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Recent Decisions

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LANDLORD-TENANT — DUE PROCESS — TENANT OF FEDERALLY SUBSIDIZED HOUSING MAY NOT BE EVICTED UPON EXPIRATION OF LEASE ABSENT A SHOWING OF GOOD CAUSE — *Green v. Copperstone Limited Partnership*.[1]

On September 5, 1974, Ms. Helen Green, a tenant in the federally subsidized Copperstone Circle Apartments in Columbia, Maryland,[2] received a letter notifying her that she was to vacate her apartment on or before October 31, 1974. The landlord stated no reason for this action[3] other than to note that it was acting in accordance with the fourth paragraph of Ms. Green's lease:

> Unless terminated as provided herein, this lease shall be automatically renewed for successive terms of one month each at the aforesaid rental. . . . *Either party may terminate this lease at the end of the initial term or any successive term by giving 30 days written notice in advance to the other party.*[4]

Upon Ms. Green's refusal to vacate, the landlord brought a Complaint in Ejectment — Tenant Holding Over[5] in the District Court for Howard County, where it was granted restitution of the leased premises. Ms. Green appealed to the circuit court and, upon again being ordered to

1. 28 Md. App. 498, 346 A.2d 686 (1975).

2. It has been estimated that in the Baltimore metropolitan area there are twelve thousand housing units subsidized by sections 221(d)(3) and 236 of the National Housing Act, 12 U.S.C. §§ 1701–49bbb–9 (Supp. IV, 1974), *amending* 12 U.S.C. §§ 1701–50g (1970). The Sun (Baltimore), Nov. 5, 1975, § C, at 1, col. 1. *See* note 21 *infra*.

3. 28 Md. App. at 501–02, 346 A.2d at 689. At trial the landlord alleged that Ms. Green had caused substantial damage to her apartment, *id.* at 516–17, 346 A.2d at 697, but this claim was not raised in the notice to vacate or in the subsequent complaint brought by the landlord in its attempt to regain possession of the leased premises. *Id. See* note 78 *infra*.

4. 28 Md. App. at 501, 346 A.2d at 689 (emphasis added). This provision, in effect, created a month to month tenancy. *See* 2 POWELL ON REAL PROPERTY § 254 (P.J. Rohan rev. ed. 1973) [hereinafter cited as POWELL].

5. MD. REAL PROP. CODE ANN. § 8–402 (1974). Subsection (b)(1) states:

> Where any interest in property shall be leased for any definite term or at will, and the landlord shall desire to repossess the property after the expiration of the term for which it was leased and shall give notice in writing one month before the expiration of the term or determination of said will to the tenant or to the person actually in possession of the property to remove from the property at the end of the term, and if the tenant or person in actual possession shall refuse to comply therewith, the landlord may make complaint thereof in writing to the District Court of the county where the property is located.

vacate, filed a petition for certiorari in the Maryland Court of Special Appeals[6] alleging a denial of due process of law under the fifth[7] and fourteenth[8] amendments. Ms. Green contended that due process requires that a federally subsidized landlord must have good cause for evicting a tenant even where the lease contains a provision granting the landlord general power to terminate upon notice, and that the landlord must afford the tenant notice and a hearing on the issue of good cause. Since Ms. Green conceded that the Maryland ejectment proceedings afforded the tenant procedural due process on any cause for eviction contained in the complaint,[9] her case rested on two issues: First, does the due process clause of either amendment apply to the termination of leases of tenants in federally subsidized housing, and second, if they do apply, is the termination of such a lease, merely upon its expiration, a denial of due process? The Court of Special Appeals reversed the circuit court, finding that the fifth amendment was applicable and that due process demands a "good cause" eviction. The court limited its holding to three propositions: "(a) that landlord is bound to assure due process to the tenant; (b) that due process requires a hearing and proof of good cause for eviction after notice of the grounds upon which eviction is sought and (c) that mere expiration of the term of a lease is not such good cause."[10] Maryland thus became one of the few states[11] to join a growing number of federal courts[12] in granting this relief to tenants.

The result reached by the Court of Special Appeals in *Green* is, of course, a radical departure from the common law. Historically a leasehold estate ended upon "the expiration of the period for which the estate was created to exist."[13] Upon expiration of the lease the landlord was entitled to resume immediate possession; there was no requirement that notice be given to the tenant since the landlord-tenant relationship was

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6. Execution of the judgment was stayed pending certiorari review. 28 Md. App. at 500, 346 A.2d at 688.

7. U.S. CONST. amend. V provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

8. U.S. CONST. amend. XIV, § 1 states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

9. *See* notes 73–74 and accompanying text *infra.*

10. 28 Md. App. at 517, 346 A.2d at 697. For a discussion of permissible causes for eviction in Maryland, see Rhynhart, *Notes on the Law of Landlord and Tenant,* 20 MD. L. REV. 1 (1960) [hereinafter cited as Rhynhart].

11. *See* Appel v. Beyer, 39 Cal. App. 3d Supp. 7, 114 Cal. Rptr. 336 (1974); Jenkins v. Allen Temple Dev., 127 Ga. App. 61, 192 S.E.2d 714 (1972); Bonner v. Park Lake Housing Dev. Fund Corp., 70 Misc. 2d 325, 333 N.Y.S.2d 277 (Sup. Ct. 1972).

12. *See, e.g.,* Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937 (2d Cir. 1974); Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973); Anderson v. Denny, 365 F. Supp. 1254 (W.D. Va. 1973); McClellan v. University Heights, Inc., 338 F. Supp. 374 (D.R.I. 1972); McQueen v. Druker, 317 F. Supp. 1122 (D. Mass. 1970), *aff'd,* 438 F.2d 781 (1st Cir. 1971).

13. 2 POWELL, *supra* note 4, at § 247.

deemed to have terminated automatically.[14] But as one commentator in discussing year to year tenancies noted, this

> was early found to leave each party too much at the mercy of the other; and the courts seized on any circumstance which could be construed to indicate an intention to require a reasonable notice to terminate the tenancy. . . . In time it was held that six months' notice expiring at the period of the year at which the tenancy began was such reasonable notice . . . .[15]

As previously indicated,[16] summary eviction proceedings are now instituted in Maryland when the landlord has given notice to the tenant one month prior to the expiration of the term and the tenant has failed to quit the premises.[17] Prior to *Green*, mere termination of a lease, if accompanied by the requisite notice, would entitle the landlord to the premises — the common law, with its subsequent statutory revisions, had not varied the substantive rights of the parties in this regard. There was no right to housing that would demand a showing of good cause, or of any cause, prior to eviction.[18] *Green* created a right to housing for tenants of federally subsidized projects by allowing continued occupation until such time as the landlord is able to show good cause for their eviction.

To establish this right to housing through the due process clause, the court first had to determine that the clause was applicable. This involved a two pronged approach: As a preliminary step, it was necessary to show that there was sufficient federal or state involvement for the operation of the fifth or fourteenth amendment's guaranty of "due process of law,"[19]

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14. *E.g.*, Smith v. Pritchett, 168 Md. 347, 350, 178 A. 113, 114–15 (1935).

15. R. VENABLE, THE LAW OF REAL PROPERTY AND LEASEHOLD ESTATES IN MARYLAND 60 (1892) (citation omitted). Professor Powell expressed the view that the requirement of notice was of special importance in terminating tenancies that existed from period to period, for "[t]he most characteristic aspect of an estate from period to period is its continuity." 2 POWELL, *supra* note 4, at § 253. The requirement of notice protects the tenant's interest in continuity by insuring that if notice is not given within the required time prior to the end of a period, the tenancy will continue for at least one more period. *Id.*

16. *See* note 5 *supra.*

17. MD. REAL PROP. CODE ANN. § 8-402(b) (1974). *See generally* Rhynhart, *supra* note 10.

18. *But see* Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. CIV. RIGHTS — CIV. LIB. L. REV. 207, 219–23 (1970) [hereinafter cited as Michelman].

It must be stressed that *Green* applies only to situations where the landlord's action is found to be governmental as the due process clauses do not reach private conduct. *See, e.g.*, Shelly v. Kraemer, 334 U.S. 1, 13 (1948) (the fourteenth amendment "erects no shield against merely private conduct, however discriminatory or wrongful."); Civil Rights Cases, 109 U.S. 3 (1883).

19. 28 Md. App. at 504, 346 A.2d at 690–91.

and secondly, it was necessary to show that the tenant was deprived of either "liberty [or] property" by the eviction proceedings.[20]

In determining whether the due process clause was operative in *Green,* it was first necessary to examine the extent of governmental involvement in the operation of the Copperstone Circle Apartments. These apartments were developed pursuant to section 236 of the National Housing Act,[21] "a statutory scheme seeking to achieve improved housing at reduced rentals for low and middle income families."[22] This is accomplished through reduced rentals,[23] rental supplements,[24] low mortgage rates,[25] and similar subsidies. Under the act the Secretary of the Department of Housing and Urban Development has the power "to make rules and regulations, to enter into such agreements, and to adopt such procedures as he may deem necessary . . . ,"[26] including the power to set rental and tenant eligibility standards.[27]

The due process clause of the fourteenth amendment applies only where the *state,* through its actions, is deemed to have deprived any person of life, liberty, or property.[28] While it is not necessary that the state bring its power to bear directly upon the party alleging a denial of due process, the degree of state involvement in private conduct that is required to constitute "state action" has been an elusive standard.[29]

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20. *See id.* at 507, 346 A.2d at 692, *quoting* Joy v. Daniels, 479 F.2d 1236, 1239 (4th Cir. 1973). While the due process clauses protect "life, liberty, or property," there were no possible claims that Ms. Green would be deprived of her "life" by eviction.

21. 12 U.S.C. § 1715z-1 (Supp. IV, 1974), *amending* 12 U.S.C. § 1715z-1 (1970). Many of the cases that have dealt with the right to good cause evictions have concerned housing subsidized under section 221(d)(3) of the National Housing Act, 12 U.S.C. § 1715*l* (Supp. 1974), *amending* 12 U.S.C. § 1715 (1970). Both section 236 and section 221(d)(3) housing programs involve similar degrees of governmental involvement and are, for the purpose of deciding whether the due process clauses apply, indistinguishable. *See* Anderson v. Denny, 365 F. Supp. 1254, 1258 (W.D. Va. 1973): "But a comparison of § 221(d)(3) . . . with § 236 . . . indicates very little difference in the degree of government involvement in the two programs. The § 236 program involves somewhat more in the way of government subsidies [but] both programs involve virtually the same government regulations." *See also* 28 Md. App. at 506 n.6, 346 A.2d at 691 n.6.

22. 28 Md. App. at 503, 346 A.2d at 690.

23. 12 U.S.C. § 1715z-1(f) (Supp. IV, 1974).

24. 24 C.F.R. 215.5, 215.10(a)(7) (1975).

25. This is accomplished through periodic interest reduction payments. 12 U.S.C. § 1715z-1(a) (1970).

26. 12 U.S.C. § 1715z-1(h) (1970).

27. 12 U.S.C. § 1715z-1(e) (1970).

28. *See, e.g.,* Shelly v. Kraemer, 334 U.S. 1 (1948).

29. *See, e.g.,* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Black, *The Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection, and California's Proposition 14,* 81 HARV. L. REV. 69

The Supreme Court's treatment of this problem has been intentionally vague; in *Burton v. Wilmington Parking Authority*[30] the Court determined that when a state had "so far insinuated itself into a position of interdependence" with an otherwise private project, the actions of the private sponsor could not "be considered to have been so 'purely private' as to fall without the scope of the fourteenth amendment."[31] It has been this standard that courts have attempted to apply in the subsidized housing eviction cases.[32] What action on behalf of the state is sufficient to cause the state to so insinuate itself into a position of interdependence with the landlord? This turns a "sifting [of] facts and weighing [of] circumstances."[33] While the use of state eviction proceedings,[34] the receipt of federal funds,[35] or the benefit of lower real estate taxes[36] have been found not to individually support a finding of state action, a com-

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(1967); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

30. 365 U.S. 715 (1961).

31. *Id.* at 725. The First Circuit Court of Appeals, in finding sufficient state action to require good cause evictions for tenants of federally subsidized housing, was equally troubled in its attempt to verbalize the requirements of the fourteenth amendment:

> [W]hile we disavow any effort to be definitive, we conclude that at least when a specific governmental function is carried out by heavily subsidized private firms or individuals whose freedom of decision-making has, by contract and the reserved governmental power of continuing oversight, been circumscribed substantially more than that generally accorded an independent contractor, the coloration of state action fairly attaches.

McQueen v. Druker, 438 F.2d 781, 784–85 (1st Cir. 1971).

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), marked the beginning of a new approach to, and possibly the decay of, *see id.* at 366 (Marshall, J., dissenting), the state action doctrine. The case was unusual in that it presented several aspects of the doctrine to the Court for simultaneous review. Mr. Justice Rehnquist, writing for the majority, analyzed the various aspects of state involvement individually rather than as presenting a single state action issue. The effect of this was to negate the effect of an over all impression of state involvement and to institute a sequential test: the grounds for finding state action are reviewed sequentially until one is found to be present; at that point the analysis ends. This approach met with swift criticism. *See id.* at 359–64 (Douglas, J., dissenting: "It is not enough to examine seriatum each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is controlling." *Id.* at 360.); *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 139–51 (1975).

32. *See, e.g.*, McQueen v. Druker, 317 F. Supp. 1122 (D. Mass. 1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971); Appel v. Beyer, 39 Cal. App. 3d Supp. 7, 114 Cal. Rptr. 336 (1974); Bonner v. Park Lake Housing Dev. Fund Corp., 70 Misc. 2d 325, 333 N.Y.S.2d 277 (Sup. Ct. 1972).

33. 365 U.S. at 722.

34. McGuane v. Chenango Court, Inc., 431 F.2d 1189 (2d Cir. 1970) (per curiam), *cert. denied*, 401 U.S. 994 (1971).

35. *Id.* It is patently obvious that the receipt of *federal* funds by a landlord, in itself, is not a *state* action.

36. Weigand v. Afton View Apartments, 473 F.2d 545 (8th Cir. 1973).

bination of these factors may be sufficient. Thus, the federal courts have consistently held that local government approval of the construction of subsidized housing, when combined with the use of state eviction proceedings[37] or the assessment of lower municipal real estate taxes,[38] is action that so far insinuates the state into a position of interdependence with the landlord that the provisions of the fourteenth amendment are operative.[39] In *Green* the record indicated that the only state involvement was the use of the state eviction proceedings. In accordance with the treatment rendered by the federal courts, the Court of Special Appeals determined that this was insufficient to constitute the degree of state action needed to invoke the fourteenth amendment's due process clause.[40]

The finding that the due process clause of the fourteenth amendment was not applicable did not, of course, dispose of the case. For if sufficient federal involvement were found, application of the due process clause of the fifth amendment was required. The definition of "sufficient federal involvement" has also been an elusive one. Perhaps the most widely recognized standard is that "when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself."[41] Did the federal government have its "thumb on the scales" in *Green*? The Court of Special Appeals, adopting the rationale of *Anderson v. Denny*,[42] determined that it did.[43] In *Anderson*, tenants of a housing project subsidized under section 236 of the National Housing Act were held to have the right to require a showing of good cause prior to eviction, this protection being based in part upon the due process clause of the fifth amendment. The court noted a well defined pattern of

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37. Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973); Anderson v. Denny, 365 F. Supp. 1254 (W.D. Va. 1973); McClellan v. University Heights, Inc., 338 F. Supp. 374 (D.R.I. 1972).

38. Short v. Fulton Redev. Co., 390 F. Supp. 517 (S.D.N.Y. 1975). *Short* did not consider the possible effect of Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). *See* note 31 *supra*. All three factors were present in McQueen v. Druker, 317 F. Supp. 1122 (D. Mass. 1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971).

39. The decision to focus upon a combination of factors to establish state action must now be reconsidered in light of Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). *See* note 31 *supra*. *But cf. The Supreme Court — 1974 Term, supra* note 31, at 149 & n.67.

40. 28 Md. App. at 512, 346 A.2d at 694. The court cited McGuane v. Chenango Court, Inc., 431 F.2d 1189 (2d Cir. 1970) (per curiam), *cert. denied*, 401 U.S. 994 (1971).

41. American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

42. 365 F. Supp. 1254 (W.D. Va. 1973).

43. *Accord*, Dew v. McLendon Gardens Associates, 394 F. Supp. 1223 (N.D. Ga. 1975); Short v. Fulton Redev. Co., 390 F. Supp. 517 (S.D.N.Y. 1975); Bloodworth v. Oxford Village Townhouses, Inc., 377 F. Supp. 709 (N.D. Ga. 1974); McQueen v. Druker, 317 F. Supp. 1122 (D. Mass. 1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971); Appel v. Beyer, 39 Cal. App. 3d Supp. 7, 114 Cal. Rptr. 336 (1974); Bonner v. Park Lake Housing Dev. Fund Corp., 70 Misc. 2d 325, 333 N.Y.S.2d 277 (Sup. Ct. 1972).

federal involvement through the benefits the government conferred upon the landlord[44] and the restrictions it imposed.[45] The court also found that subsidized landlords help to implement the congressional policy of providing decent housing to low income families[46] and have the power to deprive tenants of the federal benefits they receive through low rentals.[47] In light of these observations the court's conclusion that the landlords had "made themselves government actors"[48] seemed inevitable. As *Anderson* was factually indistinguishable from *Green*, the Maryland court felt justified in applying its rationale to find sufficient federal involvement.[49]

Having determined that the fifth amendment's guarantee of "due process of law" was available to Ms. Green, it was necessary to focus on the second prong of the test: Was Ms. Green deprived of "life, liberty, or property" by the ejectment proceedings? As she contended that the eviction deprived her of a "property" right,[50] it was upon that aspect of the due process clause that the court centered its attention. While the Supreme Court has never spoken on the possible existence of a property right in tenants of subsidized housing,[51] it has been quite active in de-

44. These benefits included reduced mortgage rates on up to ninety-five percent of the construction costs, rental supplements, tax benefits, and the guaranteed payment of construction costs. 365 F. Supp. at 1257.

45. The landlord was restricted in the following ways:

(1) the amount of rent that may be charged; (2) admission to the project is limited to persons of specified income levels; (3) the landlord cannot discriminate on account of children in a family; (4) preference in admission must be given to families displaced by government activities; (5) the landlord cannot convey, transfer or encumber the property; (6) without written approval of the Federal Housing Administration, the landlord cannot convey a beneficial interest in the property or convey a right to manage it or collect its rent nor can he remodel, add to or destroy a portion of the property; (7) the landlord must maintain the mortgaged property in good condition subject to FHA inspection; (8) the owners cannot voluntarily go into bankruptcy; and (9) the owners must furnish monthly occupancy reports and must answer questions relative to income, assets, liabilities, contracts, operation and condition of the property and the status of the mortgage. *Id.*

46. *Id.* at 1258–59.

47. *Id.* at 1259.

48. *Id.*

49. This result appears proper, for the series of restrictions imposed by the federal government, *see* note 45 *supra*, show its intention of maintaining firm control over every aspect of the management of the housing project. "[T]he government as landlord is still the government." Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955).

50. 28 Md. App. at 505, 346 A.2d at 691.

51. *But cf.* Thorpe v. Housing Authority, 386 U.S. 670 (1966). A tenant of a subsidized housing project received notice of the termination of her tenancy one day after being elected president of a tenants' organization. No reason for the termination was offered. The majority, in a per curiam opinion, avoided the tenant's allegations of interference with her first and fourteenth amendment rights by remanding the case for consideration of the effect of a HUD directive issued subsequent to the Court's granting of certiorari. That directive required local authorities to notify tenants of the reasons for their evictions. Mr. Justice Douglas, concurring, protested

veloping notions of property rights in general. In the seminal case of *Goldberg v. Kelly*,[52] the Court was called upon to determine whether due process required an evidentiary hearing for welfare recipients *prior* to the termination of their benefits. While there was no substantial contention that the due process clause was inapplicable, the Court commented upon the scope of the protection afforded by that clause and in so doing discarded the traditional distinction between "right" and "privilege":[53]

> [Welfare] benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, or to denial of a tax exemption, or to discharge from public employment. The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," and depends upon whether the recipients interest in avoiding that loss outweighs the governmental interest in summary adjudication.[54]

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that the Court was providing no guidelines for the state court (a protest that appeared well founded when the case again visited the Court in 393 U.S. 268 (1969)), and discussed the merits of the tenant's allegations. While his opinion is heavily influenced by the first amendment considerations that the case presented, he noted that "[u]nder the rationale of the North Carolina Supreme Court, a public housing authority, organized under state law and operating a housing project financed by federal and state funds, is assimilated to the position of a private property owner who can terminate a lease for any reason or no reason at all." 386 U.S. at 676. To this he responded, "Arbitrary action is not due process." *Id.* at 678, *citing* Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955).

52. 397 U.S. 254 (1970). *See* note 54 *infra.*

53. *See, e.g.,* Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court,* 341 U.S. 918 (1951) (per curiam); K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.12 (3d ed. 1972):

> The idea of privilege seems rather clearly to be something more than a mere label that is attached after the solution of a legal problem has been worked out on other grounds. The typical thinking is that one has no "right" to a government gratuity, that one who has no "right" at stake should not be entitled to a hearing, that in absence of a "right" one should not even be entitled to judicial review of an administrative denial of the gratuity or privilege, that due process protects only "life, liberty, or property" and not privileges, and that therefore courts are not called upon to require fair hearings when nothing more than privileges are at stake.

But see Bishop v. Wood, 96 S. Ct. 2074, 2082 n.4 (1976) (Brennan, J., dissenting).

The criticism of the "right" — "privilege" distinction arose long before the Court discarded it in *Goldberg. See* Reich, *The New Property,* 73 YALE L.J. 733 (1964); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

54. 397 U.S. at 261–62 (citations omitted). The continued vitality of *Goldberg* was put in question by the Court in Mathews v. Eldridge, 96 S. Ct. 893 (1976). In *Eldridge,* the Social Security disability benefits of the respondent were terminated prior to a *Goldberg*-type hearing. *See* text accompanying note 73 *infra.* As *Goldberg* had

The Supreme Court refined its *Goldberg* holding in the companion cases of *Board of Regents v. Roth*[55] and *Perry v. Sinderman*.[56] Roth, who had been hired to teach at a state university for one year, demanded a hearing when he was informed without explanation that his contract would not be renewed. The Court, speaking through Mr. Justice Stewart, held that Roth had not been denied any property right so as to invoke the due process clause:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a *legitimate claim of entitlement* to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.[57]

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provided for an evidentiary hearing prior to the termination of benefits received by welfare recipients, Eldridge challenged the administrative procedures established by HEW, claiming a denial of due process under the fifth amendment. Mr. Justice Powell, writing for the Court, applied the *Goldberg* balancing test, *see* text accompanying this note, and found the scales to tip in favor of the state's interests. 96 S. Ct. at 909–10. Concluding that a pretermination hearing was not required, *Goldberg* was distinguished on three levels. First, the termination of disability benefits was found to impose a lesser hardship than the termination of welfare benefits. This conclusion was justified by observations that: (1) as eligibility for Social Security disability benefits is not based upon financial need alone, recipients may have other forms of income or support available and, (2) upon termination, other forms of governmental subsidy may be available. *Id.* at 906–07 & n.27. The dissent took issue with the Court on this point and, noting that the Eldridge family lost its home and furniture as a result of the termination of disability benefits, argued "that the Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer a limited deprivation is no argument. It is speculative." *Id.* at 910 (Brennan & Marshall, JJ., dissenting). Secondly, as eligibility for Social Security disability is dependent upon a "medically determinable physical or mental impairment," 42 U.S.C. § 423(d)(1)(A) (1970), and medical testimony does not generally involve questions of credibility and veracity, Richardson v. Perales, 402 U.S. 389, 405–06 (1971), the Court claimed that "[t]he potential value of an evidentiary hearing, or even oral presentation to the decision maker, is substantially less in this context than in *Goldberg*." 96 S. Ct. at 907. The conclusion that medical testimony does not generally involve questions of credibility and veracity will no doubt be subject to strong criticism. Finally, noting that the knowledge that full benefits would continue until after hearings were held would result in heavy demands for hearings, the Court pointed to the costs involved and the need to preserve "scarce fiscal and administrative resources." *Id.* at 909. As identical policy considerations were present in *Goldberg*, this final argument arguably works to undermine *Goldberg* and to limit that case to its facts.

Whatever the full impact of *Eldridge* upon *Goldberg*, it is sufficient for this discussion to note that while the need to hold the pretermination evidentiary hearing may have undergone revision, *Goldberg*'s extension of the "property interests" protected under the due process clause has not. *See* 96 S. Ct. at 901–02. *But see* note 62 *infra*. As pre-eviction hearings are required by statute in Maryland, *see* note 5 *supra*, it may be concluded that *Eldridge* has no effect upon the result reached in *Green*.

55. 408 U.S. 564 (1972).

56. 408 U.S. 593 (1972).

57. 408 U.S. at 577 (emphasis added).

In contrast, Sinderman had been teaching at a state college for ten years under a series of one-year contracts. When notified that this contract would not be renewed he requested a hearing, alleging that the college had a de facto tenure program that encompassed his period of service. The Court, again through Mr. Justice Stewart, held that this was a sufficient property interest to require a due process hearing: "A person's interest in a benefit is a 'property' interest for due process purposes if there are such *rules* or *mutually explicit understandings* that support his claim of entitlement to the benefit . . . ."[58]

The Fourth Circuit Court of Appeals, in *Caulder v. Durham Housing Authority*,[59] applied the *Goldberg* test to find a right to due process protection for tenants of subsidized housing.[60] The court pointed to the grievous loss suffered by those who cannot afford acceptable housing and the delay that wrongfully evicted tenants would face in reentering the highly popular program.[61] The classification of the tenant's interest as a "right" or a "privilege" was deemed irrelevant. To fit *Roth* and *Sinderman* into the subsidized housing arena,[62] the Maryland Court of Special Appeals in *Green* adopted the approach of *Joy v. Daniels*.[63] As the Supreme Court had required "legitimate claim[s] of entitlement," "rules," or "mutually explicit understandings" to support a claim of a property interest, the court in *Joy* looked to "statutes," "governmental regulations," and the "custom and understandings of public landlords" to convincingly establish a tenant's property interest in his tenancy.[64] The congressional

58. 408 U.S. at 601 (emphasis added).

59. 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971).

60. *See* Note, *Procedural Due Process in Government-Subsidized Housing*, 86 HARV. L. REV. 880, 903–10 (1972) [hereinafter cited as Note, *Procedural Due Process*].

61. 433 F.2d at 1003. *See also* McQueen v. Druker, 317 F. Supp. 1122 (D. Mass. 1970), *aff'd*, 438 F.2d 781 (1971). The *Caulder* court noted that *Goldberg* "laid to rest" a series of conflicting public housing cases, some of which required that a governmental landlord have cause to evict, *see, e.g.*, Vinson v. Greenburgh Housing Authority, 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (1968), and some of which held that a governmental landlord had the same right as a private landlord to evict a tenant upon the expiration of his lease without assigning reasons for his action, *see, e.g.*, Chicago Housing Authority v. Stewart, 40 Ill. 2d 23, 237 N.E.2d 463 (1968); Housing Authority v. Turner, 201 Pa. Super. 62, 191 A.2d 869 (1963). 433 F.2d at 1002.

62. *See, e.g.*, Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937 (2d Cir. 1974); Bloodworth v. Oxford Village Townhouses, Inc., 377 F. Supp. 709 (N.D. Ga. 1974); Anderson v. Denny, 365 F. Supp. 1254 (W.D. Va. 1973). The continued vitality of *Roth* and *Sinderman* has been placed in question by Bishop v. Wood, 96 S. Ct. 2074 (1976). *See id.* at 2080–82 (Brennan, J., dissenting), 2085 (White, J., dissenting).

63. 479 F.2d 1236 (4th Cir. 1973).

64. 479 F.2d at 1240. *See* Fenner v. Bruce Manor, Inc., 409 F. Supp. 1332 (D. Md. 1976). In *Fenner*, tenants in housing subsidized under sections 221(d)(3) and 236 demanded a hearing prior to an increase in their rent. Rejecting the claim that the fifth amendment's due process clause prohibits rental increases unless there is a prior hearing, the court declined to recognize the existence of a "property" interest:

> [T]here is a vast difference in the right to occupy premises beyond the term of a lease and the right to occupy premises at a certain fixed rental. The Court in

goal of providing "a decent home and suitable living environment for every American family,"[65] when coupled with the right to be "free of invidious discrimination in federally assisted programs"[66] arguably creates a legitimate claim of entitlement to a tenancy.[67] Federal Housing Administration regulations implying a right to be free from arbitrary or discriminatory action[68] and a congressional report concluding that tenants may continue to live in subsidized housing when their incomes increase[69] may be said to be rules that establish a property interest in a tenancy.[70]

Joy found that Congress, in enacting the legislation, was contemplating more occupancy entitlement than limited leasehold terms and that this expectation of some degree of permanency was bolstered by custom. . . . But there is not such expectation or custom insofar as the fixing of rents is concerned.

Id. at 1346.

65. 12 U.S.C. § 1701t (1970), *citing* 42 U.S.C. § 1441 (1970).

66. 479 F.2d at 1241. *See, e.g.*, 42 U.S.C. § 2000d (1970):

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The *Joy* court cited a policy of statutory interpretation developed in Moragne v. States Marine Lines, Inc., 398 U.S. 375, 390–91 (1970), to explain that the policy reflected in this statute "carries significance beyond [its] particular scope. The policy thus established has become itself a part of our law . . . ."

67. *See* Appel v. Beyer, 39 Cal. App. 3d Supp. 7, 15, 114 Cal. Rptr. 336, 341 (1974).

68. As an example, the *Joy* court cited 24 C.F.R. § 221.536 (1975), which provides that a section 221(d)(3) landlord may not discriminate against a family because of children. It would appear difficult to infer from this regulation alone a general right to be free from arbitrary or discriminatory action and, in turn, a right to a property interest in a tenancy.

69. H.R. No. 365, 89th Cong., 1st Sess. (1965), 1965 U.S. CODE CONG. & AD. NEWS 2614, 2618:

If his income increases sufficiently so that he can pay the full economic rent with 25% of his income, rent supplement payments on his behalf would cease to be made. The tenant could, however, continue to live in the project and would not be required to pay more than the full economic rent.

The *Joy* court concluded that "this suggests the Congress was contemplating more occupancy entitlement than limited leasehold terms." 479 F.2d at 1241. This conclusion is also a tenuous one because the report, on its face, merely purports to set the maximum rent to be paid by those tenants experiencing an increase in income. The above quoted passage was drawn from the midst of a discussion concerning the way in which rental supplements would be used — hardly the context for Congress to set a policy of "occupancy entitlement."

70. The *Joy* court's argument is not without its problems. One point not considered is that the lease, with its provision allowing termination upon thirty days notice, is a form lease approved of by the FHA. *See* Note, *Procedural Due Process, supra* note 60, at 903. This would appear to undermine the argument that the federal government, through its regulations, has attempted to create an expectancy of continuous occupation. Why, it may be asked, has not the Secretary acted under the powers conferred in 12 U.S.C. § 1715z-1(h) (1970) to require landlords to state good cause for all evictions? The Secretary has done so with respect to federally

Finally, the finding that there is a custom in subsidized housing that allows a tenant to remain beyond the expiration of his lease[71] may satisfy the *Sinderman* requirement of "mutually explicit understandings." While each of these points may be insufficient individually to create a property right, the combination of them fairly may be said to come within the reach of *Roth* and *Sinderman*. The claim to a tenancy is an important one, one "upon which people rely in their daily lives."[72]

Having found both the existence of sufficient federal involvement to make the fifth amendment applicable and the necessary deprivation of an interest in "life, liberty, or property" to invoke the due process clause, the Court of Special Appeals was faced with one final question. Was Ms. Green deprived of her property without due process of law? In the context of lease termination in subsidized housing projects, *Goldberg v. Kelly* has been held to require

> (1) timely and adequate notice detailing the reasons for a proposed termination, (2) an opportunity on the part of the tenant to confront and cross-examine adverse witnesses, (3) the right of a tenant to be represented by counsel, provided by him to delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination and generally to safeguard his interests, (4) a decision, based on evidence adduced at the hearing, in which the reasons for decision and the evidence relied on are set forth, and (5) an impartial decision maker.[73]

While Ms. Green conceded that the Maryland eviction statute met these procedural requirements,[74] she contended that procedural due process also required that good cause for eviction be alleged and proved by the landlord.[75] May a tenant entitled to a due process hearing upon eviction be evicted merely upon the expiration of a lease? The courts that have considered this question in the post-*Goldberg* era have unanimously answered it in the negative by defining the due process property interest to require evictions only upon a showing of good cause, observing that otherwise such an eviction would "enable secret and silent discrimination

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supported public housing. *See* Thorpe v. Housing Authority, 386 U.S. 670, 672 n.3 (1967) (per curiam).

71. 479 F.2d at 1241, *citing* Note, *Procedural Due Process, supra* note 60, at 905.

72. 408 U.S. at 577.

73. Caulder v. Durham Housing Authority, 433 F.2d 998, 1004 (4th Cir. 1970), *cert. denied,* 401 U.S. 1003 (1971). *See also* Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970); Anderson v. Denny, 365 F. Supp. 1254 (W.D. Va. 1973). *See* note 54 *supra.*

74. The requirement of adequate notice was ostensibly met by the landlord's notice stating the reason for termination to be the expiration of the lease term. Ms. Green's contention that this was an insufficient reason formed the basis of her complaint.

75. 28 Md. App. at 502, 346 A.2d at 689.

and would wholly emasculate the procedural safeguards. . . ."[76] of *Goldberg*.[77] The Court of Special Appeals concurred with this view.[78]

Perhaps the most important feature of *Green* is its provision for a remedy in the state court system. By interpreting the state's eviction statute to allow eviction only upon the government landlord's pleading and proving of cause,[79] the court has made it unnecessary for the evicted tenant to acquire an attorney to bring suit in the federal or state courts,[80] an expense that a tenant of a subsidized housing project can ill afford. But even more important than this reduction in costs is the fact that the hurdles in establishing federal court jurisdiction may be so great as to be insurmountable, leaving the wrongfully evicted tenant with no remedy should his state court system fail to recognize the existence of a fifth amendment right to a good cause eviction.

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76. Joy v. Daniels, 479 F.2d 1236, 1242 (4th Cir. 1973).

77. *See* McQueen v. Druker, 317 F. Supp. 1122 (D. Mass. 1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971); Appel v. Beyer, 39 Cal. App. 3d Supp. 7, 15, 114 Cal. Rptr. 336, 341 (1974). ("A necessary corollary is that appellants may not be deprived of that status through eviction from their home by governmental action without prior notice and proof of good cause."); Bonner v. Park Lake Housing Dev. Fund Corp., 70 Misc. 2d 325, 333 N.Y.S.2d 277 (Sup. Ct. 1972).

Absent the need to show good cause, an ideal tenant, represented by counsel before an independent trier of fact, able to present a number of persuasive character witnesses and able to rebut successfully any adverse statement upon the cross-examination of the landlord's witnesses, could still be evicted merely upon the termination of his lease. But since procedural due process requires such a hearing, the courts have argued, it must also require that the hearing be a meaningful hearing — hence the imposition of the good cause standard. As the courts have gone beyond the mere procedural demands of due process to define the substantive demands of the hearing, the temptation to define "good cause" in terms of substantive due process is great. But the issue of substantive due process has been largely ignored in the cases. Where it has been recognized, it has been considered unnecessary to discuss: "[I]n view of our holding that the congressional scheme and custom give plaintiff a right to remain in her apartment we need not decide whether her claim is also protected by equal protection and 'substantive' due process." Joy v. Daniels, 479 F.2d 1236, 1242 (4th Cir. 1973).

78. 28 Md. App. at 516, 346 A.2d at 697. It is important to note that the mere proof of good cause for eviction at the hearing is not enough. Due process requires that the tenant be provided with notice of the grounds upon which eviction is sought. *Id.* at 517, 346 A.2d at 697.

79. "We find no constitutional impediment to utilizing summary Maryland statutory eviction procedures provided proper notice is given and good cause for eviction is shown at hearing." *Id.*

80. While an attorney would be as necessary in state court as in federal court should the tenant bring suit to obtain relief from a wrongful eviction, the important point is that while previously a tenant would have had to go through summary eviction proceedings before seeking redress in federal court, he may now obtain the same remedy by defending against the ejectment action in the state's summary proceedings. As a result the procedure is streamlined and legal expenses are reduced.

There are two basic ways in which tenants have sought to establish federal court jurisdiction: through allegations of the denial of their civil rights[81] and through federal question jurisdiction.[82] The Civil Rights Act of 1871[83] imposes liability on any person who under color of state law deprives any citizen of his constitutional rights.[84] Original jurisdiction is granted to the district court to redress this deprivation if it occurs "under color of any *State* law . . . regulation, custom or usage. . . ."[85] While federal court jurisdiction is available to prevent the landlord from depriving the tenant of his constitutional right to be evicted only upon cause,[86] it is available only if there is state action.[87] As state action was not present in *Green*,[88] tenants at the Copperstone Circle Apartments would have been unable to assert jurisdiction under the Civil Rights Act. Federal question jurisdiction exists in "all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . and arises under the Constitution . . . of the United States."[89] The difficulty arises with the attempt to establish an amount in controversy exceeding $10,000. While some authorities have stated that the amount in controversy will not be so high in an eviction case,[90] the current trend appears to call for computation of the value of the lease over the tenant's life expectancy.[91] This quite obviously would create jurisdictional problems for the elderly.[92]

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81. 42 U.S.C. § 1983 (1970).

82. 28 U.S.C. § 1331 (1970).

83. Act of April 20, 1871, ch. 22, 17 stat. 13.

84. 42 U.S.C. § 1983 (1970).

85. 28 U.S.C. § 1343(3) (1970).

86. *See* Caulder v. Durham Housing Authority, 433 F.2d 998, 1001 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971).

87. *See* McGuane v. Chenango Court, Inc., 431 F.2d 1189 (2d Cir. 1970) (per curiam), *cert. denied*, 401 U.S. 994 (1971); Weigand v. Afton View Apartments, 473 F.2d 545 (8th Cir. 1973).

88. *See* notes 28–40 and accompanying text *supra*.

89. 28 U.S.C. § 1331 (1970).

90. McGuane v. Chenango Court, Inc., 431 F.2d 1189 (2d Cir. 1970) (per curiam), *cert. denied*, 401 U.S. 994 (1971); Note, *Procedural Due Process*, *supra* note 60, at 903 n.114 (1973).

91. This is apparently the view of the Fourth Circuit Court of Appeals. Joy v. Daniels, 479 F.2d 1236, 1239 n.6 (4th Cir. 1973) (dictum). *See* Bloodworth v. Oxford Village Townhouses, Inc., 377 F. Supp. 709, 714 (N.D. Ga. 1974); Anderson v. Denny, 365 F. Supp. 1254, 1259 (W.D. Va. 1973).

92. 12 U.S.C. § 1715z-1(i)(4) (Supp. IV, 1974): "At least 20 per centum of the total amount of contracts for assistance payments . . . shall be available for use only with respect to projects which are planned in whole or in part for occupancy by elderly or handicapped families."

The fair market rental of Ms. Green's apartment was $215.52 monthly, with her lease requiring a monthly payment of $137.00, 26 Md. App. at 501, 346 A.2d at 688. Based upon a savings of $78.52 per month, a tenant would need a life expectancy of ten years and eight months to establish a sum in controversy in excess of $10,000.

By circumventing these problems, the Court of Special Appeals has given tenants the means of enforcing a right they may otherwise find unenforceable.[93]

While *Green* does not extend the length of tenancies in housing that remains outside the scope of the fifth or fourteenth amendment, it is at least an implicit acceptance of Congress' recognition of the need to provide decent living quarters for all. In limiting the arbitrary removal of tenants, and thus preserving the sense of security a family should have in establishing its home, the Court of Special Appeals heralded the advent of the right to housing in Maryland.[94]

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93. Some attempts to establish federal court jurisdiction have been based on 28 U.S.C. § 1337 (1970): "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." *Compare* Weigand v. Afton View Apartments, 473 F.2d 545 (8th Cir. 1973) *and* Potero Hill Community Action Comm. v. Housing Authority, 410 F.2d 974 (9th Cir. 1969) *with* Dew v. McLendon Gardens Associates, 394 F. Supp. 1223 (N.D. Ga. 1975) *and* Bloodworth v. Oxford Village Townhouses, Inc., 377 F. Supp. 709 (N.D. Ga. 1974).

By joining federal officials as parties and seeking mandamus to prohibit the issuance of contracts that do not protect tenants from summary eviction, attempts have been made to secure jurisdiction under 28 U.S.C. § 1361 (1970): "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." *See Weigand, supra* (trial court's rejection of motion to amend pleadings to include federal officials upheld as within the court's discretion). *But see Bloodworth, supra.* (action to prevent elimination of electrical service).

94. *See generally* Michelman, *supra* note 18.