HIDING BEHIND THE CONSTITUTION: THE SUPREME COURT AND PROCEDURAL DUE PROCESS IN CLEVELAND BOARD OF EDUCATION v. LOUDERMILL

by

JENNIFER JAFF*

This term, the Supreme Court had an opportunity to affirm the approach of the plurality in Arnett v. Kennedy in Cleveland Board of Education v. Loudermill. In Arnett, Justice Rehnquist's plurality opinion articulated the rule that statutorily-created entitlements can be limited by and conditioned upon the procedural rules that accompany those entitlements.

This article argues that the Supreme Court should have adopted Justice Rehnquist's approach in Arnett because it articulates a clear rule of law. Such clarity would have two effects. First, holders of entitlements would know what procedures they would be afforded at the time the entitlement was granted thereby allowing them to fully appreciate the nature and contours of that entitlement. Second, and more significantly, a clearly articulated rule would enable the public to appreciate the political nature of the judicial process. If the Court revealed itself as a political body to the public, people could then react appropriately by attempting to change the judicial system in America. Because adopting Justice Rehnquist's approach would have exposed the political nature of the Supreme Court and thereby encouraged political action aimed at changing the nature of the judicial process, the Court declined to do so, at least in terms as stark as those used by Justice Rehnquist.

I. STATEMENT OF THE CASE

In Loudermill, a discharged public employee brought an action for damages and declaratory relief against his municipal employers challenging his dismissal as a violation of the due process clause of the fourteenth amendment. The Court held that public employees are entitled to a hearing prior to the termination of their employment.

James Loudermill was employed by a private firm that supplied security

---

*I Instructor, University of Miami Law School. The author wishes to acknowledge the contributions of Mark Tushnet, Jonathan Chase, Gil Kujovich, and Debbie Curtis.

1Arnett, 416 U.S. at 152.

2On its face, the Court's opinion in Loudermill appears to create a clear rule of law, however, this appearance does not reflect the reality of how the Court's decision will be applied. See infra notes 107-109 and accompanying text.

guards to the Cleveland Board of Education. Upon that firm's bankruptcy, the Cleveland Board of Education hired some of the firm's employees including Loudermill. The employment application included the following question: "Have you ever been convicted of a crime (felony)?" to which respondent Loudermill replied, "No." Additionally, respondent signed his name after a paragraph at the end of the application that stated, in effect, that the applicant certified the veracity of his responses and acknowledged that false statements would result in dismissal.

Loudermill was hired by the Board on September 25, 1979. He was classified as a civil service employee and, therefore, pursuant to statute he could only be discharged for cause. In addition, the applicable statute provided for an appeal from any order of discharge within 30 days of dismissal. After one year, Loudermill was transferred to a newly-created department. A routine review of his records revealed that he had been convicted of a felony in 1968. The Board’s Business Manager informed Loudermill, by a letter dated November 3, 1980, that he was being discharged. The reason given was Loudermill's alleged dishonesty in completing the employment application. Loudermill contended that, if he had been provided an opportunity to explain before the Board took action regarding his employment, he could have shown that he

\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.
\*Id.

**OHIO REV. CODE ANN. § 124.34 (Page 1984), which in relevant part provides:**

The tenure of every officer or employee in the classified service of the state and the counties... holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty... or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office... In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.

Within ten days following the filing of such order, the employer may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officers or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code...
mistakenly believed that the crime of which he was convicted was only a misdemeanor. 17

In January 1981, approximately two months after Loudermill's discharge, the Cleveland Civil Service Commission held a hearing on his contentions. 18 The referee assigned to the case recommended that Loudermill be reinstated; however, the Civil Service Commission rejected that recommendation and affirmed Loudermill's discharge on July 20, 1981. 19 In October 1981, Loudermill brought an action under 42 U.S.C. § 1983 seeking: monetary damages, a declaration that Ohio Rev. Code Ann. § 124.34 is constitutionally invalid for failure to provide for a pre-termination hearing, and an injunction ordering reinstatement and back pay. 20

The district court, in a brief unpublished opinion, held that Loudermill's due process rights had not been violated. 21 The Court of Appeals for the Sixth Circuit reversed. 22 That court recognized that civil service employees have an interest in continuing employment which cannot be discontinued unless the requirements of due process are met. 23 The court relied on Justice Powell's concurring opinion in Arnett. 24 In Arnett, Justice Powell asserted that once a state creates an entitlement, it may not deprive someone of such an entitlement without regard to procedural safeguards. 25

The court went on to discuss and apply the balancing test articulated by the Supreme Court in Mathews v. Eldridge. 26 Under the Mathews test, the factors balanced are: the importance of the private interest affected, the risk of error created by use of the procedure in question, and the strength of the governmental interest involved. 27 The court concluded that the individual interest involved coupled with the risk of error created by the procedure embodied in Ohio Rev. Code Ann. § 124.34 outweighed the governmental interest in administrative convenience. 28 Thus, the court of appeals concluded that the

17 Id.
18 Id.
19 Id.
20 Id.
21 Id.
22 Id. at 563.
23 Id. at 559.
24 Id. at 560.
25 Arnett, 416 U.S. 134, 167 (Powell, J., concurring).
27 Id. at 333-35.
28 721 F.2d at 562. Judge Wellford dissented from the majority's holding regarding Loudermill's due process claims. Id. at 565 (Wellford, J., dissenting). By drawing an analogy to Arnett, Judge Wellford reasoned that Loudermill's property right was conditioned by the Ohio statute's procedural limitations from its inception. Id. In addition, he stressed the importance of the Ohio Supreme Court's determination that the statute's procedures comported with the requirements of due process. Id. (citing Parfitt v. Columbus Correctional Facility, 62 Ohio St. 2d 434, 406 N.E.2d 528 (1980) cert. denied, 449 U.S. 1061). Finally, Judge Wellford stated
Board's failure to provide Loudermill with a pre-termination hearing violated the due process clause of the fourteenth amendment. 29

On March 19, 1985, the Supreme Court affirmed the decision of the court of appeals by an eight-to-one majority. 30 The Court, in an opinion written by Justice White, rejected the reasoning of the plurality in Arnett stating that "the categories of substance and procedure are distinct." 31 All nine Justices found that Loudermill had a property right in continued public employment, and so the requirements of due process applied. 32 Thus, Loudermill was entitled to "some kind of hearing." 33

The Court went on to apply the Mathews criteria 34 to the facts in Loudermill. 35 The Court reasoned that the individual interest in continued public employment was extremely significant, 36 as evidenced by the Court's "frequent[] recognition[] of the severity of depriving a person of the means of livelihood." 37 Secondly, because "the only meaningful opportunity to invoke the discretion of the decision-maker is likely to be before the termination takes effect," 38 the risk of erroneous deprivations would be greatly reduced by allowing a pre-termination hearing. 39 Finally "[t]he governmental interest in immediate termination does not outweigh these interests" 40 because "affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays." 41

However, the Court went on to say that "the pretermination ‘hearing,’ though necessary, need not be elaborate." 42 It need only be an "initial check against mistaken decisions." 43 Indeed, all that is constitutionally required are "notice and an opportunity to respond." 44 The Court found it significant that
due process requires a "reliable pretermination finding," 45 Id. at 566 citing Logan v. Zimmerman Brush Co., 445 U.S. 422, 436 (1982), and that there was such a finding in this case. 46 Id.

41Id. at 4308.
42Id. at 4311 (Marshall, J., concurring); Id. at 4313 (Brennan, J., concurring and dissenting); Id. at 4314 (Rehnquist, J., dissenting).
43Id. at 4308 (quoting Board of Regents v. Roth, 408 U.S. 564, 569-70 (1974)).
44See supra notes 26-27 and accompanying text.
45Loudermill, 53 U.S.L.W. at 4308-09.
the Ohio statute provides for a "full post-termination hearing" that would supplement any pre-termination procedures.\textsuperscript{45}

Thus, because a clear majority of the Court held that Loudermill was entitled to "some kind of hearing" prior to his discharge from public employment, the Supreme Court affirmed the decision of the court of appeals.\textsuperscript{46}

Justice Marshall concurred in a separate opinion.\textsuperscript{47} He argued that the extreme weight of the individual's interest in continued public employment mandated that the pre-termination procedure consist of a trial-type hearing.\textsuperscript{48} He reasoned that a post-deprivation hearing may not "make the employee[ ] whole again,"\textsuperscript{49} and, thus, a less than rigorous pre-termination hearing could still leave open the possibility of "irreparable injury."\textsuperscript{50}

Justice Rehnquist, again the "lone dissenter,"\textsuperscript{51} reiterated the reasoning that he advanced in \textit{Arnett}.\textsuperscript{52} Justice Rehnquist stated that "the substantive right may [not] be viewed wholly apart from the procedure provided for its enforcement."\textsuperscript{53} Justice Rehnquist proceeded to discuss the contours of the Ohio statute concluding that the Ohio Legislature had provided public employees with a "limited form of tenure during good behavior, and prescribed the procedure by which that procedure may be terminated [ ] in one legislative breath."\textsuperscript{54} Justice Rehnquist argued that the majority had incorrectly defined the state-created property right in this case,\textsuperscript{55} and that a clearer rule is needed in the area of due process.\textsuperscript{56}

However, despite Justice Rehnquist's reservations and the \textit{Arnett} plural-

\textsuperscript{45}Id. at 4309. Finally, Justice White stated that the court of appeals was correct in dismissing Loudermill's separate contention that the administrative delays that he suffered were impermissible. \textit{Id.} at 4309-10. The Court found that Loudermill's complaint had not sufficiently alleged this separate cause of action. \textit{Id.}
\textsuperscript{46}Id. at 4310.
\textsuperscript{47}Id. (Marshall, J., concurring in Part II and concurring in the judgment).
\textsuperscript{48}Id.
\textsuperscript{49}Id.
\textsuperscript{50}Id. Justice Brennan concurred in part and dissented in part. \textit{Id.} at 4311 (Brennan, J., concurring in part and dissenting in part). Justice Brennan's disagreement with the majority centered on its ruling regarding the administrative delay. \textit{Id.} at 4311-13. Justice Brennan would have remanded the case to the district court because the facts alleged in Loudermill's complaint, when viewed in the light most favorable to him, were insufficient on which to base an "informed judgment." \textit{Id.} at 4312. Justice Brennan also mentioned that, in cases unlike Loudermill's in which factual disputes are involved, a more rigorous pretermination procedure might be required. \textit{Id.} at 4311. However, he reasoned that the majority's opinion did not "foreclose the views expressed [by him] or by Justice Marshall, . . . with respect to discharges based on disputed evidence or testimony." \textit{Id.}
\textsuperscript{51}Justice Rehnquist's clerks attributed that title to him a few years ago. See, New York Times, Magazine Section, March 3, 1985.
\textsuperscript{52}Loudermill, 53 U.S.L.W. at 4313-14 (Rehnquist, J., dissenting).
\textsuperscript{53}Id. at 4313 (quoting \textit{Arnett} v. Kennedy, 416 U.S. 134, 152 (1974)).
\textsuperscript{54}Loudermill, 53 U.S.L.W. at 4313.
\textsuperscript{55}Id. at 4314.
\textsuperscript{56}Id.
ty, a majority of the Court decided to affirm the court of appeals in *Cleveland Board of Education v. Loudermill*.

## II. ANALYSIS OF PRECEDENT

The question whether public employees have a constitutional right to a pre-termination hearing has, in the past, been bifurcated into two issues: first, whether those employees have a legitimate property interest; and second, what procedures are required once such an interest has been found. The first question, whether public employment creates an entitlement, has been decided conclusively in the affirmative.\(^{57}\) *Board of Regents v. Roth* established the rule that a public employee has a property right in continued employment when his employment contract provides that he can be discharged only for "sufficient cause."\(^{58}\)

Though the rule of *Roth* settled the issue of when an entitlement is created, the language of *Roth* sparked a new controversy over the nature of the procedures required to satisfy due process. The Court stated that, "[p]roperty 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..."\(^{59}\) The *Arnett v. Kennedy* plurality expanded on that language, and held that substantial entitlements created by state or federal law could be conditioned on or limited by the procedures enumerated in that law.\(^{60}\)

Thus, before this term's decision, the controversy was centered on whether the *Arnett* plurality properly determined the law on this issue, or whether due process requires something more than mere compliance with state-defined procedures. If the latter was the case, the inquiry would traditionally have proceeded to the question of what procedures are constitutionally required. In the past, this question would have been decided by applying the

---

\(^{57}\) *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). *But see, Bishop v. Wood*, 426 U.S. 341 (1976) (police officer did not have a property interest in continued employment). It was, of course, possible that the Court would have reconsidered its position in *Roth* in light of *Bishop*. Without citing any authority, the *Bishop* court seemed to collapse the issue of the existence of a property right into the issue of what process is due when such a right has been found. 426 U.S. at 345-47. This may, in fact, represent an affirmation of the general sentiment behind the *Arnett* plurality's opinion in that the *Bishop* court seems to be saying that the right that is created by statute is the right as conditioned by procedural rules. See S.G. BREYER AND R.B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 647 (1979). The arguments in favor of affirming the plurality's opinion in *Arnett* could be applied equally as well to an argument in favor of affirming *Bishop*.

\(^{58}\) Roth, 408 U.S. at 578.

\(^{59}\) *Roth*, 408 U.S. at 577 (emphasis added).

\(^{60}\) *Arnett*, 416 U.S. at 152.
three-part test established by the Supreme Court in *Mathews v. Eldridge*.61

A. The Approach of the Arnett Plurality

The plurality in *Arnett* held that substantive entitlements created by state statute could be limited by the procedural aspects of the statutory scheme that created them.62 Language in *Arnett* supports the contention that the procedural protections embodied in the Ohio statute challenged in *Loudermill* not only satisfy the requirements of due process, but actually define those requirements. Writing for the plurality, Justice Rehnquist stated that, "[an] employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which [the state] has designated for the determination of cause."63

The Ohio courts have accepted Justice Rehnquist's reasoning. In *Parfitt v. Columbus Correctional Facility*,64 the Supreme Court of Ohio held that *Arnett* "made it clear that a pre-termination hearing was not required under the Due Process Clause to remove [ ] civil service employees."65 That court also held that Ohio's constitution requires no more than the federal constitution does.66

Conversely, Justice Powell's concurring opinion in *Arnett* supports the argument that something more than mere compliance with state-defined procedures is required by the Constitution. "[T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms."67 Justice Powell stated that the right to procedural due process is "conferred not by legislative grace, but by constitutional guarantee."68 In other words, although the entitlement itself is statutorily created, the procedures required once such an entitlement has been found are mandated by the Constitution. Constitutional protections are required "to insure that the state-created right is not arbitrarily abrogated."69 Thus, even though the entitlement to public employment was created by the state, constitutional due process is required to protect that entitlement from possible abuses.

In addition, our constitutional tradition in general supports the view that

---

4Arnett, 416 U.S. at 152.
416 U.S. at 152.
62 Ohio St. 2d at 438, 406 N.E.2d at 531.
Id.
Arnett, 416 U.S. at 167 (Powell, J. concurring).
Id.
Arnett should not be followed. That tradition encompasses a bias in favor of affording individuals a federal, perhaps even constitutional, remedy when individual rights are violated. In *Monroe v. Pape*, the Court stated that a federal action can proceed despite the existence of a state remedy. In other words, the existence of a state remedy does not preclude a federal court from granting relief to an injured party. This tradition would support Justice Powell's view that due process affords public employees constitutional protection beyond mere compliance with state law.

Recent trends, however, seemed to signal a departure from this tradition. In *Ingraham v. Wright*, the Court held that the availability of a state tort remedy was a conclusive factor in deciding whether a hearing was required prior to the imposition of corporal punishment on students. Since a student against whom corporal punishment was imposed could sue in tort for damages if that punishment was excessive, there was no need for an additional federal remedy.

*Ingraham* and *Arnett* seemed to indicate the Court's disposition regarding the contours of procedural due process prior to its decision in *Loudermill*: the body (a state legislature) that creates an entitlement is the body that decides how to administer and terminate that entitlement. Thus, if the approach of the *Arnett* plurality had been adopted, a state's statutory procedures would almost always have been held to satisfy the requirements of due process.

However, in the years since it was advanced, Justice Rehnquist's approach was criticized as an "unjustifiable abdication of judicial responsibility." By allowing the government not only to determine the existence of an entitlement but also to prescribe the procedures for its deprivation, the Court would fail to fulfill its important protective function.

The *Arnett* Court's failure to establish criteria for deciding what process is due has been criticized: The *Arnett* opinions point up the Court's failure to develop a coherent structure for deciding what specific procedural safeguards

---

9See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).
11Id. at 183.
12But see Loudermill, 53 U.S.L.W. at 4308 (Recent trends have rejected the *Arnett* plurality's reasoning, citing Vitek v. Jones, 445 U.S. 480, 491 (1980) and Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1984)).
14Id. at 674-82.
15Id. See also Parratt v. Taylor, 451 U.S. 527 (1981) (prison inmate not entitled to a pre-deprivation hearing to determine the propriety of the "loss" of his "hobby materials" because such a hearing would be impractical, and inmate could sue guard in tort).
16TRIBE, AMERICAN CONSTITUTIONAL LAW 535 (1978) [hereinafter cited as TRIBE].
17Id.
are mandated in various contexts. A flexible balancing is desirable to allow consideration of many relevant factors and to encourage the protection of a wide range of interests. The court attempted to formulate just such a balancing test in *Mathews v. Eldridge.*

B. The Application of the Mathews test

In *Mathews*, the Court formulated a three-part balancing test to address the issue of what procedures are required by the constitutional guarantee of due process:

Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The principle necessarily governing the balancing of these factors is that due process requires that a holder of an entitlement be given procedural protections "at a meaningful time and in a meaningful manner."

1. The Individual's Interest

In determining the strength of the individual respondent's interest in being afforded a pre-termination hearing, it is helpful to compare that interest to the individuals' interests involved in the relevant precedents. In *Bell v. Burson*, a pre-*Mathews* decision, the Court held that a hearing is required prior to suspension of a driver's license because of the strength of the individual's interest in such a license. A weighing of the *Mathews* factors has resulted in the conclusion that pre-termination hearings are also required before a student is suspended from a public school, and before a prisoner is transferred to a mental institution, again because of the strength of the individual's interest in those cases. In *Mathews* itself, the Court held that social security disability benefits could be terminated without a full evidentiary hearing because the individual's interest was outweighed by the potential burdens

---


*424 U.S. 319 (1976).*

*424 U.S. at 335 (1976).*

*Armstrong v. Manzo, 380 U.S. 545, 552 (1965).*

*402 U.S. 535 (1971).*

*Id. at 539-41.*

*Goss v. Lopez, 419 U.S. 565, 574-75 (1975).*

*Vitek, 445 U.S. at 492-94.*
on the government if such a hearing was required. However, in Goldberg v. Kelly the Court held that such a hearing is required before termination of welfare benefits.

It can be argued that one’s interest in a driver’s license carries less weight than one’s interest in continued employment; thus, if a hearing was required in Bell, the Court properly required one in Loudermill. In the average case, suspension of a driver’s license will not have serious financial implications (though it may result in inconvenience), nor will it result in an injury to one’s reputation. Although temporary suspension from school, as in Goss, may affect one’s reputation, it will not have a financial impact. A prisoner’s transfer to a mental institution, as in Vitek, imposes serious restraints on his liberty and the consequences of such a transfer are at least as serious as those that flow from discontinuance of employment. Thus, these three cases place Loudermill’s claim somewhere in the realm of cases requiring pre-termination hearings.

However, the existence of a financial interest or a restraint on one’s liberty are not enough to determine the outcome in cases like Loudermill. In Parratt v. Taylor, a prisoner faced economic loss, albeit slight, when his hobby materials were “lost” by prison guards. The Court held that a pre-deprivation hearing was not required. Harm to one’s reputation or dignity is not dispositive either. In Ingraham, the Court held that a hearing prior to the imposition of corporal punishment was not required despite the potential harm to a student’s dignity.

As a comparison of Goldberg with Mathews demonstrates, the Court has not developed an easily applied hierarchy of interests into which the interest involved here can be fit. Characterization of the relative strength of the respondent’s interest in a case such as Loudermill involves an essentially subjective assessment of the harshness of the consequences which stem from the termination of that interest.

2. Risk of Error

The second factor to be considered is whether the proposed procedure would help to minimize the risk of erroneous deprivations of rights. Although it is undeniably true that the risk of an erroneous discharge from employment

---

8Mathews 424 U.S. at 349.
10Id. at 266-71.
12Id. at 541.
14Both Mathews and Goldberg involved the general category of welfare benefits; however, in the former, a pre-termination hearing was not required, while in the latter, such a hearing was required. See supra notes 87-89 and accompanying text.
was higher without a pre-termination hearing than with one, the inquiry cannot end there. It is equally true that an erroneous deprivation could be effectively cured by reinstatement and compensation for lost earnings. The question is whether minimizing the risk of error is, on balance, worth the cost of a pre-termination hearing.

In *Ingraham*, the availability of an effective post-deprivation remedy was dispositive. Thus, the same should have held true in *Loudermill*. It is possible to distinguish *Ingraham* from *Loudermill* on the basis that in *Ingraham* a pre-termination hearing was not feasibly practical because of the necessarily spontaneous nature of the school's action. Such is not the case in the area of public employment, however, where no emergency necessitates immediate action. A pre-termination hearing would have been feasible in *Loudermill*'s case.

The ease of curing an erroneous deprivation is a factor that weighs against making the expenditures necessary to eliminate occasional errors. However, it may be more efficient to avoid those errors initially and eliminate the need for any correction. Again, the Court itself must assess the value of minimizing the risk of error as well as the curative value of post-deprivation remedies.

3. The Government's Interest

Under the traditional *Mathews* analysis, the final factor to be considered is the strength of the government's interest in affording pre-termination hearings. Here, the dominant consideration is the financial and administrative cost of affording the proposed procedure. Through a pre-termination hearing would impose an undue delay on an administrative body, it would be more consistent with the aims of due process to provide for some form of temporary action such as suspension pending final action. This would allow the administrator to act while insuring fairness to employees. Additionally, although a pre-termination hearing is not any more costly than a post-termination procedure, since not every discharged employee subsequently challenges his dismissal and because a pre-termination procedure would encourage such challenges by extending the term of employment pending the employee's appeal, the allowance for pre-termination hearings would increase the number of such appeals, thereby increasing their cost.

These factors must be considered in light of the other two prongs of the *Mathews* test. The costs of a pre-termination procedure must be weighed against the costs of erroneous deprivations to the individual who must bear those costs. Though the individual respondent's interest in continued employ-

---

*721 F.2d at 562.
*430 U.S. at 674-82.
*Id. at 674-82.
ment may be relatively strong, the government's interest coupled with the availability of post-deprivation remedies mitigates against the strength of that interest when the test is applied and the factors are weighed.

That test, as fashioned by the Court in *Mathews* and applied in subsequent decisions, has been widely criticized on numerous grounds. First, an accurate balancing of the three criteria “require[s] a technique for measuring the social value and social cost of government income transfers, but no such technique exists.”97 Secondly, state legislatures have no guidelines for establishing constitutional procedures because “[t]he great variations in the test as applied [ ], unnecessarily complicate the task of legislative draftsmanship.”98 Finally, as a result of *Mathews*, courts have the power to fashion statutory procedures raising the concern that “there is no sound argument that this is a legitimate power or function of the Court.”99 Indeed, Professor Tribe has argued that:

The proper role of courts in this context is to define and protect those substantive and procedural rights that may not receive their due respect in the political process. It is largely this additional protection, after all, that justifies the judicial review of administrative procedures in the elaboration of constitutional norms.100

Thus, from the traditional liberal perspective of most constitutional scholars, *Mathews* provides an inadequate mechanism for deciding what process is due. However, these same scholars criticize Justice Rehnquist's approach in *Arnett* too.101 Still the following section will argue that the Supreme Court should have adopted a Rehnquist-like approach in *Loudermill* for reasons which stem from a distinctly anti-liberal perspective.102

III. THE RULE OF THE ARNETT PLURALITY SHOULD HAVE BEEN ADOPTED

Writing for the plurality in *Arnett*, Justice Rehnquist reasoned that entitlements created by statute can be limited by and conditioned on the procedural rules accompanying those entitlements.103 This rule should have been adopted by the Supreme Court in *Loudermill*, not necessarily because of its

---


99Mashaw, *Supra note 97*, at 343.

100See Mashaw, *Supra note 97*, at 343.

101See supra notes 77-79 and accompanying text.

102For this article's critique of liberalism, see *Note, Radical Pluralism: A Proposed Theoretical Framework for the Conference on Critical Legal Studies*, 72 Geo. L.J. 1143, 1144-45 (1984). This article's arguments in favor of adopting Justice Rehnquist's approach are anti-liberal in that they are motivated by a desire to drastically change the nature of the American judicial system, not merely to “fix” the problem that courts face in procedural due process cases.

103*Arnett*, 416 U.S. at 152.
wisdom, but because of the effects that such an affirmance would have had both on litigants and on the general public.104

The *Arnett* plurality articulated a clear rule of law; adoption of which would have had two desirable affects. First, a clear rule of law in this instance would allow the holders of entitlements to understand the nature and contours of those entitlements at the time that the entitlement was granted. Second, exposure of the political biases of the Supreme Court would make possible political action aimed towards reforming the judicial system. It is because of this second effect that the Court declined to adopt the plurality rationale in *Arnett*.

A. *The Arnett Plurality's Rule Would Allow Holders of Entitlements to Appreciate the Dimensions of Those Entitlements Without Having to Litigate them.*

The *Loudermill* decision incorporates a *Mathews*-type approach that differs from Justice Rehnquist's approach in that it is constitutionally rather than statutorily-based and thus, on its face, it appears to more directly address concerns about fairness.105 However, from the point of view of holders of entitlements, the *Arnett* approach is preferable to the *Mathews* test as applied in *Loudermill* in that it creates a clear rule of law.

At first blush, it may seem that the plurality's rule in *Arnett* is harsher on holders of entitlements than the *Mathews* test as applied in *Loudermill*. However, the *Mathews* test does not insure favorable results to holders of entitlements;106 all it does insure is that holders of entitlements will have to litigate the issue of the adequacy of any given procedure. Under *Mathews*, there is no way for the holder of an entitlement, or for that matter, the agency in charge of administering that entitlement, to know whether statutory procedures will be upheld until their validity has been adjudicated. The *Loudermill* decision, though seemingly clear on its face, will do no more in practice to protect holders of entitlements than *Mathews* has done. Although Justice White's majority opinion stated that the right of public employees to a pre-termination hearing is constitutionally mandated,107 he also indicated that the hearing need not be extensive and does not have to resemble a trial.108 However, he did not go on to articulate precisely what kind of hearing is re-

---

104There may be those who object to this article's arguments because of their political nature, and are not based on an objective analysis of what the "right" rule of law is. Because this article ascribes to the position that "[t]he [law's] pretense is that the law is a system of known rules applied by a judge," LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949), and that the Court functions as an essentially political body, see generally THE POLITICS OF LAW (D. Kairys, ed., 1983), objective analysis that attempts to identify any rule as "right" is an empty exercise in abstraction. Legal analysis should incorporate a realistic appreciation of the way the judiciary operates.

105See supra notes 30-45 and accompanying text; see also infra notes 127-35 and accompanying text.

106On the contrary, in *Mathews* itself, the Court held that recipients of social security disability payments are not entitled to a pre-termination hearing. See supra note 60 and accompanying text.

107Loudermill, 53 U.S.L.W. at 4308.

108Id. at 4309; see supra notes 42-45 and accompanying text.
Thus, *Loudermill* does not go far enough in defining the constitutionally required procedure; holders of entitlements still cannot understand and fully appreciate the dimensions of those entitlements until those dimensions are defined by a court.

If, as has been argued, substance and process are inextricably intertwined, the fact that a procedure is untested means that holders of entitlements cannot appreciate the substantive right, if any, created by an entitlement. People have come to rely on the benefits derived from modern, statutorily-created entitlements such as welfare and social security for their subsistence. The insecurity one would feel if one had no way of knowing how long those benefits might be received, or how easily they could be terminated, must certainly be substantial. If the holders of entitlements were made to understand the scope of those entitlements, they could assess for themselves the wisdom of relying on the continuation of the benefits that they receive. Instead of taking away procedurally what had previously been granted substantively, agencies would grant a substantive right which was, at its inception, conditioned on and limited by procedural rules.

Incidental to this point are arguments concerned with judicial and administrative economy. Instead of piece-meal litigation and appeals or administrative decisions questioning the adequacy of a procedure, the constitutionality or wisdom of a substantive entitlement as conditioned on or limited by accompanying procedures could be questioned and resolved conclusively at the outset of its application. This would greatly reduce the costs to government agencies of repeated appeals and litigation challenging administrative decision-making. Though there could be appeals challenging the merits of particular decisions, the decision-making process itself could not be challenged further after its validity had been established judicially.

109 J. White did, however, say that the hearing should be aimed at avoiding mistakes. *Id.* at 4309. Still, the precise procedures necessary for accomplishing that end are nowhere defined. In his dissent, Justice Rehnquist stated that the "lack of principled standards in this area means that these procedural due process cases will recur time and again. Every different set of facts will present a new issue . . . ." *Id.* at 4314 (Rehnquist, J., dissenting).

110 See generally Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981). Though Justice White rejected this reasoning, 53 U.S.L.W. at 4308, this author thinks that he is mistaken. Common sense informs us that substance and procedure are inevitably two aspects of the same statutory scheme, not two separate schemes in and of themselves. These two aspects work together to form the work of the statutorily-created entitlement.


112 An argument can be made that certain kinds of substance-limiting procedures are so tied to the merits that the merits can only be attacked by attacking the fact-finding process itself. For example, in *Bishop*, a finding of cause could be based on the discretion of the police officer's superior. 426 U.S. at 345. In that case, one might argue that the employee had no way to challenge the exercise of discretion; the procedure required a finding of cause, cause was found, and that ends the matter. [This author is indebted to Dean Jonathon Chase for this argument.]

This objection misses the point. If the substantive entitlement is seen as limited by its accompanying procedure from its inception, the constitutionality of that whole scheme can be tested; if the discretionary
The important point here, though, is that it is not fair to encourage reliance on substantive entitlements only to undercut those same entitlements after such reliance has been formed. Holders of entitlements should be able to know exactly on what they are relying at the time that reliance is created. The Arnett plurality's approach would result in encouraging reliance only to the extent that it was justified.  

B. The Arnett Plurality's Approach Would Expose the Political Biases of the Supreme Court, thereby Facilitating Political Action with a View Towards Changing the Judicial System.

The approach of the Arnett plurality avoids some distasteful aspects of the approach employed by the Court in Mathews and in Loudermill. Through Arnett is an example of positivism in its most arbitrary form, Mathews and Loudermill allow "the patent arbitrariness of positivism...[to be] pushed below the surface but [to] persist [ ] nonetheless." In other words, though Arnett defines rights as being "no more extensive than the procedures elements of the scheme destroy its usefulness as a truth-finding process, it can be held unconstitutional. Weiman v. Updegraff, 344 U.S. 183, 192 (1952). Furthermore, if a statute, with both its substantive and procedural elements taken together, is upheld as constitutional, wrong decisions under the statute can be challenged on their merits. An arbitrary or capricious finding of cause may be the proper subject of a Title XII action or some other suit on the merits, See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 103 S.Ct. 2856, 2866-67 (1983) (citing Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)); Coastal Tank Lines, Inc. v. Interstate Commerce Comm'n, 690 F.2d 537 (6th Cir. 1982), but litigation to determine the validity of the procedure under the due process clause is not necessary to remedy erroneous outcomes in these cases.

Even if this counter-argument is wrong, and if an injured party has no remedy for a due process violation when the procedure is provided by the statute that created a property right is followed, the main argument here would not fail. That is, such a harsh rule would serve to stimulate opposition, thereby providing an opportunity for changing the nature of the judicial process. See infra notes 114-135 and accompanying text.

One could argue that "justifiable reliance" point differently, by drawing an analogy to the Uniform Commercial Code. UCC § 2-316 allows warranties to be disclaimed; however, UCC § 2-719(3) says that any attempt to limit liability for injury is prima facie unconscionable. Based on that model, one could argue that it is permissible for a state to refuse to create a property right, but that once such a right is created, attempts to limit it are unconscionable. [The author is indebted to Dean Jonathon Chase for this argument.]

Again, though, this argument misses the point. So long as holders of entitlements know what the limits of those entitlements are at the time that it is granted to them, they can justifiably rely on the entitlement as limited. It is only when holders of entitlements have no way of knowing what the procedural limits on their substantive entitlement are until after they have been deprived of their property and have been forced to litigate the issue of validity of the procedure, as is the case if Mathews controls, that they are encouraged to rely when that reliance might not be justified. The Uniform Commercial Code suggests that fairness dictates that one should not be able to give with one hand and take away with the other. UCC § 2-719(2). However, that is not the consequence of this article's position. Under the Arnett plurality's reasoning, it is not the case that a right is created and then limited by procedure; on the contrary, the right that is created is the right as limited from its inception.

See supra notes 68-70 and accompanying text.

See supra notes 30-56 and accompanying text.

11In philosophy, ethical positivism is an attempt to make ethics an exact science. N. Abbagnano, "Positivism," in THE ENCYCLOPEDIA OF PHILOSOPHY 19 (P. Edwards, ed. 1967). In law, the word "positivism" usually refers to Austinian legal positivism, or the notion that the law consists of the rules made by a sovereign. F.L. Windolph, LEVIATHAN AND NATURAL LAW 80 (1951).

provided in state law for taking them away," the "fuzziness of the [Mathews and Loudermill] criteria provide an opportunity for manipulation," thus allowing courts to reach the same result as they would under Arnett while serving to reinforce the legitimation of the dominant societal moral position in a subtle, disguised way.

In delineating the various roles of law, Mark Tushnet has said that, in its ideological role, the law operates to do three things: first, it justifies the dominance of the dominators; second, it reconciles the oppressed with the system that oppresses them; and, third, it helps to maintain the status quo by serving as a barrier to organization of opposition. The Mathews approach as applied in Loudermill is a worse offender than the approach of the Arnett plurality with respect to all three of these functions of law simply because the former approach allows judges to couch their offenses to justice in inoffensive terms.

First. "the legal order helps to persuade the dominated elements in American society that their domination is justified — or that their material conditions of existence are justified or, equivalently, that they are not dominated at all." The Arnett plurality approach is a blatant example of this kind of attempt to silence the cries of litigants by shifting the "blame" for their oppression from the courts onto legislatures. However, the Mathews approach as applied in Loudermill does even more to silence those cries by not merely shifting the blame for oppression, but by justifying that oppression out of existence. Mathews and Loudermill embody a constitutional standard; when a procedure passes muster under Loudermill or Mathews, that procedure is constitutional, and, thus, not oppressive. The highest civil authority that we recognize, the Constitution, is made to justify judicial decisions under Loudermill and Mathews, thereby legitimizing the dominators' positions.

---

118Id. at 423.
122Id. at 94.
123Id. at 101, 102.
125See supra Tushnet, Perspectives note 121, at 100.
126Just as an unliberated mother might shift her child's anger toward her to her husband — "Why? Because your father said so!" — Arnett allows judges to say to litigants: "Why? Because the legislature said so!"
127424 U.S. at 334; 53 U.S.L.W. at 4308.
128"[The legal order helps the oppressors understand their actions as those of humane and reasonable people, by placing what they do in the comprehensive setting derived from a long tradition of ethical reasoning." Tushnet, Perspectives supra note 121 at 94.
129"[Supreme Court] opinions not only reflect dominant societal moral positions, but also serve as part of the process of forming or crystallizing such positions." Freeman, supra note 120 at 1051 (footnote omitted).
However, "[t]he doctrine cannot legitimize unless it is convincing, but it cannot be convincing ... unless it holds out a promise of liberation." By telling the oppressed that their claims will be assessed according to constitutional ideals, *Loudermill* and *Mathews* allow the oppressed to believe that their best interests have been considered, and that they could and would win if their claims were meritorious. Litigants are told that they are being afforded "due process," and that the outcomes in cases decided according to *Loudermill* and *Mathews* are fundamentally fair. The approach of the *Arnett* plurality does not purport to show sensitivity to the litigant's plight; it merely holds that state legislatures are competent to decide what process is due, not based on fairness, but based on their own administrative concerns. Thus, not only does the *Mathews* approach as applied in *Loudermill* justify the dominance of the dominators, but it also reconciles the oppressed with their oppression in a much more effective way than the *Arnett* plurality's approach would.

Finally, *Loudermill* and *Mathews* "affect[ ] social stability by combining with other factors to inhibit social change." By "softening the blows" of courts' decisions, by reconciling the oppressed and justifying the dominators' dominance, the status quo is reinforced and challenges to the existing regime are defused. By characterizing decisions as "constitutional," and thus "fair," the *Mathews* approach as applied in *Loudermill* "serves as an additional barrier to organization of the underdogs to upset existing social arrangements." The harshness and blatant positivism of the approach of the *Arnett* plurality would stimulate opposition. For this reason, the Court did not employ this approach in *Loudermill*.

**IV. CONCLUSION**

The foregoing analysis demonstrates that the *Mathews* approach as applied in *Loudermill* does more to appease those who might wish to disturb the existing structure of society than the approach of the *Arnett* plurality would.

---

132Freeman, *supra* note 120, at 1052.

133"For all that appears, the Justice simply retreated to their chambers and pondered over what would be best, and emerged with conclusions that cannot be criticized except by saying that the critic, were it up to him, would have arrived at a different balance." Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 285 (footnote omitted).

134"[D]ecisions like *Goldberg* and *Mathews* deflect political forces] into a fruitless struggle against a bureaucracy that readily swallowed the Court-prescribed dose of due process without any change in symptoms, and second by bolstering the idea that fairness was not far away in the American welfare state." Tushnet, *Dia-Tribe, supra* note 124, at 709.

135John Ely has argued that these kinds of issues ought to be decided by the political process. Those who wish to challenge the decisions of Legislatures should do so by exercising their political power, not by seeking redress in the courts. ELY, DEMOCRACY AND DISTRUST 103 (1980). This argument has been attacked on various grounds. See, e.g., Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).


137*Id.* at 102.

138See *supra* notes 74-103 and accompanying text.
It further argues that courts can reach the same results (adverse to individual litigants') by following either approach. Thus, it is no surprise that the Supreme Court used a Mathews-like approach in holding that the post-termination procedure afforded by the Ohio statute is unconstitutional. The choice of this approach was predictable if one considered the Court's tendency to avoid politically "hot" issues. By "focusing on technique rather than on questions of value [the Mathews and Loudermill cases] generate[] an inquiry that is incomplete because unresponsive to the full range of concerns embodied in the due process clause," as well as in the hearts and minds of the people. However, those approaches cloud their unresponsiveness with images of constitutionalism and fairness, and thereby deflect any would-be opposition.

The approach of the Arnett plurality is no less unresponsive; however, its harshness and blatancy make opposition to it more viable. In an extension of its attempts to deflect political opposition, the Supreme Court has chosen to extend a Mathews-like approach as opposed to the approach of the Arnett plurality in deciding Cleveland Board of Education v. Loudermill.

---

137 See supra note 70 and accompanying text.
138 See supra note 11.
139 This point has been discussed in relation to issues such as the political question doctrine and standing. Charles Black has argued that it's not just that the cases are "hot," but that they're difficult. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). The Court, for example, might not want to endorse a policy that says that the states can provide any procedure they want. The Mathews approach would allow courts to hear § 1983 cases concerning job termination while allowing them to avoid prescribing the precise procedures required by the Constitution, thus still leaving the matter in the hands of state legislatures.
140 Mashaw, supra, note 97, at 28.
141 See supra notes 89-92 and accompanying text.
142 See supra notes 94-95 and accompanying text.
143 See supra notes 96-103 and accompanying text.