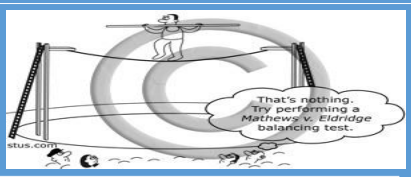


ADMINISTRATIVE LAW

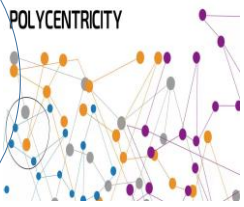
WEEK EIGHT
Tues., Oct. 12, 2021
Professor Julia M. Glencer

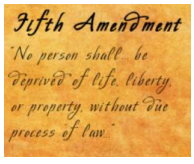
AGENDA

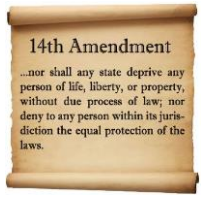
6:00 to 6:40	Lecture on Procedural Due Process & *Mathews* v. *Eldridge* test
6:40 to 6:50	Set up for The Exercise
6:50 to 7:00	---------- Break ----------
7:00 to 8:50	Hypos! (using Breakout Rooms)
8:50 to 9:00	Wrap-Up . . .

Adversarial: Bi-Polar

Legislative: Polycentric







Procedural due process means . . . What?
"Notice & *some kind* of hearing"
What *kind* of hearing?

PROCEDURAL DUE PROCESS

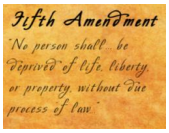
"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

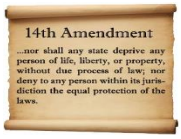
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

PROCEDURAL DUE PROCESS

- What due process required in the admin law context was revolutionized in the 1950's & 1960's.
- "Due process cannot be imprisoned within the treacherous limits of any formula . . . Due process is not a mechanical instrument. It is not a yardstick. It is a process."

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951).





- The **5th Amendment** (applicable to the **federal government**) & the **14th Amendment** (applicable to the **state governments**) *both* prohibit deprivation of life, liberty or property without due process of law.
  - They <u>are</u> treated – for adjudicatory procedure purposes – as having the *same content*.
  - Cases under each are routinely cited for the other.

PROCEDURAL DUE PROCESS

"The Fourteenth Amendment prohibits any state deprivation of life, liberty, or property without due process of law. Application of this prohibition requires ***the familiar two-stage analysis***: We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty or property"; if protected interests are implicated, we then must decide what procedures constitute "due process of law." . . . *Board of Regents v. Roth*, 408 U.S. 564, 569-572 (1972). *See* FRIENDLY, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975)."

Ingraham v. Wright, 430 U.S. 651, 672 (1977).

PROCEDURAL DUE PROCESS

<u>Step 1</u>: Is the Asserted Interest Recognized as Protected?

"Liberty' and 'property' are broad and majestic terms. They are among the '[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience."

Roth, 408 U.S. at 571.

LIBERTY

"While this [C]ourt has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment] the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.' *Meyer v. Nebraska* . . . In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."

Roth, 408 U.S. at 572.

PROPERTY

The [14th] Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in **specific benefits**. . . . [P]roperty interests—may take many forms.

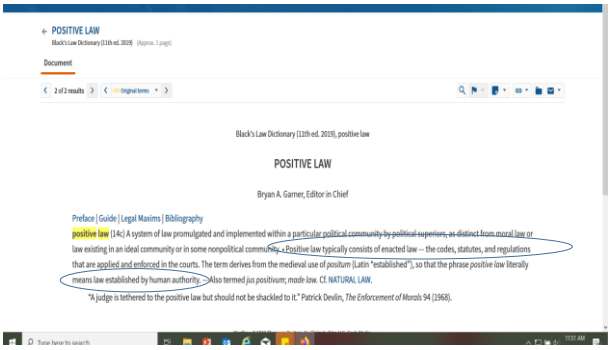
. . . [A] person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg v. Kelly* . . . Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, and college professors and staff members dismissed during the terms of their contracts, have interests in continued employment that are safeguarded by due process. . . . **To have a property interest in a benefit, a person clearly must have <u>more than an abstract need</u> or desire for it. He must have <u>more than a unilateral expectation</u> of it. He must, instead, have a <u>legitimate claim of entitlement</u> to it."**

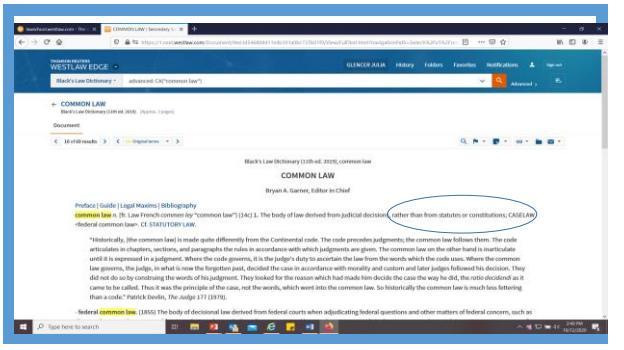
Roth, 408 U.S. at 576-77.

PROPERTY

"Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by *existing rules or understandings* that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg* . . . had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them."

Roth, 408 U.S. at 577.





STATE-CREATED?

There are:

- State-created property interests
- State-created liberty interests

that are protected by federal Constitutionally-based procedural due process.

"State law creates protected liberty interests only when (1) the state places substantive limitations on official conduct by using explicitly mandatory language in connection with requiring specific substantive predicates," and (2) the state law requires a specific outcome if those substantive predicates are met."

O'Donnell v. Harris Cty., Texas, 251 F. Supp. 3d 1052, 1143 (S.D. Tex. 2017) (complex appellate history omitted!)

PROCEDURAL DUE PROCESS

Step 2: What Process is Due?

"The analysis requires consideration of three distinct factors: "First, the private interest that will be affected . . . ; second, the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards; and, [third], the [government] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)."

- *Ingraham*, 430 U.S. at 674–75.

Really Strive to Understand the Procedure that *is* Provided . .

- Parse the language of any statute, regulation, ordinance, procedural rule that identifies the "procedures" provided for use.
- Make sure you understand what each procedure would actually look like in operation.
- Think through the pros & cons of these procedures (in terms of protectiveness and cost), individually and as used together.

What <u>are</u> the possible procedures to use in fostering "due process"? (textbook page 572-73)

- Notice of the proposed action & supporting grounds
- Opportunity to present reasons against the proposed action
- The right to call witnesses
- The right to know the evidence against one
- The right to have a decision based only on the evidence presented.
- An unbiased tribunal
- Representation by counsel
- The making of a record
- A statement of final reasons
- Public attendance at a hearing
- Judicial review

MATHEWS FACTOR 1

- The private interest to be affected.
  - Assess:
    - the *nature* of the private interest
    - the *impact* and *degree* of the potential deprivation
    - the potential *length* of the deprivation and how that will affect the private interest.

MATHEWS FACTOR 2

- Risk of erroneous deprivation and the probable value of added procedural safeguards
  - Assess what kind of a determination is being made and what procedures are being used to make it:
    - Are the procedures well suited to *foster reliability* in the kind of decision being made?
    - What kind of evidence will be handled in this determination?
    - Are there significant issues of credibility & veracity involved?
    - Consider the "generality of cases, not the rare exceptions."
    - Do the proposed added procedures promise to foster reliability?

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    - Do the proposed added procedures promise to foster reliability?

MATHEWS FACTOR 3

- The governmental interest, including the governmental function & the burden of added procedural safeguards
  - Includes administrative burden (resources & personnel)
  - Includes fiscal cost ($$ & diversion of $$ from other programs)
  - Cost not given controlling weight, but it is a reality that "resources available for any particular program of social welfare are not unlimited."
  - Public interest fits here (recall that many admin agencies are charged with operating in the public interest)

"We need only say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial." *Mathews*, 424 U.S. at 347

"At some point the benefit of an additional safeguard to the individual affected and to society in terms of increased assurance that the action is just, may be outweighed by the cost. . . . [T]he cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited." *Id.* at 348.

RUN THE BALANCING TEST!

MATHEWS BALANCING TEXT

"The ultimate balance involves the determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action **to ensure fairness** . . . The judicial model of an evidentiary hearing is neither a required nor in even the most effective method, of decision-making in all circumstances." *Mathews*, 424 U.S. at 348.

MATHEWS BALANCING TEXT

"All that is necessary is that the procedures be *tailored*, in light of the decision to be made, to the 'capacities and circumstances of those who are to be heard' . . . to ensure that they are given a meaningful opportunity to present their case." *Mathews*, 424 U.S. at 349.

"In assessing what process is due . . ., substantial weight must be given to the good faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure *fair consideration* of the entitlement claims of individuals." *Id.*

POST-DEPRIVATION HEARING?

- *N.*
- "[
- "I
- "I

Sometimes a *post-deprivation* hearing will be all the procedural due process that is *constitutionally* due.

EXERCISE

- **Five Hypos**
  - We read the hypo together
  - I put 2-person teams in a Breakout Rooms to discuss the hypo
- I bring us all back together to tell you what happened.

EXERCISE

- Hypos of varying length in terms of **facts** given
- Hypos set the procedural due process Q in **varying postures**
- All of these are similar in style to my Exam Qs

AS YOU ASSESS . . .

- Step 1: Is there a constitutionally protected interest at stake?
- Step 2: What process is due under the *Mathews* factors?

  First, the private interest that will be affected

  Second, the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards;

  Third, the [government] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

IN THE BREAKOUT ROOMS . . .

- Talk about each step and the *Mathews* factors, obviously!
- But you might also:
  - explore Qs about the procedure that *is* given if either of you don't understand it or think maybe its inadequate.
  - explore the value of certain follow-up Qs you may have.
  - explore practical angles (stipulations, settlement, etc.)

BASED ON CASES BUT . . .

- I *know* you are not a judge or a mind reader!
- On our Final Exam, I would expect you to write a thorough well-organized assessment, not accurately predict exactly what a court said or did (that said, I'll bet you can get pretty close . . .).

HYPO 1 - QUARANTINED NURSE

Hypo 1 - Quarantined Nurse

- **Case**: *Hickox v. Christie*, 205 F. Supp. 3d 579, 601–02 (D.N.J. 2016).
  - Nurse argued the state violated her due process rights by (1) failing to provide a *hearing* on her confinement and (2) failing to provide her with adequate *notice* of her rights.
  - Obvious liberty interest in her own freedom!
  - The District Court rejected both; no violation of procedural due process.

NOTICE: Nurse argued notice was inadequate because (1) only gave recourse thru the DOH Commissioner, not a neutral decision-maker; (2) gave no timeframe for anyone to respond to her; (3) required her to seek relief on her own initiative; and (4) did not identify her right to counsel.

"Some form of notice," very fact-dependent.

- *Mathews* factors:

(1) Freedom of movement significant here – quarantined!

(2) Risk of an erroneous deprivation present, though minimized because confinement tied to disease with specific incubation period (which would expire at some point).

(3) Government's interest is **weighty**; it *must* protect citizens from spread of deadly communicable disease.

- **HEARING**: Where practicable, DP requires pre-deprivation hearing. But in emergency, post-deprivation hearing is acceptable if ASAP (p = practicable)
- No set time-frame for hearing; fact-dependent; courts allow varying lengths in civil commitment scenario (24 hrs-20 days).
- Entitlement to hearing must be understood in context of order of quarantine, which is necessarily prophylactic and peremptory.
- Approx. 80 hours of commitment; no body of clearly-established quarantine/civil commitment cases gave entitlement to a hearing in any set timeframe.
- Once she was released, the need for a hearing was mooted.
- Hearing not practicable under the circumstances ("relatively short quarantine").

- "This was a unique, emergency situation, and the order was prepared on an expedited basis. [The] confinement was short—essentially encompassing a single weekend. The procedures, whatever they might or should have been, simply did not have the opportunity to play out."

205 F. Supp. 3d at 603.

- "[Nurse] was upset not only by the quarantine itself, but by what she saw as an inefficient, unfriendly, and opaque process. . . . [S]he disagreed with the assessment . . . and quarantine process."
- "Bad science and irrational fear often amplify the public's reaction to reports of infectious disease. Ebola, although it has inspired great fear, is a virus, not a malevolent magic spell. The State is entitled to some latitude, however, in its prophylactic efforts to contain what is, at present, an incurable and often fatal disease."

Id. at 584.

HYPO 2 - IMPROPER DANCING

Hypo 2 – Improper Dancing

Case: *Foxy Lady, Inc. v. City of Atlanta*, 347 F.3d 1232, 1236 (11th Cir. 2003).

- No dispute that the Clubs had a "constitutionally-protected property interest in their existing respective liquor licenses."
- The Clubs insisted that procedural DP gave them a right to subpoena witnesses to the revocation hearing.
- The District Court agreed with the Clubs, but the Eleventh Circuit reversed.

Procedural DP does not require an absolute or independent right to subpoena witnesses in administrative hearings.

Ordinance requiring Clubs to ask Mayor to issue subpoenas is acceptable balance between need to conduct a fair hearing & the City's legitimate desire to place reasonable limitations on the content & duration of liquor license revocation hearings.

No guarantee Clubs can convince the Mayor/Mayor's designee to subpoena all the witnesses Clubs want to call, but provides a reasonable framework from within which to operate.

Nothing in the record to suggest Mayor/Mayor's designee does not follow these limitations or that different standards are in place for the adult entertainment industry.

- Makes sense for the Mayor's office to control the issuance of subpoenas in the license revocation process.
- Otherwise, process could get *out of hand*!

LIKE WHAT??

- "For example, if the Clubs were to have their own, absolute or independent subpoena power, they effectively could stop, or at the very least delay significantly, the entire revocation process by issuing subpoenas to potentially hundreds of individuals. In the hopes of frustrating the City's efforts, the Clubs could subpoena witnesses *ranging from* club regulars to testify that they have never seen any dancer commit one of the enumerated violations to the dancer's parents who may testify that their child is unlikely to do such things."

Court labelled "Clubs' claim of a dire need to subpoena witnesses" to be exaggerated:

- Clubs can cross-examine the undercover police officers who allegedly witnessed the illegal acts.
- Clubs can introduce testimony from witnesses with relevant information, such as certain dancers, who agree to testify voluntarily.
- Clubs can introduce evidence, *to the extent it exists*, "about how they inform all their dancers of the rules surrounding nude dancing, that they post the rules in conspicuous places, and/or how the Clubs discipline those dancers found violating city ordinances."

HYPO 3 - PANDEMIC MINGLING

Hypo 3 – Pandemic Mingling

Case: *Cloister East, Inc. v. New York State Liquor Authority*, 2020 WL 5238731 (S.D. N.Y. Sept. 2, 2020).

- Restaurant claimed violation of equal protection (as compared to other restaurants who received a hearing before license revocation) and procedural due process.

Before the District Court on Restaurant's motion for a preliminary injunction and request to reinstate its liquor license.

- District Court ultimately denied the motion without prejudice to renew if the Article 78 proceeding – which the District Court deemed to offer a *procedurally adequate post-deprivation remedy* – did not result in a finding of unconstitutional summary suspension.
  - Article 78 added a unique New York twist to this case.

Property Interest?

- "The Court *assumes without deciding* that a New York State liquor license is a property interest to which the protections of the Due Process Clause attach."

  2020 WL 5238731 at *6 (emphasis added).

- *Took the Mathews factors out of order: 1, 3, and then 2.*

Mathews Factor 1 – Private interest *High (But . . .)*

- "[S]traightforward and strong," private interest, "compelling" even.
- NYC restaurant industry competitive even during ordinary times. Liquor license provides competitive advantage, helping certain restaurants earn additional revenue.
  - Liquor yields high profit margin & draws patrons seeking certain atmosphere.
  - "[L]oss of a liquor license can be devastating for restaurants whose business model is built around being able to serve alcohol."
- Restaurant also struggling with substantial lost revenue due to the pandemic shutdown. *But . . .*

- Record didn't yet show Restaurant couldn't operate/be forced to close without liquor license.
- Limited evidence provided raised an odd question.
  - "That [Restaurant] experienced such remarkable success during a pandemic that has devastated the restaurant industry is, to say the least, unusual. . . . [Restaurant's] failure to confront the SLA's allegations that the restaurant was earning revenue from prohibited activity impedes the Court's task of determining how much lawful revenue the business stands to lose if its liquor license remains suspended."
- Court remained open to more evidence on this factor if and when Restaurant refiled court action after Article 78 proceedings.

Mathews Factor 3 – Government Interest (also *High, but*)

- "New York *has compelling interests in protecting the health and safety of its citizens and in promoting its economy*. Action to prevent the spread of the COVID-19, a deadly and highly contagious virus that has killed tens of thousands of New Yorkers and caused untold damage to New York's economy, falls squarely within the crosshairs of advancing these public interests."
- "If a business is violating State law by using its liquor license to attract customers to mass gatherings that the State has good reason to believe will facilitate the spread of COVID-19, then the *State has every interest in putting a stop* to this behavior. Indeed, it should be applauded for doing so."

Hypo 3 – Pandemic Mingling

Mathews Factor 3 – Government Interest (also *High, but*)

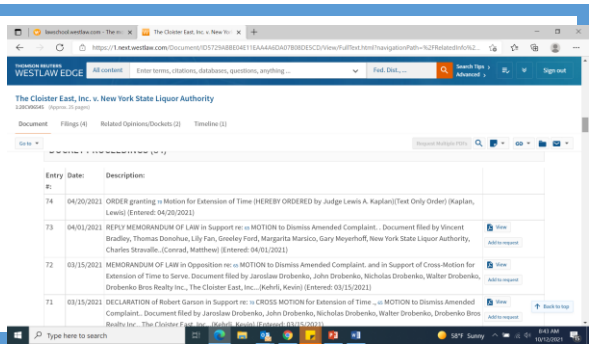
- "[The State was] justified in perceiving an immediate need to ensure that [Restaurant] stopped hosting what reasonably were viewed as dangerous mass gatherings . . . [and had a reasonable basis for wishing to suspend [its] liquor license as quickly as was possible."
- "That said, [the State] clearly could have provided [Restaurant] with at least *some* additional procedural safeguards."
  - "Most obviously, . . . advance notice of the summary suspension hearing, the opportunity to observe the hearing, which was held virtually, or the opportunity to submit a brief statement in response to the charges against them." Back to *Mathews* Factor 2 ►►

Hypo 3 – Pandemic Mingling

Mathews Factor 2 – Risk of erroneous deprivation & probable value of added safeguards. *Emergency nature of suspension kicks in assessment of adequate post-deprivation remedy . . .*

3 possible post-deprivation remedy options

- Option 1: Informal reconsideration
- Option 2: Subsequent revocation proceeding
- Option 3: Article 78 Proceeding (raised *sua sponte*)



HYPO 4 - SUSPENSION OF MEDICARE ENROLLMENT

Hypo 4 – Suspension of Medicare Enrollment

Case: *Senior Life York, Inc. v. Azar*, 2019 WL 6310456 (M.D. Pa. Nov. 25, 2019)

- Parties disputed whether Provider even had a protected interest (i.e., a legitimate claim of entitlement) in participation in federal healthcare programs
- District Court said it "need not resolve this issue" because Provider's procedural DP claim failed on the *Mathews* balancing test; the District Court simply assumed the existence of a protected interest (*and it didn't think much of it!*)

Mathews Factor 1 – Private interest *Low*

- Private interest in financial harm and patient-borne burdens "not compelling."
- Interests related to life's necessities are weighty whereas business & pecuniary interests are "less weighty."
- Provider still has paying Medicare patients
- Medicare designed to benefit patients, not subsidize providers.
- Yes, there *is* concern for reputational harm but that's a species of financial harm
- Effort to claim harm to EEs & future patients deemed speculative.

Mathews Factor 2 – Risk of erroneous deprivation & probable value of added safeguards. *Low*

- Measured by looking to type of determination to be made and type of evidence needed; risk of erroneous deprivation shrinks when determination calls for rote application of facts to outlined standards.
- Suspension decision documented, done via audit process with well-defined standards known to the provider; largely based on medical records (which exist and offer own credibility).
- Provider given plenty of opportunity to influence admin agency here (on-going submission of written documentary material).

Mathews Factor 3 – Government interest *High*

- Strong government interest in protecting the elderly from noncompliant providers and preserving financial & admin resources to support compliant providers.
- Existing body of case law supports admin agency here – federal courts have held provides are NOT entitled to pre-deprivation hearing (citing slew of cases.)

The court's parting shot:

"[Provider's] interest in survival is 'incidental' to the government's interest in protecting citizens regulated by the scheme."

2019 WL 6310456 at *10.

HYPO 5 - HEAP BENEFITS

Hypo 5 – HEAP Benefits

Case: *Kapps v. Wing*, 404 F.3d 105 (2d Cir. 2005)*

- District court granted SJ in part to plaintiff/class of applications, in part to admin agency defendants.
- Admin agency defendants did NOT violate the Act, but the procedures were constitutionally inadequate.
- **BIG ISSUE**: Whether mere "applicants" had a property interest sufficient to trigger due process.

Property Interest?

- Not all benefits programs create protected property interests; must be a "legitimate claim of entitlement" beyond a mere unilateral expectation.
- Key inquiry into whether there is a mandated admin outcome.
- Act by itself did not create property interest

- Act by itself did not create property interest because it did not dictate a particular result.
- But NY law set "fixed" eligibility requirements.
  - Objective criteria, no discretion for admin agency
  - Based on a standard matrix
  - Once determined eligible, household would receive a HEAP benefit.
    - But admin agency had two other arguments as to why this entitlement was still *uncertain* . . .

- *Uncertainty* because mere "applicants"? No. Property interest exists.
  - USSC reserved decision on that; but circuits courts to have addressed it said yes, applicants *could* have property rights if admin agency not invested with discretion.
  - Demonstration of fixed, objective criteria leads to "limited" property right, still triggering procedural due process.
  - Why?

"For, as the Tenth Circuit recently observed, the aim of proper procedures is precisely to allow the state to decide *properly* whether the applicant in fact has a legitimate claim of entitlement."

"If [the applicant] would be so entitled [to show his eligibility], state law creates a property interest, and an applicant must be afforded procedural protections under the Due Process Clause to demonstrate his or her eligibility."

- *Uncertainty* because contingent upon federal funding? No. Property interest exists.
  - Not all HEAP applicants who are technically "eligible" will actually receive benefits.
  - Few courts have addressed whether funding contingency affects status of property interest, but they have still founded a "limited" property interest separate from the funding.
  - Property right still exists (the "so long as funded" piece doesn't impact that existence.)

- What process is due?
  - The District Court (below) had concluded *this* was the process due:
    - Notice of the reasons for the admin agency's preliminary determination of eligibility & amount
    - Opportunity to be heard in response to that notice.
- It ran a very well-organized *Mathews* balancing test, concluding that the applicants' interests greatly outweighed the government's.

- *Mathews* Factor 1 – Private interest *High*
  - HEAP benefits are small, but given to very needy, those at risk of heat shut-off.
  - Court gives off the sense that it placed these benefits in the *Goldberg* subsistence realm.
    - Noteworthy because few benefits have ever been according "Goldberg status."

- *Mathews* Factor 2 – Risk of erroneous deprivation & probable value of added safeguards. *High*
  - Adverse risks of heat shut-off are "self-evident."
  - Heat shut-off is health & safety risk.
  - Even greater risk when the programs seeks to help households with "vulnerable" members.
  - Other calamities can stem from heat shut-off (frozen pipes, eviction, homelessness).

- *Mathews* Factor 3 – Government's interest *Existent but less*
  - Assessed in terms of the costs of the two procedures the District Court had mandated:
    - For the admin agency to ensure that HEAP eligibility determinations were issued no more than 45 days after program year so ALL APPLICANTS could get a fair hearing. (Admin agency said prohibitive cost)
    - For the admin agency to provide "budgetary information" in every notice so applicants could better understand the reason for the benefits determination. (Admin agency said applicants had "additional means" of seeking information.)

GOOD POINT!

"In the absence of effective notice, the other due process rights afforded a benefits claimant – such as the right to a timely hearing – are rendered fundamentally hollow."

Kapps, 404 F.3d at 124.

Hypo 5 – HEAP Benefits

- *Mathews* Factor 3 – Government's interest
  - Cost of ensuring HEAP eligibility determinations were issued no more than 45 days after program year?
    - Admin agency characterized as "exorbitant cost" to manually match budgetary info with auto-generated notices.
    - But primary info tech expert testified in deposition that HEAP computer system modifiable in 7-10 months at "relatively modest cost of $75,000." Court said that "would not be unduly high."

Hypo 5 – HEAP Benefits

- *Mathews* Factor 3 – Government's interest
  - Availability of "additional means" of seeking information?
    - Yes, the auto-generated notices gave claimants a number to call and offered a meeting option.
    - But adding the budgetary information will undoubtedly help claimants decide whether to seek a fair hearing.
      - Especially the "meek and submissive" who might otherwise not seek out that additional information.
        - And *especially* here, where it was likely (given the nature of HEAP) that many claimants face added obstacles (age, disability, resource-deprivation).

RUN THE BALANCING TEST!

WRAP UP . . .

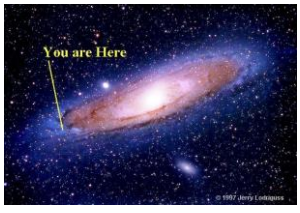
IS *MATHEWS* OUTCOME DETERMINATIVE?

Some say *Mathews* favors the government.

IS *MATHEWS* UNPREDICTABLE?

Some say *Mathews* – because it is built to foster flexibility – is incapable of principled application because it is *subjective* and *unpredictable*.

WHERE ARE WE?



SAMPLE EXAM QUESTION

12. In a situation where a guidance document is challenged in litigation as being enforced by a federal administrative agency as if it were a legislative rule with binding effect without having gone through the required notice and comment process of APA Section 553, a court would likely be interested in evidence suggesting that:

A. The guidance document itself warns members of the regulated industry that they may not rely on its terms as a "safe harbor" by which to structure their behavior.

B. The administrative official who drafted the guidance document did not have statutory authority to draft regulations with the force and effect of law.

C. The guidance document does not contain language of command (i.e., words like "shall" or "must") to describe duties and expectations for members of the regulated industry.

D. All of the above.