textsuperscript{81} Because "in the parish where this case arose, the requisite showing must be made to a judge, . . . Mitchell was not at the unsupervised mercy of the creditor and court functionaries."\textsuperscript{82} Finally, since the deprived party could bring a motion to dissolve the writ, he "was not left in limbo to await a hearing that might or might not 'eventually' occur, as the debtors were under the statutory schemes before the Court in Fuentes.\textsuperscript{83}

\textsuperscript{75} Id. at 97.
\textsuperscript{76} 416 U.S. 600 (1974).
\textsuperscript{77} Id. at 605 (quoting LA. CODE CIV. PROC ANN. art. 3501 (West 1953)).
\textsuperscript{78} Id. at 606 n.5.
\textsuperscript{79} Id. at 606 (quoting LA. CODE Crv. Pnoc. ANN. art. 3506 (West 1953)).
\textsuperscript{80} Id. at 606.
\textsuperscript{81} 416 U.S. at 617-18.
\textsuperscript{82} Id. at 616.
\textsuperscript{83} Id. at 618.
In the dissent, Mr. Justice Stewart criticized each of these distinctions. In particular, he emphasized the fact that a judge could make routine, non-validatory decisions as well as a clerk. "But, so long as the Louisiana law routinely permits an ex parte seizure without notice to the purchaser, these procedural distinctions make no constitutional difference."  

Several months after Mitchell, Mr. Justice White joined Justices Brennan, Douglas, Stewart, and Marshall to turn the Court around again in Goss v. Lopez. Here the Court decided that a student accused of misconduct could not be suspended from school for ten days or less without being given a prior hearing. The hearing, though, did not have to extend beyond giving the student notice of the charges, an explanation of the evidence against him, and an "opportunity to present his side of the story."  

Mr. Justice White provided the majority opinion as well as the decisive vote. The opinion rejected two of the three most restrictive doctrines suggested in the cases decided after Goldberg. Citing Fuentes, Mr. Justice White reaffirmed the proposition that the right to a prior hearing does not depend upon the seriousness of the deprivation. "The Court's view has been that as long as a property deprivation is not de minimus, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause."  

Next, he rejected the argument that a statute which creates a property right can also limit the amount of procedural protection to be given to that right, despite the fact that the due process clause would impose a higher standard of protection.  

However, Mr. Justice White did not reject the argument that the completeness of a prior hearing depends upon the seriousness of the injury, a ground implicit in Morrissey v. Brewer. Accordingly, "[t]he student's interest [which] is to avoid unfair or mistaken exclusion" when balanced against the school's interest in maintaining discipline and avoiding costly, full-scale hearings required that "the student be given oral or written notice of the

84. Id. at 632.  
85. Id.  
86. 419 U.S. 656 (1975).  
87. Id. at 581.  
88. Id.  
89. Id. at 576.  
90. This argument was the principal basis for the plurality decision in Arnett v. Kennedy, 416 U.S. 134 (1974). However, only three members of the plurality had accepted this argument. But see Moody v. Daggett, 429 U.S. 78, 89 (1976).  
91. 419 U.S. at 575-76.  
92. 408 U.S. 471, 480 (1972).  
93. 419 U.S. at 579.
charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.\textsuperscript{94} Such a procedure would "provide a meaningful hedge against erroneous action; the disciplinarian will be alerted to the existence of disputes about facts and arguments"\textsuperscript{95} and, as a result, "[h]e may then determine himself to summon the accuser, permit cross-examination . . ., allow the student to present his own witnesses\textsuperscript{96} and even have counsel.\textsuperscript{97}

There are two principal objections to Mr. Justice White's analysis. The seriousness of the deprivation should be no more relevant to the completeness of a hearing than to its timing. Nor is it at all clear that the procedure afforded the deprived party satisfied even the minimal requirement of a valid method of decision-making. Mr. Justice White's argument assumes that there will be no abuse of power in a conflict situation. There is little point in assigning someone the role and power of a disciplinarian and then trusting in his good intentions not to exercise that power to carry out his role. The only way to avoid the use of power to further the interests of one of the parties is also to give the other party some effective power to protect his valid claims. Allowing one of the parties to a conflict an exclusive right to invoke any or all of the effective means for determining the validity of a claim such as calling witnesses, denies the other party any control over the validity of the decision.

\textit{Mathews v. Eldridge}\textsuperscript{98} is the most recent significant decision of the Court dealing with the right to a pre-deprivation hearing. The facts in the case are similar to those in \textit{Goldberg}. Eldridge was claiming disability benefits from a state agency under the provisions of the Social Security Act.\textsuperscript{99} To be eligible for payments under the Act, the disability worker must continually show by "medically acceptable clinical and laboratory diagnostic techniques"\textsuperscript{100} that he is unable to work. Reports on his condition are regularly obtained from the worker and from the physicians treating him.\textsuperscript{101} If the agency and the recipient disagree over his continuing eligibility, the agency informs the recipient that his benefits may be terminated, gives him a summary of the evidence against

\begin{itemize}
  \item \textsuperscript{94} \textit{Id.} at 581.
  \item \textsuperscript{95} \textit{Id.} at 583-84.
  \item \textsuperscript{96} \textit{Id.} at 584.
  \item \textsuperscript{97} \textit{Id.}
  \item \textsuperscript{98} 424 U.S. 319 (1976).
  \item \textsuperscript{99} \textit{Id.} at 323-25.
  \item \textsuperscript{100} \textit{Id.} at 336 (quoting 42 U.S.C. § 423(d) (3) (1970)).
  \item \textsuperscript{101} \textit{Id.} at 324.
\end{itemize}
him, and permits him to submit contrary evidence in writing. The case is then reviewed by an examiner in the Social Security Administration's Bureau of Disability Insurance. "If, as is usually the case, the SSA accepts the agency determination," benefits are terminated and the recipient is informed of the reasons for the termination. The recipient can then apply to have his case reconsidered de novo. If the state agency and the SSA review the case adversely, the claimants can obtain an evidentiary hearing before an SSA administrative law judge. After a further appeal to the SSA, the claimant may seek judicial review.

Mr. Justice Powell wrote the majority opinion in Mathews. He presented a reformation of the case law which conditioned the right to a pre-deprivation hearing upon a weighing of three factors:

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

In applying the first criterion, Mr. Justice Powell acknowledged that the deprivation of payments to a disabled worker, and a delay of approximately one year in obtaining a post-deprivation hearing, might impose a "significant" hardship. Nevertheless, the "possibility of access" to private resources or welfare assistance distinguished the disabled worker from the welfare recipient whose property was protected in Goldberg. Secondly, the decision to terminate "disability benefits will turn, in most cases, upon 'routine, standard, and unbiased medical reports by physician specialists.'" Thus, the risk of error and the value of a hearing would be less than that involved in Goldberg, where the issues of witness "credibility and veracity" were critical. Interestingly, Mr. Justice Powell rejected the use of statistical data showing that these ter-

102. Id.
103. Id. at 338.
104. Id.
105. Id.
106. Id. at 339.
107. Id.
108. Id. at 335.
109. Id. at 342.
110. Id.
111. Id. at 344.
112. Id. at 343-44.
minations were reversed more than half of the time when they were appealed to an administrative law judge. Thirdly, the "Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources" may "[a]t some point . . . [outweigh] the benefit of an additional safeguard to the individual affected." Mr. Justice Powell also observed that the judicially evolved procedure of an evidentiary hearing should not be imposed on administrative agencies, at least in part, because "substantial weight must be given to the good-faith judgments of those 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."

Mr. Justice Powell's three factor test as applied in Mathews leaves much to be desired. The first factor requires identification of the deprived party's injury, presumably in order to balance this against other interests. However, the identification of this interest proceeds no further than saying that the loss of disability payments in the present case is not as serious as the loss of welfare payments in Goldberg. There are at least three problems here. In terms of precedent, Mr. Justice Powell's comparison is irrelevant because the prior case law rejected the serious injury test. Second, disability recipients do not appear to have financial resources which significantly set them apart from welfare recipients. Third, Mr. Justice Powell did not examine actual loss to the claimant.

Next, Mr. Justice Powell set out to determine the accuracy of the deprivation procedure as a prelude to balancing this factor with the individual and public interests involved in obtaining a prior hearing. Mr. Justice Powell asserted that the risk of an inaccurate deprivation procedure was small because the decision was based on hard medical evidence. However, medical evidence must be translated into rough judgments concerning the extent of disability and the effect of the disability on the claimant's

113. *Id.* at 346-47.
114. *Id.* at 348.
115. *Id.*
116. *Id.* at 349.
117. Mr. Justice Brennan also presents an almost point-by-point critique of the majority's reasoning here in his dissenting opinion in another disability benefits termination case. Richardson v. Wright, 405 U.S. 208, 212-27 (1972) (Brennan, J., dissenting).
118. The Court noted that the median income of a disabled worker's family was $2,836 and their median liquid assets were $940. 424 U.S. at 342 n.36.
119. *Id.* at 343.
120. *Id.* at 345.
capacity and, realistically, his opportunity to work. Despite his
deferece to "scientific evidence," Mr. Justice Powell rejected the
statistical evidence indicating that 58.6% of the reconsiderations
appealed to an administrative law judge are reversed.\(^1\)

Mr. Justice Powell's third factor called for the specification of
the public's interest, the final element in the balancing process.\(^2\)
The public's interest was to conserve "scarce fiscal and adminis-
trative resources."\(^3\) One might wonder what happened to the gov-
ernment's interest in distributing social security benefits and
whether the government has any interest in protecting due pro-
cess guarantees. Higher goals aside, Justice Powell might at least
have examined the question of whether an evidentiary prior hear-
ing leads to higher or lower governmental costs.

Having failed to precisely or substantially identify the factors
called for by his theory, it is difficult to see how Mr. Justice Powell
could go on to "balance" them. Nor is it at all clear how these fac-
tors are to be "balanced" or related in arriving at a decision. Are
these factors to be weighed equally, so that the loss to the individ-
ual is to be treated the same as the loss to a government whose
resources, although they may be "scarce," are substantially more
than those of a disabled worker who can not work to support
himself? Clearly, any serious attempt at "balancing" these inter-
ests must address such problems.

Before turning to a discussion of the approach which the Court
should take to the right to a pre-deprivation hearing, a brief sum-
mary of the legal doctrines developed in this line of cases may be
useful. In Sniadach, the Court recognized that the seriousness of
the injury, the validity of the method of decision-making and, im-
PLICITLY, the distribution of substantive and remedial rights be-
tween the parties all affect the constitutionality of the decision-
making procedures provided by statute or rules. Goldberg added
to these considerations by creating a hierarchy of goals in which
the operating efficiency of an organization was made subordinate
to the higher social functions served by the program. Moreover,
Goldberg emphasized that the method of determining depriva-
tions must be one which is designed to determine the factual and
legal validity of the taking. Bell initiated the rejection of the seri-
ous injury test and at least suggested that the general language of

\(^{121}\) Mashaw, *The Supreme Court's Due Process Calculus for Administration Ad-
judication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44

\(^{122}\) 424 U.S. at 346-47.

\(^{123}\) *Id.* at 347.

\(^{124}\) *Id.* at 348.
the due process clause should be used to determine the right to a prior hearing. *Fuentes* expanded the hierarchy of interests to be considered in granting a prior hearing: the Constitution, both in the due process clause and in the guarantee against unreasonable searches and seizures, guarantees the right to a pre-deprivation hearing.

The argument that the probability of an erroneous taking under the procedures provided had to be estimated before granting a hearing triumphed in *Mitchell*, which appeared to overrule *Fuentes*. In *Goss v. Lopez*, a majority of the Court, while rejecting the seriousness of the deprivation as the test of the right to a prior hearing (any injury which was not "de minimus" was to be protected), conditioned the completeness of the hearing on the extent of the injury. Finally, in *Mathews v. Eldridge*, the majority of the Court apparently resurrected the degree of injury as a test for a pre-deprivation hearing, reiterated the need to consider the "risk of an erroneous deprivation . . . through the procedures used," and, in effect, limited the interests and priorities of the government to those of saving the costs of a prior hearing and possible overpayments to program beneficiaries.

**DISCUSSION**

In assessing the right to a pre-deprivation hearing under the due process clause, it is appropriate to begin by examining the function assigned to the United States Supreme Court and the organizational and political context in which the Court performs its role. The Constitution assigns the Court the role of protecting constitutional guarantees, including the guarantee that citizens will not be deprived of their property without due process of law. The Court exercises this function by reviewing the procedures provided to citizens by lower level governmental bodies, courts, and administrative agencies. These organizations typically have their own goals and objectives, respond to more particular and special demands as to how deprivation decisions should be made, and design deprivation procedures to meet their needs. The extent to which they have adopted procedures aimed at meeting due process objectives has largely depended upon the Court's imposition of such requirements.

While the Court's task of reviewing lower level deprivation decisions is rather clear from the point of view of organization theory, we may still ask whether the words of the due process clause lend

125. 419 U.S. at 576.
126. 424 U.S. at 335.
any additional specificity to that role. Based upon the language of the due process clause—"nor shall any State deprive any person of life, liberty, or property, without due process of law"—several immediate implications can be drawn about the rights to be afforded under it. Certainly, the language of the clause implies that procedural protection should be given prior to a deprivation. Second, the clause applies to all property rather than just to some property. It implies, in other words, a general grant of protection to property owners. Third, it is the person who owns or holds property who is granted the right to procedural protection, not the person or agency seeking the deprivation.

The protection of the deprived party follows directly from the meaning of the words of the due process clause, but the specific kind of procedural protection to be given to the deprived party is not immediately derivable. Nevertheless, if a property owner is to be protected from unfounded deprivations, then the Court must deal with how a person is to be protected from invalid claims against his property. Thus, the problem becomes one of providing a method and organizational system for making valid determinations.

There is no simple way of determining the validity of a legal claim. Much like the establishment of scientific truths, the establishment of valid legal claims depends upon the use of a method of decision-making which is designed to arrive at valid decisions. If the validity of a legal claim depends upon contested facts and the application of complex rules, then, as suggested earlier, a valid method of decision-making would seem to require at least: a means of gathering information on both sides of an issue, a means of testing the accuracy of this information, a knowledge of the rules to be applied and skill in their application, and a means of insuring that this method is in fact followed in arriving at a decision.

Specifying the elements in a valid method of decision-making, though, only gives us the criteria or standards for constructing the required decision-making system. The roles, skills and techniques used to achieve these standards remain somewhat open. In fact, one of the central controversies in administrative law is the extent to which different kinds of decision-making systems may attain these standards.

127. U.S. Const. amend. XIV § 1.
128. Judge Friendly, in a recent article, has called for more experimentation with non-trial types of decision-making but it is not at all clear that he is suggesting that such procedures should be based on a nonvalidatory method of decision-making. His remarks express the concern that the Court may impose trial-type hear-
Because legal claims involve controversies over facts and rules, the participation of the parties in the decision-making process is an important consideration in the design of an effective system. Individuals with different convictions and information often have conflicting positions on an issue. As opposing parties are allowed to participate more fully in the decision of the issue, there is at least some evidence indicating that the effectiveness of the decision reached will increase. Presumably, the participation of conflicting parties in a legal controversy can make similar contribution to increasing the validity of legal decisions. The justification for participation of all parties, therefore, is not just a matter of preventing political alienation. Their participation is directly related to the validity of the decision-making.

The various decision-making processes used in the cases reviewed reveal the importance of allowing the deprived party to participate in the deprivation procedure. In various ways, these processes created serious imbalances of power or influence. Participation was made to depend, for example, upon the relative resources or abilities of the parties. The Court's reasons for denying or restricting the participation of the deprived party are hardly convincing: trust in the profit motive of an adversary or the good will of a superior whose role assigns him conflicting goals. The creation of an imbalance of power between the parties to a claim promotes a biased decision outcome and decreases the validity of the decision.

Although it would be possible to go on to specify the assignment of other roles in an effective decision-making system, the content of those roles, the degree of knowledge and skill of role participants, the requirements of techniques for testing facts and the sequencing of behaviors, the purpose of the present paper is not to design specific decision-making systems. Rather, it is to provide a set of criteria by which the various systems or procedures which are used to deprive persons of their property can be evaluated. The Court can and should ask whether the components of the

130. Mashaw, supra note 85, at 50.
131. Mr. Justice White argued that the self-interest of a creditor would prevent a wrongful replevin in his dissent in Fuentes v. Shevin, 407 U.S. at 100, and in the majority opinion in Mitchell v. W.T. Grant Co., 416 U.S. at 610. In Goss v. Lopez, 419 U.S. 565, 583-84 (1975), Mr. Justice White assumed that merely informing a school principal and disciplinarian of the student's side of the issue would substantially avoid an erroneous decision.
particular system under review meet the methodological criteria for making a valid decision.

The Court's recent reviews of specific deprivation procedures do not adequately assess the validity of the method of decision-making involved. In the dissenting opinion in *Fuentes* and the majority opinion in *Mitchell*, Justice White did not attempt to examine whether the replevin and sequestration procedures under review provided for the gathering and testing of facts or the skillful and impartial application of rules. Since these procedures provided none of the elements involved in a valid method of decision-making, there was nothing which even purported to be a valid means of deciding claims for the Court to review. Instead, Justice White said, in effect, that an adversary could decide the validity of claims. Similarly, in *Mathews*, Justice Powell did attempt to review the disability payments termination procedure to see if it included any effective means of testing conflicting information or determining opposing interpretations and application of rules. The system did not provide for this. Instead, Justice Powell asserted that the factual information on one side of the issue was so accurate that it did not have to be tested against other information and that factual evidence alone, not the evaluation of evidence in the light of complex rules, was enough to make a valid decision.

Notice that even in these decisions the Court acknowledged that the general goal of reviewing a deprivation procedure was to determine its validity or, in Justice Powell's words, to determine the "risk of an erroneous deprivation." Thus, it is only the means of doing this, not the general goal itself, which is in dispute. Yet, logically, it is very difficult to accept this as the goal of reviewing deprivation procedures and at the same time insist that validity may be assessed in an arbitrary manner. Specifically, it is difficult to insist that the supposedly scientific character of the evidence on one side of an issue of both fact and law is more likely to cause valid decisions than a valid method of decision-making.

It might seem that the use of statistical data on the reliability of decisions, where available, offers some kind of middle ground between arbitrary speculation about the validity of decisions and an insistence upon a valid method of making decisions. However, reliability data of the sort used in *Mathews* reflects not only differences in decision-makers but also differences in the decision-making methods used. The method of decision-making used by administrative law judges in hearing appeals is far more valid than

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the reconsideration procedures offered claimants. Therefore, the use of reliability data should not be an alternative to a valid method of decision-making but rather an indicator of the importance of using such a method. While reliability data should not be rejected by the Court as was done in Mathews, it is clear that the proper focus of inquiry is not on reliability per se. Instead, the problem is to determine the variables which lead to valid decisions and then to design decision-making systems which embody these variables.

As we saw earlier, the language of the due process clause implies that property owners in general have a right to procedural protection which can be invoked against the depriving party prior to the taking of their property. Unless we want to abandon the terms of the Constitution as the legal basis for extending procedural protection, the prior, rightful and general protection of property owners must be treated as assumptions which control, at least, the usual or normal application of due process protection. In fact, the early decisions of the Court seemed to be saying as much. Bell, for example, speaks of the right to prior protection as "fundamental . . . except in emergency situations." Goldber and Fuentes gave the protection of the property owner a high priority over other interests because of the higher values served by governmental programs or implied in the Constitution. Even the opinion in Goss recognizes that all property interests which are not "de minimus" are entitled to protection.

The most significant attack on these assumptions came in Mathews, where a prior hearing was denied because the cost of the hearing and the possible overpayment of the claimant outweighed the injury which the claimant might suffer from having his disability payments terminated. The balancing of these interests in terms of their dollar costs raises a number of serious difficulties. First, the worth of a dollar to a disabled individual cannot be equated with the worth of that dollar to the government. If we assume that the due process clause assigns a higher priority to the protection of the deprived individual, we can correct this imbalance. Secondly, the costs of a prior hearing and possible overpayments may be small compared to the costs of subsequent litigation and back payments. Granting a prior hearing as a matter of course, especially one in which claims are likely to be validly determined, might result in an overall savings by reducing the more substantial costs of

133. The two procedures are described in the Court's opinion in Mathews. Id. at 338-39.
135. 419 U.S. at 576.
subsequent litigation and back payments. Thirdly, the *Mathews* decision excludes various positive interests which the government has in the effectiveness of the disability program or in the prevention of political alienation, presumably on the basis that such interests are not readily measured in dollar terms. In contrast, the assumption that the injured program beneficiary and citizen is ordinarily to be granted the right to procedural protection would recognize these values.

**CONCLUSION**

The due process clause implies that property owners in general are to be protected from deprivations by a prior determination of the validity of claims made against their property. This general, rightful and prior protection is not only mandated by the Constitution but, as assumptions applicable in the normal case, these requirements would seem to avoid some of the intellectual difficulties and monetary, individual, and societal costs involved in the Court's recent approach to granting pre-deprivation protection. By giving property owners a right to be protected from invalid claims, the due process clause also seems to imply the need for the kind of procedural protection which can determine the validity of such claims. Such a procedure, in turn, appears to depend upon a system which employs a valid method of decision-making and allows the deprived party effective participation in the decision-making process. Using criteria designed to insure valid deprivations will not only give citizens the protection which is due them but will also give the Court the standards it needs to perform this high task.