GOVERNMENT BENEFITS AND THE RULE OF LAW: TOWARD A STANDARDS-BASED THEORY OF DUE PROCESS

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INTRODUCTION

Under the Supreme Court's current due process jurisprudence, legislative actors control whether the rule of law applies to the denial or termination of government benefits. Due process applies only when government actors deprive a person of a "protected interest" in "life," "liberty," or "property," and government benefits are "property" only when one has an "entitlement" to the benefit. Thus, Congress or a state legislature can preclude the application of the Due Process Clause simply by declining to create an entitlement to a government benefit. While this anomaly has been widely recognized and bemoaned in the academic literature, the Court has shown no inclination to adopt any of the solutions that academics have proposed to correct it.

The Court's refusal to rethink its due process jurisprudence is of more than academic interest. The current approach denies due process safeguards to individuals who cannot claim an entitlement to a government benefit, no matter how important the benefit is to them or how arbitrarily the government has acted. Given the centrality of rule of law principles to the constitutional order, it is disquieting that such a basic rule of law safeguard as due process is dependent upon political discretion, just because the interest at issue is a governmentally created one. Whether the government's action concerns a deprivation of government benefits or of private property, failure to comply with statutory or other legal standards violates the rule of law.

Despite these and other serious problems, the Court is apparently locked into the entitlement approach by a fundamental dilemma. The Court remains committed to the "due process revolution," which, according to conventional wisdom, extended due process protections to government benefits (such as public employment, licenses, and welfare) that previously had been regarded as mere privileges beyond the protections of due

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1. For a definition of "government benefits," see infra note 13 and accompanying text.
2. See infra notes 107-36 and accompanying text (discussing the emergence of the entitlement approach).
3. See infra notes 29-54 and accompanying text (highlighting gaps created by the entitlement approach).
4. See infra notes 191-240 and accompanying text (discussing various academic responses to the entitlement approach). Moreover, even when there is an entitlement, it is not entirely clear that due process attaches to the denial of an initial application for the benefit, as opposed to the termination of benefits for which eligibility had previously been established. See infra notes 40-45 and accompanying text (assessing the Court's view of applications in relation to entitlement).
5. See infra notes 29-54 and accompanying text (discussing cases declining to apply due process).
6. See infra notes 16-28 and accompanying text (discussing the meaning of the rule of law).
process. Nonetheless, the Court has never been willing to recognize an affirmative constitutional right to government benefits. Notwithstanding its flaws, the entitlement approach to due process offers a mechanism for applying due process to many government benefits without creating a constitutional right to them.

We have never been entirely satisfied with the entitlement approach to due process, and decided to investigate the problem of government benefits more thoroughly. This investigation yielded several surprises. First, contrary to the conventional wisdom, the due process revolution was not so revolutionary. Long before the famous Supreme Court decisions of the 1970s that recognized government benefits as property for purposes of due process, the Court in a number of cases had applied due process to the kinds of benefits typically characterized as “new property,” including government employment, occupational licenses, and pension benefits.

Second, we discovered that the real due process revolution of the 1970s was the adoption of a strict requirement of a protected interest and an entitlement construct to define property. This entitlement approach, which crystallized in Board of Regents v. Roth, actually restricted the application of due process to government benefits, by comparison to the previous cases. Although the precise rationale and scope of the Court’s earlier due process cases remain somewhat murky, the decisions tended to mix the language of rights with the more fundamental rule of law principle that government officials have a duty to comply with statutory or other legal standards. Indeed, it is striking just how little support Roth could muster from the Court’s prior due process cases for the entitlement approach to property.

A third surprise was that these early decisions suggest an alternative approach to due process that has the potential to solve the seemingly

7. This commitment appears to be solid notwithstanding the predictions of one leading commentator that a due process “counterrevolution” would sweep away due process protections for government benefits. See generally Richard Richard J. Pierce, The Due Process Counterrevolution of the 1990s?, 96 COLUM. L. REV. 1973 (1996) (predicting that the “due process counterrevolution” would occur before the turn of the century).

8. Our research in government benefits also led us to develop an alternative approach to the availability or preclusion of judicial review, which is the subject of a separate article. See Sidney A. Shapiro & Richard E. Levy, Government Benefits & the Rule of Law: Towards a Standards-Based Theory of Judicial Review (unpublished manuscript undergoing revisions for submission to law reviews).

9. See infra notes 62-106 and accompanying text (discussing the Supreme Court’s application of due process to government benefits prior to the 1970s).

10. 408 U.S. 564, 577 (1972) (stating that an entitlement is more than “an abstract need or desire” for a property interest).

11. Thus, while Roth is typically seen as part of the due process revolution’s expansion of due process (even though the Court actually declined to apply due process on the facts of the case), we will argue that due process actually applied more broadly to government benefits before Roth. See infra notes 62-136 and accompanying text (discussing the scope of due process protections before and after Roth).
intractable dilemma of how to extend due process to government benefit decisions without implicating a substantive constitutional right to them. This approach, which we will call the “standards-based” approach, encompasses two fundamental principles. First, the Constitution requires due process whenever the allocation of government benefits is constrained by legal standards in statutes, whether or not there is a legal “entitlement” to the benefit, although the scope of procedural requirements will vary with the nature of the decision and the interest involved. Second, the legislature may decide whether or not to provide government benefits, but once it chooses to provide benefits, it is constitutionally compelled by the rule of law to provide statutory standards for the allocation of those benefits, except in limited circumstances controlled by the political question doctrine.

We argue in this Article that the standards-based approach is superior to the current entitlement construct of due process. Part I of the Article advances the basic premise that the entitlement approach fails to provide an adequate foundation for the rule of law, and therefore warrants reconsideration. Part II examines the historical application of the due process to government benefits decisions, demonstrating that the conventional account of the due process revolution is wrong and that Roth’s adoption of the entitlement approach was the real due process revolution. Part III describes the standards-based approach to due process, and explains how it would solve the dilemma of how to secure due process for government benefits without establishing a substantive constitutional right to benefits, and serve as a powerful explanatory tool for related administrative law doctrines. Finally, Part IV explains why we believe the standards-based approach is superior to alternative approaches proposed by other commentators as solutions to the problems confronting current doctrine.

I. ENTITLEMENT-BASED DUE PROCESS

Because the rule of law is fundamental to the constitutional order, and due process is an essential rule of law safeguard, due process should generally apply to decisions concerning government benefits, even if there is no constitutional right to those benefits. We use the term “government benefits” to describe a broad spectrum of benefits, including welfare and social security, public employment and government contracts, and occupational licenses or building permits. Under the entitlement-based
approach that currently prevails, however, this is not always the case. Due process is triggered only by government action adversely affecting "protected interests," which include "life," "liberty," and "property." Government benefits are property for purposes of this analysis only when there is a "legitimate claim of entitlement" to those benefits. While this approach is well established in current law, it leaves the application of a fundamental rule of law safeguard to the vagaries of the political process.

A. Due Process, the Rule of Law, and Government Benefits

We begin with the proposition that due process should generally apply to government benefits. Decisions concerning government benefits are subject to statutory standards in most cases, and under the rule of law, those standards bind government officials. Because the constitutional function of the Due Process Clause is to provide an essential safeguard for the rule of law, due process should therefore apply to benefit decisions. The differences between government benefits and private rights do not justify the exclusion of government benefits from essential rule of law safeguards.

While the rule of law has various connotations and shades of meaning, at bottom it reflects a core requirement of legal regularity under which government actors derive their authority from, and are bound by, the law. As captured by Marbury v. Madison’s famous pronouncement that ours is "a government of laws, and not of men," the rule of law is central to the constitutional order. Insofar as the interest at issue in Marbury was a government benefit (a position as a Justice of the Peace), Marbury leaves

15. See id. at 160-63 (discussing the reaches and limits of the entitlement system).
16. In the regard, we simply disagree with critics of the current doctrine who argue that due process should be confined to traditional common law private rights. See infra notes 192-207 and accompanying text (discussing and critiquing “traditionalist” approaches to due process).
18. 5 U.S. (1 Cranch) 137, 163 (1803).

While the text of the Due Process Clause is extremely general, the fact that this text is (uniquely) expressed twice in the Constitution strongly suggests an understanding that its words state a central proposition about the requirements of American legal order. Historically, the clause reflects the Magna Carta of Great Britain, both its expression of principles of legality and its particular assurance that all would be subjected to the ordinary processes (procedures) of law. Its words also echo that country’s Seventeenth Century struggles for political and legal regularity, and the American colonies’ strong insistence during the pre-Revolutionary period on observance of regular legal order. The requirement that government function in accordance with law is, in itself, ample basis for understanding the stress given these words.
little doubt that the rule of law does not become inoperative simply because a government benefit is involved.

Within our Constitution, the requirement of due process is the core expression of this rule of law ideal, incorporated into two separate constitutional amendments. Although neither provision produced significant debate or discussion, what is known about the origins of due process indicates that it is closely linked to the rule of law. Indeed, the evidence suggests that the framers understood the phrase "due process of law" as the equivalent of the phrase "by the law of the land" in the Magna Carta. So understood, the primary focus of the Due Process Clauses was to ensure that officials comply with legal standards, thereby preventing the arbitrary and abusive exercise of government power.

Due process also incorporates a specific mechanism to ensure that the government acts in accordance with law—fair procedures. The requirements of notice and an opportunity to be heard by an unbiased decisionmaker provide an effective means of constraining factual determinations and ensuring the application of the law to those facts.

21. Chapter 39 of the Magna Carta provides: "No free man shall be taken, imprisoned, outlawed, banished, or in any way destroyed . . . except by the lawful judgment of his peers and by the law of the land." A.E. Dick Howard, The Road from Runnymede, Magna Carta and Constitutionalism in America 298 (1968) (quoting Chapter 39 of the Magna Carta) (emphasis added). After Sir Edward Coke declared "law of the land" to be synonymous with "due process of law," prominent American commentators, including Kent, Storey, and Cooley, continued this association, thereby suggesting to early American lawyers that the concept of "due process of law" was derived from the Magna Carta. See Edward S. Corwin, Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368 (1911) (explaining the link between "by the law of the land" and "by due process of law"). Later scholars have argued that Coke's association is mistaken in terms of how the English understood the phrase "law of the land," see, e.g., Keith Jurov, Un timely Thoughts: A Reconsideration of the Origins of Due Process of Law, 19 Am. J. Legal History 265 (1975), but the framers are unlikely to have made this distinction. See Howard, supra, at 299 ("From the start, the American courts, state and federal, approached due process with the express acknowledgment that it sprang from [the] Magna Carta."); see also Murray's Lessee v. Hoboken Land Improvement Co., 59 U.S. (18 How.) 272, 276 (1855) (stating that "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta").
22. See Rodney L. Mott, Due Process of Law 159, 161 (1973):
There is no doubt that the Fifth Amendment was expected to limit arbitrary abuses of the powers of government from whatever source abuse might come, and it is a perfectly tenable hypothesis that the due process provision was intended to serve as a general limitation to check tyranny in any kind of case in which it should arise . . . . This view that due process of law was considered as a general phrase designed to prevent general arbitrary action on the part of the government is strengthened when we consider that even though it had been frequently used in the colonies and in England, no settled meaning was yet attached to it.
23. Another core rule of law protection is judicial review. As noted previously, see supra note 8, we will address the problem of judicial review and government benefits in another article.
24. Concerns over the potential for evasion of the law through abusive fact-finding are evident in the text of the Constitution itself, which provides, in Article III, § 2, cl. 2, for the
Most directly, a party who is the subject of government action will ordinarily have information that is essential to a fair and accurate decision. Equally important, it is fundamentally unfair to deny adversely affected parties the opportunity to convince decisionmakers regarding the facts or the proper application of law to the facts. Finally, the hearing process provides a mechanism through which evidence is gathered, presented, and evaluated to provide a basis for the decisionmakers’ factual conclusions and a record for reviewing those conclusions.

The rule of law is violated when the government fails to follow statutory or other legal standards in determining government benefits. While we believe that the differences between private property and government benefits are overstated, our more fundamental point is that, regardless of the character of the underlying interest, the injury to rule of law principles is the same when the government acts inconsistently with legal standards. In this regard, it is critical to bear in mind that we are not talking about a substantive constitutional right to a particular benefit, but rather a right to have those benefits government does provide allocated in accordance with the rule of law. Under the current entitlement approach, this right rests on decidedly shaky foundations.

B. Political Control over Entitlements

The express requirement of a “legal entitlement” makes the applicability of due process protection contingent on the legislature’s willingness to create one. Since the Supreme Court has also made clear that the Constitution does not normally impose affirmative duties on the government, a legislature has the power to control the nature and extent

Supreme Court’s appellate jurisdiction “both as to Law and Fact.” As Justice Story observed in Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 357 (1816), if a court may only construe a law in the abstract and may not review the factual basis upon which a case rests, its appellate jurisdiction “will be wholly inadequate... and may be evaded at pleasure.”


26. Thus, two critical rule of law safeguards, due process and judicial review, are mutually reinforcing.

27. See infra notes 201-03 and accompanying text (examining the similarities between private property rights and government benefits).

28. Indeed, as we will develop in Part II of the Article, there is a long history of applying due process to government benefits. See infra notes 62-106 and accompanying text (rejecting the conventional notion that Goldberg v. Kelley expanded the scope of due process).

of any benefit it creates, including whether there is an "entitlement" to that benefit.\textsuperscript{30} Therefore, under the entitlement approach, due process does not apply in contexts where, although government officials are subject to statutory or other legal standards, these standards are not sufficient to create a legal entitlement.

Welfare reform in Wisconsin affecting persons seeking assistance under the Temporary Assistance to Needy Families (TANF) program demonstrates how the entitlement approach permits legislative bodies to preclude due process protection for government benefits. Under recent reform legislation, the state has eliminated "pre-termination" hearings for beneficiaries and provided only a limited post-deprivation "Fact Finding Review" of some adverse decisions.\textsuperscript{31} This procedure would appear to be inadequate under \textit{Goldberg v. Kelly},\textsuperscript{32} which held that states had to have a hearing before the termination of welfare benefits.\textsuperscript{33} Nonetheless, the state apparently believes that due process does not apply because both federal\textsuperscript{34} and state law\textsuperscript{35} expressly disclaim the creation of any entitlement to benefits.

The constitutionality of this aspect of Wisconsin's law has not been resolved, but the lower federal courts have been receptive to arguments against the existence of a property interest in benefits when statutes contain such disclaimers.\textsuperscript{36} Although it is not entirely clear whether an express

\textsuperscript{30} There are, of course, limits to this "greater power includes the lesser power" argument; the government, for example, may not impose standards or conditions on benefits that violate other constitutional provisions. See, e.g., Adarand Constructors, Inc., v. Pena, 515 U.S. 200 (1995) (invalidating financial incentives for government contractors to hire minority firms). But the government appears to be free to decline to create an entitlement and thereby avoid the constraints of due process.

\textsuperscript{31} The statute provides that applicants and recipients adversely affected by benefit decisions "may petition the Wisconsin works agency for a review of such action," Wis. Stat. § 49.152 (2001-02), but the statute does not specify the form of that review, which in any event comes after the adverse decision. The agency's internal policy documents suggest that such reviews afford claimants limited procedural rights. See generally Arlo Chase, Note, \textit{Maintaining Procedural Protections for Welfare Recipients: Defining Property for the Due Process Clause}, 23 N.Y.U. REV. LAW & SOC. CHANGE, 571, 578-79 (1997) (arguing that this arrangement conflicts with the requirements of \textit{Goldberg v. Kelly}).

\textsuperscript{32} 397 U.S. 254 (1970).

\textsuperscript{33} \textit{Id.} at 264.

\textsuperscript{34} See 42 U.S.C. § 601(b) (2000) ("This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.").

\textsuperscript{35} See Wis. Stat. § 49.141(4) (2001-02) ("Notwithstanding fulfillment of the eligibility requirements for any component of Wisconsin works, an individual is not entitled to services or benefits under Wisconsin works.").

\textsuperscript{36} See, e.g., Washington Legal Clinic for the Homeless v. Barry, 107 F.3d 32, 38 (D.C. Cir. 1997) (expressing doubt over whether a simple disclaimer was sufficient to defeat an entitlement, but relying on disclaimer in part to support its conclusion that there was no protected property interest in emergency shelter under applicable law); Mover Warehouse, Inc. v. City of Little Canada, 71 F.3d 716, 719 (8th Cir. 1995) (relying in part on statement of no entitlement to conclude that there was no protected property interest in renewal of
disclaimer, standing alone, is sufficient to defeat an entitlement if the statute otherwise creates one, the combination of a disclaimer with other factors appears to be sufficient.

In Colson v. Silman, for example, the Second Circuit held that a state statute providing for emergency medical benefits did not create a property interest because the relevant statute, which contained an express disclaimer of entitlement, also conditioned benefits on the appropriation of funds. Because a claimant who met eligibility requirements could be denied benefits for lack of funds, Colson concluded that a claimant had no legal entitlement to them from the state government. Under this reasoning, the possibility of insufficient funds destroys the entitlement to a benefit even if lack of funds is not an issue and the denial of benefits was based on other considerations.

Current doctrine also creates considerable uncertainty about the extent to which due process applies to applications for, as opposed to the termination of, benefits. Roth stated that due process applies only to benefits already acquired, apparently because the benefits do not become "property" until an initial entitlement to them has been established. Based on this language, many commentators have indicated that entitlement theory incorporates a requirement of "present enjoyment." Notwithstanding the language in gaming license); Colson v. Silman, 35 F.3d 106, 108-09 (2d Cir. 1994) (relying in part on declaration of no entitlement to conclude that there was no property interest in state funding for emergency medical benefits, although the parties conceded property interest in individual claims against the county).

37. A leading administrative law hornbook has said of the federal statute that "[i]t is hard to imagine that any court will hold that an individual has a protected 'property' interest in any benefits made available by this statute, given the powerful evidence that Congress did not intend to create any 'property' interest when it enacted the statute." RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIJL, ADMINISTRATIVE LAW & PROCESS 243 (3d ed. 1999). Nonetheless, if a government benefit is otherwise structured as an entitlement, then a disclaimer standing alone might be disregarded. For example, if a statute creating a government position specified a term of years, and provided further that the employee could be removed only for specified causes, but disclaimed the creation of an entitlement, a court might look to the substance of the statute rather than to the disclaimer. Of course, if in such a case the court relied on the disclaimer to deny the application of due process, then the rule of law would be on shaky foundations indeed.

38. 35 F.3d 106, 109 (2d Cir. 1994); see also Wash. Legal Clinic for the Homeless v. Barry, 107 F.3d 32, 36-38 (D.C. Cir. 1997) (concluding that, because the city council had discretion to allocate shelter space among eligible families, entitlement to emergency shelter did not exist); Eisdon v. Pierce, 745 F.2d 453, 462 (7th Cir. 1984) (holding that where discretion ary judgment rests with a landlord, outside of the constraints of legal criteria, entitlement to Section 8 housing did not exist).

39. 35 F.3d at 109. Although the state argued that there was no property interest, the county did not contest this point. See id. at 108 (stating that "[t]he County did not contest the district court's conclusion that the 'claim of entitlement' runs against it").

40. See generally Comment, Entitlement, Enjoyment, and Due Process of Law, 1974 DUKE L.J. 89.

41. 408 U.S. at 576 (observing that due process protects "the security of interests that a person has already acquired in specific benefits") (emphasis added).

42. See, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 620 (7th
Roth, the federal courts of appeals have unanimously rejected an absolute rule that applications are never subject to due process safeguards, and the Supreme Court repeatedly has characterized the question as an open one while declining to resolve it. Nonetheless, the lower courts have generally imposed especially exacting standards for the creation of a legal entitlement in the context of applications.

The entitlement approach also appears to make due process inapplicable when government officials allocating benefits are subject to standards that leave some discretion whether or not to award a government benefit. Most courts require mandatory language or its equivalent to create a property interest. In Welch v. Paicos, for example, the court held that due process did not apply to a developer’s application for a modification of a permit for a subsidized housing project. Although the modification

ed. 2004) (“This [entitlement] concept also seems to include a requirement that the person already has received the benefit or at least had a previously recognized claim of entitlement.”).

43. See Mallette v. Arlington County Employees’ Supplemental Ret. Sys. II, 91 F.3d 630, 638 (4th Cir. 1996) (“As far as we can tell, every lower federal court that has considered the issue has rejected the ‘application/revocation’ distinction.”); see also Gregory v. Pittsfield, 470 U.S. 1018, 1021 (1984):

One would think that where the state law creates an entitlement to general assistance based on certain substantive conditions, there similarly results a property interest that warrants at least some procedural safeguards. Although this Court has never addressed the issue whether applicants for general assistance have a protected property interest, the weight of authority among lower courts is [that they do]. Id. (O’Connor, J., joined by Brennan and Marshall, JJ., dissenting from denial of certiorari) (citations omitted); Peer v. Griffeth, 445 U.S. 970 (1980) (describing the court of appeals’ extension of Goldberg to benefit applications as “a significant step” that “merits plenary consideration by the full Court”) (Rehnquist, J., dissenting from denial of certiorari).

44. See Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 61 n.13 (1999) (reserving question whether due process required a hearing at some time before insurance benefits are denied as not reasonable and necessary); see also Lyng v. Payne, 476 U.S. 926, 939 (1986) (“We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendments.”); Walters v. Nat’l Ass’n of Radiation Survivors, 473 U.S. 305, 320 n.8 (1985) (noting that the lower court had held that applicants for veterans benefits had a property interest, but finding it unnecessary to address the issue).

45. See, e.g., Midnight Sessions, Ltd. v. Philadelphia, 945 F.2d 667, 679 (3d Cir. 1991) (holding that an applicant for a business license has no entitlement when the licensing authority retained discretion to determine whether applicant’s operations would be in a safe and proper place); Welch v. Paicos, 66 F. Supp. 2d 138, 164-65 (D. Mass. 1999) (reviewing cases and concluding that applicants have a property interest “only if the benefit, license, or program for which he applies is routinely granted to all applicants meeting objective or easily judged criteria”).

46. See Plaza Health Labs., Inc. v. Perales, 878 F.2d 577, 581 (2d Cir. 1989) (“[T]he existence of provisions that retain for the state significant discretionary authority over the bestowal or continuation of a government benefit suggests that the recipients of such benefits have no entitlement to them.”).


48. Because Welch v. Paicos involved an application for a permit modification rather than revocation of a permit, it also implicates the problem of already acquired, as opposed to future benefits, see supra notes 40-45 and accompanying text, and may reflect a stricter
request was governed by legal standards, there was no property interest because the agency considering the request had some discretion in the application of those standards. 49

Thus, the entitlement approach leaves significant gaps in the application of the Due Process Clause to government benefits. Of course, where due process does not apply, Congress or a state legislature can, and often does, incorporate statutory requirements for notice and a suitable hearing. 50 There is, however, no guarantee that this will happen. To the contrary, legislatures have strong incentives to minimize (or even eliminate) procedural protections for unpopular groups, 51 such as welfare recipients or, in an earlier era, persons accused of being Communists.

These incentives are well illustrated by returning to the example of welfare reform in Wisconsin, which provides only a limited post-termination hearing to persons removed from the welfare rolls. 52 Pre-termination hearings, the costs of which are born by the government, can prevent the erroneous termination of benefits, 53 the costs of which are born by claimants. 54 The government, therefore, has an inherent incentive to deny pre-termination hearings even if there would be an overall gain from supplying them. Welfare recipients lack the political clout to overcome such incentives, as the tenor of the recent welfare reform movement suggests.

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conception of entitlement than cases dealing with benefit termination. 66 F. Supp. 2d at 165-66. We did not find any cases dealing with the termination of a government benefit based on the discretionary application of standards, although there is language in some cases suggesting that there would be no property interest.


50. See Pierce, *supra* note 7, at 1998 (suggesting that legislatures and agencies are equally, if not more, capable than courts of determining appropriate procedures).


52. *See supra* notes 31-35 and accompanying text.

53. The evidence in *Goldberg* showed that the New York welfare agency reversed approximately 37% of its initial decisions at post-termination hearings, and the error rates were even higher in other states. Brief for Appellees at 38-19, *Goldberg* (No. 62); Comment, *Due Process and the Right to a Prior Hearing in Welfare Cases*, 37 FORDHAM L. REV. 604, 611 & n.47 (1969) (explaining that many welfare decisions are reversed after later hearings).

54. Indeed, to the extent that erroneous denials go unchallenged and uncorrected, the government realizes a gain from the benefits not paid. Even if back benefits may eventually be recovered in a post-termination hearing, in the meantime, claimants (who are, by definition, poor) face the loss of their primary source of income.
C. Logical Implications

Another well-known problem with the entitlement-based approach to due process is the Supreme Court’s inability to deny the logical implications of its greater-power-includes-the-less-power reasoning. Starting with the premise that the government has no antecedent constitutional duty to provide benefits, the Court reasons that the legislature controls the creation of property through its control over the positive law by conferring entitlements. But this logic “proves too much,” and threatens to undermine both the constitutional content of due process and traditional private property rights.

Consider the “bitter-with-the-sweet” argument forcefully advanced by (then) Justice Rehnquist in *Arnett v. Kennedy*. Since the government controls the creation and extent of any entitlement, it may define that entitlement by reference to the procedures to be followed when it is terminated. This reasoning permits the legislature to control not only the creation of an entitlement, but also the content of due process. Nonetheless, it seems to follow logically from the premises of entitlement theory, insofar as it is hard to see how a beneficiary can take any more rights than the legislature chooses to give it.

The Court rejected the bitter-with-the-sweet argument in *Cleveland Board of Education v. Loudermill* without offering any explanation of why. *Loudermill* simply declared by judicial fiat that the existence of a property interest was to be determined by reference to external sources of law creating an entitlement, but the procedures that must accompany its deprivation are determined by due process.

For similar reasons, even traditional private property rights are at risk under the entitlement approach because there is no constitutional baseline for property. Logically, if the state’s positive law determines the existence and scope of an entitlement, then the state could limit entitlements to private property by reserving the right to impose whatever conditions it might choose. Once again, the Court has been able to avoid this result, but only by ignoring the logical implications of entitlement theory.

These serious flaws in entitlement theory suggest to us that the current

58. See Henry Paul Monaghan, Of “Liberty” and “Property,” 62 CORNELL L. REV. 405, 440 (1977) (hypothesizing a statute under which “no person who bought a car after the statute was passed would be deemed to have a ‘right to continued ownership’ as against the state”).
59. See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 833-34 n.2 (1987) (rejecting the argument that the state’s prior announcement of its intention to condition rebuilding permits on the cession of access to public beaches prevented the imposition of this condition from being a “taking”).
entitlement approach to due process warrants re-examination. We undertake such a re-examination in the next part of the Article, which reveals that—contrary to the conventional wisdom—the adoption of the entitlement approach in Roth was an unnecessary and unprecedented restriction of the due process protections accorded to government benefits.

II. THE REAL DUE PROCESS REVOLUTION

Before the due process revolution of the 1970s, according to the conventional account, “new property” interests, such as government employment, licenses, and welfare benefits, were entirely beyond the scope of due process.60 This account, however, is quite simply wrong. A number of cases, some of them quite old, applied due process to various government benefits long before the revolution, although those cases left considerable ambiguity about what triggered the application of due process. Thus, Goldberg v. Kelley,61 usually seen as the seminal new property decision, did not reflect an expansion of the scope of due process. The truly revolutionary decision was Roth, which replaced the open-ended and ambiguous due process analysis characterizing the Court’s prior due process cases with a strict requirement of a protected interest in life, liberty, or property and incorporated the concept of legal entitlement to define property.

A. Brief History of the Not-So-New Property

Most academic commentators assume that prior to the due process revolution, the right-privilege distinction precluded the application of due process protection to government benefits.62 According to this understanding, due process applied only to interests traditionally recognized by the common law as rights, including private property and certain fundamental personal liberties. By contrast, because the government could revoke government benefits at any time for any reason, beneficiaries had no right to “mere privileges” such as government employment or welfare, which were therefore beyond the scope of due process. As Justice Holmes famously observed, a person “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”63 Thus, cases such as Bailey v. Richardson,64 which rejected a

60. See, e.g., Pierce, supra note 7, at 1980 (asserting that the effect of the due process revolution “was to expand the scope of due process protection to encompass hundreds of new ‘property’ and ‘liberty’ interests that were previously considered mere unprotected ‘privileges’”).
62. See, e.g., ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, supra note 14, at 154-56 (discussing the fall of the privilege doctrine); PIERCE ET AL., supra note 37, at 229 (same).
government employee's claim that his termination by the President without a hearing violated due process, pronounced broadly that "the [D]ue [P]rocess [C]lauses does not apply to the holding of Government office."\textsuperscript{65}

The difficulty with this account is that the Supreme Court did extend due process to government benefits long before the revolution. Indeed, there are multiple decisions, many of them quite old, applying due process to each of the three major categories of new property—government employment, licenses, and social insurance benefits. Since the reasoning of these cases mixed notions of property, the importance of the interest to the claimant, and broader considerations of legal regularity, they left unclear precisely why due process attached. Nonetheless, the cases clearly belie the conventional wisdom that the extension of due process to such government benefits marked a revolutionary expansion of constitutional protection.

Consider first the example of government employment, which was the focus of both Justice Holmes' famous observation and Bailey v. Richardson's broad pronouncement. As noted previously,\textsuperscript{66} this was the type of interest at issue in Marbury v. Madison itself, where the plaintiff sought a writ of mandamus directing the Secretary of State to deliver his commission as a Justice of the Peace. Although Marbury was not, strictly speaking, a due process case, in determining whether rule of law principles applied, it did not appear to trouble Chief Justice Marshall in the least that a government benefit was involved.\textsuperscript{67} More directly on point are Hall v. Wisconsin\textsuperscript{68} and Indiana ex rel. Anderson v. Brand,\textsuperscript{69} decided in 1880 and 1938, respectively, which invalidated the elimination of government employment by repeal of authorizing legislation as a violation of due process.\textsuperscript{70}

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It is interesting to note that in McAuliffe, the fired policeman also claimed that he had not received a due process hearing and the court rejected this argument on the ground that he had received an adequate hearing, not that he had no right to a hearing. See id. at 518.

\textsuperscript{64} 182 F.2d 46 (D.C. Cir. 1950), aff'd by equally divided Court, 341 U.S. 918 (1952).

\textsuperscript{65} Id. at 57 (stating that "[n]ever in our history has a Government administrative employee been entitled to a hearing of the quasi-judicial type upon his dismissal from Government service").

\textsuperscript{66} See supra notes 18-19 and accompanying text.

\textsuperscript{67} Marshall was careful to determine that the commission had vested when signed and sealed, though not delivered, see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 155-62, and distinguished appointments for a term of years from positions in which an officer served at the pleasure of the President. Id. at 162. Nonetheless, once it was established that these conditions were met, the evidences of the office were property. Id. Critically, the fact that the government was the source of the interest involved made no difference.

\textsuperscript{68} 103 U.S. 5, 6, 10-11 (1880) (invalidating the elimination of government employment by repeal of legislation authorizing contract).

\textsuperscript{69} 303 U.S. 95, 108-09 (1938) (invalidating the repeal of teacher tenure legislation).

\textsuperscript{70} Although these decisions relied on substantive as opposed to procedural due process, the trigger for these two types of protections should be the same. See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 198-99 (2003) (finding it
The critical feature of these cases is that the legislature had established statutory constraints on firing.\textsuperscript{71} Thus, due process applied to government employment when it was for a specified term of years and removal was limited to specified causes. This distinction is, of course, essentially the line drawn under current entitlement doctrine, which extends due process only to government employment to which there is an entitlement, which is typically demonstrated by employment for a term of years and a “for cause” limitation on removal to cause.\textsuperscript{72}

There is also longstanding precedent applying due process to occupational licenses.\textsuperscript{73} Despite its initial conclusion in the \textit{Slaughterhouse Cases}\textsuperscript{74} that pursuit of a calling was not protected by the Fourteenth Amendment, the Court soon applied due process to occupational licensing decisions. In \textit{Yick Wo v. Hopkins},\textsuperscript{75} an 1886 decision that is perhaps most famous for its equal protection holding,\textsuperscript{76} the Court implied that unfettered administrative discretion to deny licenses to operate a laundry was incompatible with the rule of law and thus violated due process.\textsuperscript{77} Two features of \textit{Yick Wo} are particularly noteworthy. First, the licenses at issue could not possibly be considered an entitlement under the applicable law, unnecessary to determine whether a property interest existed in a building permit because the state government’s action was not sufficiently arbitrary and irrational to violate substantive due process).

\textsuperscript{71} Thus, for example, even \textit{Bailey v. Richardson} limited its pronouncement to government employment that was “at will.”

\textsuperscript{72} Nonetheless, the cases leave unclear precisely why this feature of the employment relation triggered due process. See infra notes 90-96 and accompanying text.

\textsuperscript{73} Occupational licensing may implicate both property and liberty interests. Most of the cases tend to view an occupational license as a form of property, and occupational licenses may be grouped with other kinds of government permits and licenses as a species of new property. See \textit{Bell v. Burson}, 402 U.S. 535, 542-43 (1971) (requiring due process before the revocation of a driver's license). We uncovered no early Supreme Court cases dealing with other kinds of licenses or permits, perhaps because the government was less active in this regard.

\textsuperscript{74} 83 U.S. (16 Wall.) 36 (1872). The Court’s primary focus in the analysis was on the Privileges and Immunities Clause of the Fourteenth Amendment, which prohibits the states from abridging the privileges and immunities of United States citizenship. \textit{Id.} at 74. The Court concluded that these privileges and immunities excluded those privileges and immunities attendant to state citizenship, including the right to pursue a calling. \textit{Id.} at 78. The Court concluded rather easily and without much discussion that there was no violation of due process.

\textsuperscript{75} 118 U.S. 356 (1886).

\textsuperscript{76} See id. at 373-74 (holding that a pattern of licensing decisions reflected unconstitutional discrimination against applicants of Chinese heritage).

\textsuperscript{77} See id. at 369-73 (discussing the abuse of administrative discretion and its corollary effect on an individual’s constitutional rights).
which apparently left licensing decisions entirely to the discretion of responsible officials.\textsuperscript{78} Second, the case concerned applications for licenses, rather than termination or revocation of licenses already granted.\textsuperscript{79}

While \textit{Yick Wo} did not explicitly hold that there was a due process violation, not long thereafter the Court applied the minimum rationality requirement of due process to occupational licensing requirements in \textit{Dent v. West Virginia}.\textsuperscript{80} an 1889 decision upholding the rationality of continuing educational requirements as a condition for retaining a license to practice medicine. Similarly, the 1926 decision in \textit{Goldsmith v. United States Board of Tax Appeals}\textsuperscript{81} held that notice and a hearing was required before an attorney could be precluded from practice before the Board of Tax Appeals.\textsuperscript{82}

Although government employment and occupational licenses might be reconciled with the right-privilege distinction on the theory that they resemble traditional property or liberty interests,\textsuperscript{83} the Court also extended

\textsuperscript{78} Indeed, it was the absence of standards that violated due process. \textit{See infra} note 164. This result might be reconciled with current doctrine by characterizing the denial of the license as a deprivation of the liberty interest in the pursuit of a calling, but the Court in \textit{Yick Wo} did not discuss the licenses in these terms. \textit{See} 118 U.S. at 369-73 (characterizing the interest at stake in terms of economic impact and equal protection).

\textsuperscript{79} This aspect of the case is incompatible with the suggestion in \textit{Roth} that due process only applies to benefits a claimant already has. \textit{See supra} notes 40-45 and accompanying text.

\textsuperscript{80} 129 U.S. 114, 122-25 (1889). Although \textit{Dent} and other early due process cases concerned substantive rather than procedural due process, there is no reason to suppose that the interests that will trigger due process should differ between its substantive and procedural components. \textit{See supra} note 70.

\textsuperscript{81} 270 U.S. 117, 123 (1926) ("We think that the petitioner having shown by his application that being a citizen of the United States and a certified public accountant under the laws of a state, he was within the class of those entitled to be admitted to practice under the board's rules, he should not have been rejected upon charges of his unfitness without giving him an opportunity by notice for hearing and answer.").

\textsuperscript{82} \textit{Id.} at 123. \textit{Willner v. Comm. on Character and Fitness}, 373 U.S. 96 (1963), is another 'pre-revolutionary' case. \textit{See also} Konigsberg v. State Bar of California, 353 U.S. 252, 273-74 (1957) (holding that denying admission to the state bar violated due process because the applicant's refusal to answer questions about his political associations was an insufficient basis for concluding that he lacked the requisite moral character and fitness for admission to the bar). \textit{Barsky v. Board of Regents}, 347 U.S. 442 (1954), which upheld the revocation of a license to practice medicine upon a physician's conviction of a crime overseas, is not to the contrary. While the Court characterized the practice of medicine as a privilege, \textit{id.} at 451, it did not refuse to apply due process, but rather concluded that the restriction was sufficiently reasonable to satisfy its requirements. \textit{See id.} at 453 (noting that the statutory provisions in question are "well within the degree of reasonableness required to constitute due process of law in a field so permeated with public responsibility as that of health"). Indeed, the Court apparently assumed that a hearing would attach to the denial of admission to practice. \textit{See id.} at 451 ("[The state] could at least require disclosure of [criminal] convictions as a condition of admission and leave it to a competent board to determine, \textit{after opportunity for a fair hearing}, whether the convictions, if any, were of such a date and nature as to justify denial of admission to practice . . . ." (emphasis added)).

\textsuperscript{83} Government employment for a term of years subject to for cause removal restrictions resembles a private employment contract. Even the distinction between "at will" employment and employment for a term of years resembles the law's traditional treatment of private employment contracts. Similarly, occupational licensing restricts the
due process protections to government benefits that were regarded as largess. Again, it is instructive that Marbury assumed judicial review would apply to benefits for disabled veterans of the revolutionary war. Indeed, Chief Justice Marshall used veterans benefits to prove the point that government officials must be amenable to the rule of law.84

The Court also held that due process applied to veterans benefits in Dismuke v. United States,85 a 1936 decision, noting that the government is not required to create claims against itself, but that when it does elementary notions of due process attach.86 By 1951, the notion that procedural safeguards ought to attach to government benefits was sufficiently established when Justice Frankfurter (no particular friend of expansive notions of due process) observed that "[e]ven in the distribution by the Government of benefits that may be withheld, the opportunity of a hearing is deemed important."87 Indeed, Flemming v. Nestor,88 a 1960 decision rejecting the contention that Social Security benefits were vested rights and upholding retroactive disqualification for benefits upon deportation, nonetheless applied the minimum rationality test of due process to the disqualification.89

While these cases make clear that due process attached to government benefits long before the due process revolution, they are unclear about what triggers the application of due process. Many of the cases used the language of vested rights, property, or entitlements to describe the interest in question and might therefore be read as supporting current entitlement doctrine.90 Critically, however, these cases did not treat the existence of a

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84. See 5 U.S. at 164:

By the act concerning invalids, passed in June 1794 . . . the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate?

For a detailed discussion of Marshall’s use of veteran’s benefit cases as authority, and for the suggestion that he mixed and mangled several cases in his account of them, see Susan Low Bloch & Maeva Marcus, John Marshall’s Selective Use of History in Marbury v. Madison, 1986 WIS. L. REV. 301 (1986) and Richard E. Levy, Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefit System, 13 KAN. J. L. & PUB. POL’Y 303, 308-12 (2004) (discussing the early history of the veterans benefit system, including early Supreme Court decisions).

85. 297 U.S. 167 (1936).

86. Id. at 171-72.


89. Id. at 611.

90. For example, in Dent v. West Virginia, 129 U.S. 114 (1889), which held that a continuing education requirement to maintain a license satisfied the minimum rationality
property interest or entitlement as an essential prerequisite for the application of due process. In other cases, the Court's analysis emphasized more open-ended rule of law concepts, and in some cases the Court applied due process to interests that it clearly did not regard as property. Intermingled in this analysis were more open-ended considerations of the importance of these interests to the individuals asserting them. As one leading commentator observed, before the revolution, "courts determined the requirements of procedural due process in a one-step process without any clear attempt to distinguish (1) the question of what specific interests are entitled to due process protection, from (2) the inquiry into what process is due."

The Court's indifference to the status of the interests in question reflected a broader lack of precision in due process doctrine that generally prevailed until the due process revolution of the 1970s. Aside from the special protection attached to vested rights, the Court did not conceive of due process in terms of particular safeguards that attached to specifically

91. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, at 164 (1803) ("Is it to be contended that where the law in precise terms directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate?"); Dismuke v. United States, 297 U.S. at 171-72 (reasoning that "if [a hearing officer] is authorized to determine questions of fact, his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, . . . or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized . . ."). Both Marbury and Dismuke also use the language of entitlement. See Marbury, 5 U.S. at 155, 162-63 (referring to the commission in question as a right or a vested right); Dismuke, 297 U.S. at 172 ("[T]he power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled.").

92. E.g., Flemming v. Nestor, 363 U.S. 603, 611-12 (1960) (applying the minimum rationality test to benefits that the Court determined were not vested property rights).

93. See generally Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (considering "the precise nature of the government function involved as well as . . . the private interest that has been affected by governmental action").

94. Lawrence H. Tribe, American Constitutional Law 678-79 (2d ed. 1988) (citing McElroy, 367 U.S. at 895). For contemporaneous treatments of this approach, see Kenneth Culp Davis, Administrative Law Text 127-45 (1959) (discussing the application of hearing requirements to various government benefits) and David Morris, Welfare Benefits as Property: Requiring A Prior Hearing, 20 ADMIN. L. REV. 487, 496 (1968) ("Failure to find a property right present, however, has not stopped the Court in applying the [D]ue [P]rocess [C]lause when it wants to.").
defined interests. Instead, the Court employed an open-ended balancing approach that incorporated elastic concepts such as basic standards of ""decency and fairness."" Under this open-ended analysis, the Court applied due process when it considered the interests of the affected party to outweigh the government's interests in the efficient enforcement of its police power or other regulations.

That the Court did not require a property right to trigger due process was pointedly illustrated by Flemming v. Nestor, which upheld amendments to the Social Security Act providing for the termination of Old Age Benefits upon the deportation of the recipient, even as to benefits that had accrued prior to the amendments. The Court overturned the lower court and held that Social Security benefits were not ""vested"" rights. This conclusion implied that Social Security benefits were not property rights in the traditional sense, but the Court went on to state that congressional power to modify them was not ""free of all constitutional restraint"" because ""[t]he interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause."" While the Court ultimately upheld the statute, its application of due process to benefits that were not vested property rights, based on a casual reference to their being of ""sufficient substance,"" underscores both the broad application of due process to government benefits and the lack of any specific ""trigger"" for due process protections.

Against this background, it becomes clear that the application of due process to welfare benefits in Goldberg, which is typically treated as the opening salvo in the due process revolution, was hardly revolutionary. Indeed, this question was so well settled the state conceded that due process

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95. Rochin v. California, 342 U.S. 165, 169 (1952) (due process encompasses ""cannons of decency and fairness which express the notions of justice of English-speaking peoples . . ."") (citation omitted).
96. McElroy, 367 U.S. at 895.
98. The Court concluded that ""a person covered by the Act has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment."" Id. at 611. It explained that because a recipient's benefits ""are not dependent on the degree to which he was called upon to support the system by taxation . . . the noncontractual interest of an employee covered by the Act cannot be soundly be analogized to that of a holder of an annuity, whose right to benefits is bottomed on his contractual premium payments."" 363 U.S. at 610. The lower court had held that benefits were an ""accrued property right"" whose termination violated due process. See Nestor v. Folsom, 169 F. Supp. 922, 934 (D.D.C. 1959).
applied, and argued only that a post-termination hearing satisfied the requirements of due process. Similarly, although the Supreme Court discussed the issue in dicta, nothing in that discussion suggests that the Court was doing anything revolutionary. Like the prior cases, moreover, Goldberg was ambiguous about precisely why due process applied. The Court described welfare benefits as "statutory entitlements" that were "more like property than a "gratuity,"" but it also emphasized the importance of the interest to recipients, who would be faced with "brutal need" if benefits were terminated.

It follows from this brief history that the "recognition" of "new property" interests in the 1970s was not a significant expansion of the scope of due process protection. Indeed, the real due process "revolution" was not the extension of due process to government benefits, but rather a reformulation of doctrine that actually undermined the protection of benefits that had long been within the scope of due process. As we will describe in the following section, Roth's adoption of an entitlement approach clarified the issue of when due process applied, but it did so in a manner that restricted the scope of due process as compared to many of the Court's previous cases.

B. The Entitlement Revolution in Roth

Goldberg was not revolutionary, but Board of Regents v. Roth was. Roth held that a university could decide not to renew the annual contract of an untenured professor without first giving him notice and an opportunity for a hearing because the professor had no property interest in renewal of the contract. The reasoning of the majority opinion, written by Justice Stewart, incorporated two critical innovations in due process doctrine. First, the Court for the first time imposed a strict requirement that a litigant must show that he or she had been deprived of a "protected interest" in "life," "liberty," or "property" in order to claim due process protection.

102. Goldberg, 397 U.S. at 261 (noting that the state "does not contend that procedural due process is not applicable to the termination of welfare benefits").
103. Id.
104. The Court observed that New York could not have won dismissal of the case by arguing that public assistance benefits were "a 'privilege' and not a 'right,'" id. at 262, and it went on to justify this observation by citing several prior cases that applied due process to government benefits, indicating that the decision was a logical extension of prior doctrine. See id. at 261-63.
105. Id. at 262 n.8. It is worth noting that the Court in Goldberg said the benefits were like property, not that they were property. In this sense, Goldberg is inconsistent with a strict requirement of a protected interest.
106. Id. at 261 (quoting the district court); see also id. at 263-64 (emphasizing the impact of the loss of benefits pending a post-termination hearing).
108. Id. at 576-78. The Court also concluded that the professor had not been deprived of a liberty interest by the nonrenewal of his contract because the decision did not damage his reputation so as to prevent him from the pursuit of a calling. See id. at 572-75.
Second, the Court defined property by reference to the creation of an entitlement by a body of law that is external to the Constitution. The key passage establishing the protected interest requirement began with the following categorical assertion:

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.\(^\text{109}\)

Justice Stewart acknowledged that “a weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process,”\(^\text{110}\) but emphasized that “[t]o determine whether due process requirements apply in the first place, we must look not to the ‘weight’ but to the nature of the interest at stake.”\(^\text{111}\) Finally, Justice Stewart recognized that “‘liberty’ and ‘property’ are broad and majestic terms” and that the right-privilege distinction had been rejected,\(^\text{112}\) but concluded that the Court had “observed certain boundaries” because “the words ‘liberty’ and ‘property’ in the Due Process Clause of the Fourteenth Amendment must be given some meaning.”\(^\text{113}\)

Having established that due process applied only if the professor had a protected interest in the renewal of his contract for the following year, Justice Stewart turned to the question of what constitutes “property” for the purpose of due process analysis. On this issue, he stated simply that “[t]o have a property interest in a benefit, a person . . . must . . . have a legitimate claim of entitlement to it.”\(^\text{114}\) Justice Stewart explained that property interests “are not created by the Constitution,” but “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”\(^\text{115}\) Since the instructor’s terms of appointment secured “absolutely no interest in re-employment” for the next year, he had “absolutely no possible claim of entitlement to re-employment for the next year,” which meant he was not deprived of any property

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\(^\text{109}\) Id. at 569-70.
\(^\text{110}\) Id. at 570 (emphasis in original text).
\(^\text{111}\) Id. at 570-71.
\(^\text{112}\) It is particularly ironic that the court cited Bailey v. Richardson as an example of the now rejected right-privilege distinction. Bailey was actually limited to employment at will, see supra note 71, and the Court in Roth actually applied nearly identical reasoning to conclude that there was no entitlement to renewal of the contract because the college and the teacher had an employment at will arrangement after expiration of the teacher’s one-year contract. See infra note 116 and accompanying text.
\(^\text{113}\) Roth, 408 U.S. at 571-72.
\(^\text{114}\) Id. at 577.
\(^\text{115}\) Id. Thus, in order to have a property interest, a person must point to “rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” Id.
protected by the Due Process Clause.\textsuperscript{116}

It is striking just how little authority Justice Stewart referred to in support of the protected interest requirement of \textit{Roth}.	extsuperscript{117} While this reading of the phrase "life, liberty, or property" as a technical reference to the specific interests listed may seem self-evident from the text of the Due Process Clause, it is not the only plausible reading. It is equally plausible to read the phrase "life, liberty, or property" as a general reference to all individual interests of value,\textsuperscript{118} a reading that has support in both the text and the history of the Due Process Clause.

Textually, it is particularly instructive to compare the language of the Fifth Amendment's Due Process and Takings Clauses. While the Due Process Clause refers to "property," the Takings Clause incorporates the more technical and specific term "private property."\textsuperscript{119} Although one must be cautious about drawing inferences from differences in language, the proximity of the Due Process and Takings Clauses strongly suggests that the difference was intended to have some meaning.\textsuperscript{120} Most clearly, it seems to dispel any argument that due process applies only to private property.

The historical context also tends to support reading the words "life, liberty, and property" as a general phrase. As Ed Rubin has pointed out, the connection between due process and the Magna Carta suggests the Framers' emphasis "was on the concept of due process, not on liberty or property."\textsuperscript{121} While it is impossible to say with confidence that the framers understood the phrase "life, liberty, or property" in this more general way, it is equally impossible to say with certainty that the Clause compels the reading adopted in \textit{Roth}.

\textsuperscript{116} \textit{Id.} at 578.
\textsuperscript{117} It has long been rumored that a law clerk who was asked to distinguish the \textit{Goldberg} case came up with the distinction that \textit{Goldberg} involved the entitlement theory that the Court adopted. Our research does not reveal whether this story is true, but it is plausible since \textit{Goldberg} referred to welfare benefits as an "entitlement," see supra note 105 and accompanying text, and the Court was obviously seeking some way to rule against \textit{Roth} notwithstanding \textit{Goldberg}.
\textsuperscript{118} NOWAK \& ROTUNDA, supra note 42, at 594 ("One might assume (incorrectly as it turns out) that the phrase 'life, liberty or property' was to include all aspects of an individual's life in society, but the Supreme Court has given the phrase a more restrictive meaning."). Nowak and Rotunda compare this interpretation to the common reference "to all matter as 'animal, vegetable or mineral' with no intent to exclude fish, fruits, or alloys," \textit{Id.} at n.1. For a discussion of other academic proposals based on such a broader interpretation, see infra notes 222-40 and accompanying text.
\textsuperscript{119} "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.
\textsuperscript{120} As is the case today, at the time of the framing, the term "property" had various meanings in various contexts. See Steven Siegel, \textit{Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation}, 70 VA. L. REV. 187, 189-90 (1984).
\textsuperscript{121} Rubin, supra note 20, at 1093.
Nor was a strict requirement of a protected interest compelled by precedent, insofar as prior cases had not imposed a “protected interest” requirement. Justice Stewart cited only Morrissey v. Brewer, another opinion that he wrote which was handed down the same day. Even Morrissey offers only weak support at best for Justice Stewart’s conclusions. The referenced passage from Morrissey begins with the statement that “[w]hether any procedural protections are due depends on the extent to which an individual will be ‘condemned to suffer grievous loss,’” which is more consistent with a balancing approach than a protected interest requirement. The passage in Morrissey continued with the explanation that “[t]he question is not merely the ‘weight’ of the individual’s interest, but whether the nature of the interest is one within the contemplation of the ‘liberty or property’ language of the Fourteenth Amendment.”

For this proposition Justice Stewart in Morrissey cited only Fuentes v. Shevin, another of his own opinions in a case decided the previous year, which also stated without citation to authority that the protections of due process apply “only to the deprivation of an interest encompassed within the Fourteenth Amendment’s protection.”

In none of these three opinions did Justice Stewart identify a Supreme Court opinion other than his own that expressly required the presence of a “protected” liberty or property interest to trigger due process. There is, moreover, a critical difference between Roth on the one hand and Morrissey and Fuentes on the other. In Morrissey and Fuentes, Justice Stewart relied on the nature of the interest to extend due process protections to interests whose weight was allegedly insufficient to warrant protection, while in Roth it was used to preclude the application of any due process safeguards, even though the weight of the interest in question was great.

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122. See supra notes 90-99 and accompanying text; NOWAK & ROTUNDA, supra note 42, at 594 n.2 (describing Roth as “the first clear use of this approach”).
123. 408 U.S. 471 (1972).
124. Id. at 481 (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).
125. Id. (emphasis added).
127. Morrissey, 408 U.S. at 481.
128. Fuentes, 407 U.S. at 84. Fuentes rejected the lower court’s conclusion that the interests in question were not entitled to protection because they did not represent complete ownership and had little value. See id. at 86-90.
129. See, e.g., Roth, 408 U.S. at 569-72; Morrissey, 408 U.S. at 481; Fuentes, 407 U.S. at 84. The cases do reference other decisions using the language of property and entitlement, but not as a strict requirement to trigger due process safeguards.
130. The interest in Fuentes was a possessory interest in household goods purchased with a conditional sales contract under which the seller retained title. In Morrissey, a parolee had only a limited liberty interest in freedom from bodily restraint because convicted prisoners have already lost their “liberty” by means of a criminal trial. See 408 U.S. at 480. In Fuentes, the Court emphasized the character of the interest, as opposed to its
Justice Stewart’s discussion of property interests in Roth, like his discussion of the requirement of a protected interest, did not marshal much authority in support of its key propositions. He did not cite any authority for his initial definition of property as “already acquired . . . benefits,” a conception that led to considerable confusion in later cases dealing with initial applications for benefits. Justice Stewart did base the entitlement approach on a synthesis of several government benefit cases, many of which described the interest involved as entitlements. But the referenced cases apply the more open-ended due process analysis that prevailed before Roth, and therefore did not even attempt to define property, much less adopt a clearly articulated entitlement construct. Finally, Justice Stewart offered no authority for the proposition that property interests are created by independent sources of law rather than the Constitution, an issue that is far more complicated than his simple assertion would let on.

All of this is not meant to prove that Justice Stewart’s approach was wrong (although we believe that it was), but rather to remind readers that the requirement of a protected interest and the use of entitlement to determine the existence of property were significant doctrinal innovations that were not compelled by the prior case law or the constitutional text.

weight, as a means of rejecting the lower court’s conclusion that the temporary loss of possession of household goods was insufficiently weighty to warrant due process protections. See 407 U.S. at 84-90. This analysis came after the Court had concluded that due process required a pre-deprivation hearing and did not permit issuance of an ex parte replevin order. Id. In Morrissey, the Court had little difficulty concluding that parolees justifiably relied on implied promises that they would remain free if they complied with conditions and would be subject to a “grievous loss” if parole were revoked without a hearing. 408 U.S. at 482. It is particularly striking that in Fuentes (the earlier decision) the Court concluded first that a statute permitting the seller to obtain an ex parte replevin order subject to a subsequent hearing violated due process, and only then turned to the question whether the interest involved was protected by due process. See 407 U.S. at 80-90. In contrast to Fuentes and Morrissey, however, Roth employed the protected interest requirement as an essential element of a due process claim whose absence on the facts prevented the application of due process to an important interest. Of course, earlier decisions had held that due process had not been violated, but we did not find any cases that used the two-step framework or relied specifically on the absence of a protected liberty or property interest.

131. 408 U.S. at 576.
132. See supra notes 40-45 and accompanying text.
133. See Roth, 408 U.S. at 576 (citing, inter alia, Goldberg and Flemming).
134. See supra notes 90-99 and accompanying text.
135. See Roth, 408 U.S. at 577.
136. See, e.g., RICHARD R. POWELL, POWELL ON REAL PROPERTY § 2.05 (Michael Allan Wolf ed. 2002). Even if property interests are created from independent sources, moreover, it does not follow that their status as property interests is entirely at the discretion of their creator. In the case of a private contract, the parties’ control whether to enter into the relationship and the terms of that relationship. In that sense, they control whether a property interest is created. They do not, on the other hand, control whether the interests created by their contract will constitute property. When the state contracts are involved, we must be careful to distinguish the state’s ability to control the terms of the contract from its role as a law-creating entity over the legal implications of those terms.
More fundamentally, viewed against a more accurate picture of the prior case law applying due process to government benefits, it becomes clear that these doctrinal innovations reduced the scope of due process protection for such benefits as compared to the earlier due process cases. In the following section, we consider Roth’s adoption of the entitlement approach in relation to other contemporaneous constitutional developments, which suggests the concerns that may have prompted the Court to embrace these doctrinal innovations.

C. Roth and Welfare Rights

The Court’s adoption of the entitlement approach in Roth is best understood in the broader constitutional context of the period. By the end of the 1960s, the United States had acquired many accoutrements of the social welfare state. Social insurance and welfare programs had greatly expanded as a result of President Johnson’s “Great Society” agenda, comprehensive regulatory programs had created a wide array of permits and licenses, and the evolution of a civil service model of government employment led to an exponential growth in employees who were subject to for cause removal provisions. Thus, even though due process had historically applied to government benefits, their ever-increasing role in modern society lent the surrounding constitutional issues an increasing urgency.

In addition to procedural due process, a critical question at the time of Roth was the extent to which the Constitution provides substantive protection for government benefits; i.e., “welfare rights.” While other constitutions may embrace the social welfare state and create affirmative constitutional rights to some government benefits, ours does not. Our government was created, like all governments, to secure the benefits of collective action, but the framers phrased constitutional rights as

137. For further discussion of affirmative constitutional rights, see Susan Bandes, The Negative Constitution: A Critique, 88 Mich. L. Rev. 2271 (1990); see also Frank B. Cross, The Error of Positive Rights, 48 UCLA L. Rev. 857 (2001); David P. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864 (1986); William E. Forbath, Constitutional Welfare Rights: A History, Critique and Reconstruction, 69 Fordham L. Rev. 1821 (2001); Jenna MacNaughton, Comment, Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune, 3 U. Pa. J. Const. L. 750 (2001); Jon D. Michaels, Note, To Promote the General Welfare: The Republican Imperative to Enhance Citizenship Welfare Rights, 111 Yale L.J. 1457 (2002). For purposes of this Article, we take it as a given that the Court will not recognize affirmative constitutional rights, and attempt to show that our approach is consistent with that given. We do not, however, take a position on the underlying debate over affirmative constitutional rights to benefits.

138. See generally Vicki C. Jackson & Mark Tushnet, Comparative Constitutional Law 1436-97 (collecting materials on social welfare rights in various countries).

negative restrictions on government, reflecting political theory at the time, which did not conceive of the social welfare state. Thus, the United States Supreme Court has steadfastly refused to recognize them except in narrow situations where there are particular justifications. 140

Some of the Court’s decisions leading up to Roth, however, might be read to support affirmative welfare rights. 141 Legal services lawyers and other advocates for the poor seized upon these suggestions to argue that many government benefits should be treated as fundamental rights for purposes of due process or equal protection, 142 a view that was supported by some commentators. 143 The Court, however, quickly rejected this

140. See Dandridge v. Williams, 397 U.S. 471 (1970) (applying the minimum rational basis test under the Equal Protection Clause to uphold a cap on total benefits per family); see also DeShaney v. Winnebago County Dept’ of Soc. Servs., 487 U.S. 1216 (1988); Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450 (1988). The Court has recognized affirmative rights in certain limited contexts, such as prisons, where the affirmative duties derive from the government’s prior use of coercive authority, and equal protection, where the government may have to raise the level of benefits for some (or lower it for others) to achieve equality. See Currie, supra note 137, at 873-74. Critically, however, these decisions do not recognize a baseline right to any particular benefit that can be violated by the government’s failure to provide it.

141. In the equal protection area, for example, the Court’s fundamental rights jurisprudence had afforded some affirmative rights for the poor. Even though there is no constitutional right to have an appeal of a criminal conviction, the Court required the states to pay the costs of appeals and of counsel on appeal for indigent criminal defendants. See Griffin v. Illinois, 351 U.S. 12 (1956) (invalidating statutes requiring transcripts and filing fees that barred access to appeals for indigent defendants); see also Douglas v. California, 372 U.S. 353 (1963) (requiring the state to provide an attorney for indigent criminal defendants on appeal). Of particular relevance to government benefits was Shapiro v. Thompson, 394 U.S. 618 (1969), a 1969 decision holding that states could not deny welfare benefits to new residents. Although premised on the theory that denying benefits to new residents impaired the fundamental right to travel, Shapiro also emphasized the importance of welfare benefits to their recipients, observing that new residents were “denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life.” Id. at 627. Thus, Shapiro is like Goldberg in that both cases extend constitutional protection to welfare benefits and use language suggesting that such protection is necessary because without it people lack the means to acquire food and shelter. It is not such an incredible leap from these propositions to the conclusion that there is some sort of fundamental right or enhanced scrutiny status for welfare benefits under equal protection or due process. See Dandridge v. Williams, 397 U.S. 471, 522 (1970) (Marshall, J., dissenting): “And this Court has already recognized several times that when a benefit, even a ‘gratuitous’ benefit, is necessary to sustain life, stricter constitutional standards, both procedural and substantive, are applied to the deprivation of that benefit.” (emphasis added).


143. See Frank I. Michelman, The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7, 13 (1969) (arguing that the Court’s decisions should be understood as a right to "minimum protection from economic hazard"); see also TRIBE, supra note 94, at 1336 ("Emerging notions that government has an affirmative obligation somehow to provide at least a minimally decent subsistence with respect to the most basic human needs... fit quite naturally into a conception of bodily integrity...") (citing Michelman, supra).
suggestion in *Dandridge v. Williams*, 144 decided only two weeks after *Goldberg*. The *Dandridge* opinion, which, like *Roth*, was written by Justice Stewart, applied the rational basis test to uphold a maximum cap on welfare benefits available to any one family. 145 Justice Stewart equated welfare classifications to other economic and social regulation for purposes of equal protection analysis, upholding the family cap as rationally related to a legitimate purpose.146 Since *Dandridge*, the Court has consistently refused to recognize any affirmative rights to particular government benefits, including a right to education, safe working conditions, or protection from child abuse.147

While *Dandridge* rejected heightened scrutiny for welfare benefits, the Court still had to explain how and why welfare benefits could be rights for due process purposes and avoid the ad hoc balancing of important interests that might support welfare rights. Justice Stewart accomplished this objective in *Roth* by basing the determination of whether a government benefit is protected by due process by reference to the "nature" of the interest and by limiting the weighing process to the form of hearing required.148 This analysis makes the importance of welfare or other government benefits to recipients irrelevant to the determination of whether there is a right at stake, thus limiting its implications for substantive rights.

Once Justice Stewart rejected the importance of the interest involved as relevant to whether due process was triggered, the Court had to offer some other basis for ascertaining whether an interest constituted property. This issue, too, was fraught with difficulty. The Court was not prepared to incorporate traditional common law definitions of property, which repudiate *Goldberg* and depart dramatically from the long history of extending due process to government benefits that were not traditional property.149 Thus, it was necessary to develop some other doctrinal method

145. *Id.* at 483-87. The Court expressly distinguished *Shapiro* as involving the fundamental right to travel. *Id.* at 484 & n.16.
146. *Id.* at 486-87.
147. *See Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (holding that there is no constitutional right to a safe public workplace); *see also DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (holding that there is no constitutional right to protection from an abusive parent); *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 451 (1988) (holding that indigents have no right to subsidized busing to public schools); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (declining to recognize a constitutional right to education); *Lindsey v. Normet*, 405 U.S. 56 (1972) (refusing to recognize a fundamental right of access to decent housing). Moreover, even when the denial of a government benefit turns on the exercise of constitutionally protected rights such as abortion and free speech, the Court has reasoned that the denial of government benefits does not burden the exercise of those rights and applied the rational basis test. *See Harris v. McRae*, 448 U.S. 297 (1980).
149. Moreover, the Court had the fundamental problem that common law baselines are commonly associated with the discredited substantive economic due process jurisprudence
to protect government benefits without recognizing a constitutional right to welfare.

At first glance, the entitlement approach would seem to represent an attractive solution. Under this approach, welfare benefits are property because the state made them property, but the state has no constitutional obligation to provide benefits or to do so as a matter of entitlement. As discussed in Part I of the Article, however, the entitlement approach creates more problems than it solves. Thus, if there is an alternative solution to the welfare rights dilemma that avoids those problems, a change of doctrine is clearly in order. As we will demonstrate in Part III, such an alternative is available, and it is a “standards-based” approach that focuses on the rule of law conception of due process.

III. STANDARDS-BASED DUE PROCESS

The standards-based approach to due process we propose rests on two fundamental propositions. First, the rule of law and hence due process attach whenever the government takes adverse action concerning a government benefit pursuant to legal standards that determine individual eligibility, whether or not those standards also create an entitlement to that benefit. Second, the rule of law requires that government action, including decisions respecting the distribution of benefits, must be subject to legal standards except as to those decisions constitutionally vested in the political discretion of the responsible officials. This approach provides a solid constitutional foundation upon which to rest due process safeguards for government benefits that does not implicate the creation of constitutional welfare rights. The standards-based approach, moreover, also provides a powerful tool for organizing and explaining a number of related areas of administrative law.

A. Standards, Rights, and Duties

The standards-based approach draws on the Hohfeldian conception of law and its relationship to rights and duties150 and correlates directly with the core historical understanding of due process as the constitutional expression of the rule of law.151 From this perspective, it is the existence of legal standards governing societal relationships that converts those


150. See Wesley Newcomb Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 36-38 (1923).

151. See supra notes 16-28 and accompanying text (discussing why due process should apply to government benefits).
relationships into ones based on legal rights and duties. Thus, when
government action is subject to statutory or other legal standards, the rule
of law imposes a legal duty to comply with those standards and a
correlative right of beneficiaries to insist on government compliance.\(^{152}\)
When the presence of applicable standards engages the rule of law, it
should also engage essential rule of law safeguards, such as due process.\(^{153}\)

Current doctrine focuses on the “rights” side of this equation, with
unfortunate results that arise from the varied and ambiguous connotations
of the term “rights.” For while it makes sense to talk about a “right” to
compliance with standards,\(^{154}\) that “right” is easily conflated with the
underlying “right” to the benefit. In order to avoid this confusion, our
approach to due process uses standards, as opposed to the correlative rights
and duties created by them, as the trigger for due process protections. In
other words, a claimant has a right to have government actors comply with
standards even if the claimant does not have a right to the benefit itself.
Consider, for example, the situation of a government grant that is to be
awarded based on the discretionary application of various criteria. Even if
no grant applicant has a right to the grant, each of them has a right to have
the decision made according to those criteria.

By focusing on standards, as opposed to rights, our approach avoids the
contingent character of due process. The government would continue to
control the creation and character of benefit programs, but could no longer
foreclose the application of due process by declining to create an
entitlement to the benefit. So long as there are standards governing when
someone is eligible for a benefit, due process would attach. Likewise, as
we will develop in the next section, the legislature could not avoid the
application of due process by conferring standardless discretion to award or
deny benefit, because the Constitution normally requires the establishment
of such standards.\(^{155}\)

In a similar way, the standards-based approach closes the other due
process gaps that exist under the entitlement-based approach. Various
factors thought currently to affect the presence of an
entitlement—limitation of benefits to available funding, discretion in the
application of standards, or the fact that an application for a benefit is

\(^{152}\) From a Hohfeldian point of view, it is hardly surprising that cases like *Marbury*
often mixed the language of rights and duties. *See supra* note 91 (discussing cases in which
the Court used the language of both rights and duties).

\(^{153}\) As we develop in a companion article, *see* Shapiro & Levy, *supra* note 8, standards
would, for similar reasons, also engage judicial review.

\(^{154}\) This is the approach taken by some scholars. *See infra* notes 218-21 and
accompanying text (discussing the similarities between van Alstyne’s approach and the
standards-based approach).

\(^{155}\) *See infra* notes 158-69 and accompanying text.
involved—would not generally be relevant to whether there are legal standards and hence whether due process applies.

By the same token, the standards-based approach avoids the logical incoherence of current doctrine. The bitter-with-the-sweet argument would not be a problem because the state’s power to create and define the legal entitlement to benefits would no longer be relevant to either the application of due process or the kind of procedures that due process requires, both of which would be determined by constitutional principles derived from due process and the rule of law. Conversely, the standards-based approach does not threaten to undermine traditional property, because the Court need not accord the state unfettered power to define property in order to avoid the creation of welfare rights. 157

B. A Requirement of Standards

The Constitution normally requires that government agencies operate under statutes containing legal standards that constrain their action. Because our proposal links due process to the presence of such statutory standards, due process is more secure under a standards-based approach than the current entitlement approach. Under the current entitlement-based approach, Congress may avoid the application of due process by refusing to create an entitlement to a given benefit. Congress, by comparison, cannot avoid the application of due process under our proposal because it is under a constitutional command to establish statutory standards and these standards trigger the application of due process. This constitutional command, however, is not absolute. There may be matters that, from a separation of powers perspective, are allocated to the standardless discretion of the political branches. This narrow exception, however, would not apply to the administration of most government benefits.

The requirement of standards to constrain government action is normally expressed in separation of powers terms under the so-called nondelegation doctrine. This doctrine prohibits Congress from delegating the legislative power, 158 but permits the delegation of significant governmental authority

156. See supra notes 38-49 and accompanying text.
157. See supra notes 58-59 and accompanying text. As discussed below, any attempt to give “property” some constitutional meaning is fraught with difficulties, which is probably why the Court has refused to move in this direction, despite its endorsement by a number of prominent academic commentators. See infra notes 208-11 and accompanying text.
158. The Vesting Clause of the Constitution, U.S. Const. art. I, § 1, provides that the legislative power is vested in Congress, which has been interpreted as precluding Congress from delegating that power to anyone else. See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (“In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests ‘“[a]ll legislative Powers herein granted . . . in a Congress of the United States.” This text permits no delegation of those powers . . .’”).
provided that Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform . . . ."159

While the nondelegation doctrine is normally understood in terms of protecting the political accountability of key policy decisions,160 it also has an important rule of law component. As Richard Stewart has observed, "Insofar as statutes do not effectively dictate agency actions, individual autonomy is vulnerable to the imposition of sanctions at the unruly will of executive officials . . . ."161 Indeed, some commentators have suggested that the nondelegation doctrine ought to be understood in rule of law terms and that it should be satisfied by administrative regulations that provide sufficient standards to constrain administrative discretion.162

In this sense, the requirement of standards under the nondelegation doctrine is closely akin to another line of cases suggesting that standardless administrative discretion violates due process.163 These due process cases

159. Mistretta v. United States, 488 U.S. 361, 372 (1989) (citation omitted). In other words, the formulation of an initial policy decision (i.e., setting standards) is a legislative act, while the exercise of discretion pursuant to statutory standards is an executive act. See INS v. Chadha, 462 U.S. 919, 953-54 n.16 (1983) (distinguishing between the legislative character of the legislative veto and the executive character Attorney General's decision which was vetoed because "[t]hat kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely," while the legislative veto is "is not so checked").

160. As (then) Justice Rehnquist elaborated in his concurring opinion in Industrial Union Department, AFL-CIO v. American Petroleum Institute (Benzene), 448 U.S. 607, 685 (1980), the nondelegation doctrine "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."


162. See, e.g., AMAN & MAYTON, supra note 14, at 34-36; KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 297-308 (2d ed. 1978). This possibility received some support from the influential decision in Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971), in which a three-judge panel of the district court relied in part on the subsequent development of administrative standards to reject a nondelegation challenge to the Economic Stabilization Act, which vested broad discretion in the President to freeze wages and prices in response to inflation. The Supreme Court, however, flatly rejected a more recent manifestation of this sort of reasoning in Whitman, 531 U.S. at 473 (reversing Am. Trucking Ass'n v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), modified on denial of rehearing, 195 F.3d 4 (D.C. Cir. 1999)).

The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.

This rejection is clearly based on Vesting Clause analysis rather than the rule of law.

163. See generally BREYER ET AL., supra note 101, at 490-515 (discussing cases involving a requirement of rules and the converse requirement of individualized discretion); AMAN & MAYTON, supra note 14, at 71-73 (discussing rule of law implications of cases
strongly imply that the distribution of government benefits, particularly licenses and monetary or in-kind benefits, may not be vested in the unconstrained discretion of executive officials. Administrative law texts often approach these due process cases with some embarrassment because a requirement of standards does not fit neatly into conventional procedural due process categories.

Indeed, a due process requirement of standards is impossible to explain in terms of the Court's current entitlement approach to defining property. Under an entitlement approach, unconstrained discretion could not violate due process because the existence of unconstrained discretion means that there is no entitlement and due process therefore does not attach. Under a standards-based approach, however, these cases make perfect sense. The vesting of executive authority over the allocation of benefits requires standards to preserve the rule of law, and the absence of an entitlement to those benefits would not affect the analysis.

Although the legislature is generally required to incorporate legal standards to guide and control administrative discretion, there is an exception in some cases. The Constitution itself may vest decisions in the standardless political discretion of Congress and the President. These requiring administrative rules).

164. An early example of this sort of reasoning is *Yick Wo v. Hopkins*, 118 U.S. 356, 372-73 (1886), which objected to the standardless discretion granted to officials in determining eligibility for licenses to run a laundry. Several court of appeals decisions in the late sixties and early seventies echo this principle, such as *Holmes v. New York Public Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968); where the court reasoned:

It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse . . . . For this reason alone due process requires that selections among applicants be made in accordance with ascertainable standards.

*Id.* at 265 (citing Hornsby v. Allen, 326 F.2d 605, 609-10 (5th Cir. 1964) (applying this principle in a licensing case); see also White v. Roughton, 530 F.2d 750 (7th Cir. 1974) (holding that an administrator of a general assistance program had the duty to insure consistent application of the program's eligibility requirements); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964). The Supreme Court's decision in *Morton v. Ruiz*, 415 U.S. 199 (1974), which involved eligibility for government benefits to members of Indian Tribes, also lends support to this idea insofar as it suggests that agencies cannot distribute government benefits on the basis of ad hoc decisions.


166. In this regard, it is particularly interesting that most of the cases (but not *Morton v. Ruiz*) involve state administrative determinations. Federal separation of powers principles have little, if anything, to say about the boundaries between legislative and executive authority under a state constitution, so the nondelegation doctrine does not require state legislatures to include statutory standards. But the rule of law applies to states via the Due Process Clause and would require some legal standards to constrain arbitrary administrative decisions, although it would not appear to matter whether those standards are promulgated by the legislature or the administrative agency.

167. The most conspicuous example of these cases is the "political question" doctrine. *See Nixon v. United States*, 506 U.S. 224, 228 (1993) ("A controversy is
cases typically arise where there are especially compelling reasons for relying solely on the judgment of political actors. In such cases, subjecting executive decisions to procedures and judicial review could undermine the effective operation of government. Under a standards-based approach, due process would not apply when the Constitution itself commits decisions to standardless discretion.

These cases, however, are unlikely to justify standardless legislation concerning most government benefits because there are simply no compelling reasons for relying solely on the judgment of political actors to make such decisions in most cases. Decisions about welfare benefits, licenses, and most government jobs do not require that government officials have unfettered discretion in order to make the government run more effectively.

The general requirement of standards, subject to this exception, places due process on secure constitutional foundations without implicating constitutional welfare rights. This requirement leaves the decision of whether to provide a benefit to the discretion of political actors, but explains why, once the political decision is made to provide a kind of benefit, the Constitution requires due process in its administration.

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nonjusticiable—i.e., involves a political question—where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . .') (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)). For a recent comprehensive discussion of the political question doctrine, see Rachel E. Barkow, More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 COLUM. L. REV. 137 (2002). A similar issue arose in the Court's recent decision in Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2645-48 (2004), in which the Bush administration claimed that "'[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict' ought to eliminate entirely any individual process." Id. at 2645. The Court rejected this claim, with the plurality employing a due process analysis to conclude that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Id. at 2648.

168. See infra notes 172-75 and accompanying text (discussing the possible exceptions and their relation to the current contours of due process).

169. A standards-based approach would not require the reinvigoration of the nondelegation doctrine, a course that some commentators have advocated. See, e.g., DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1969). But see Jerry L. Mashaw, Why Administrators Should Make Political Decisions 1 J.L. ECON. & ORG. 81 (1983) (proposing that Congressional decisions be narrowly tailored to deter broad policy interpretations by officials). It may be easier for administrators to comply with broad and ambiguous standards than with specific ones, but due process would attach even to ambiguous standards.
C. Standards and Administrative Due Process

The standards-based approach not only closes significant gaps in current doctrine, it does so without requiring a wholesale reconstruction of current administrative law practices. Indeed, the standards-based approach not only would accommodate most existing practices and doctrines, but it would also provide a powerful explanatory tool for many of them. In this section, we will consider the implications of the standards-based approach for three aspects of administrative due process: government employment, the extent of "process due," and administrative rulemaking.

I. Government Employment

Consider first the matter of government employment. The President has special constitutional responsibilities for the oversight of officers of the United States, including the appointment and removal of those officials. These prerogatives reflect important practical considerations, such as the need for political and personal loyalty within the executive branch and the difficult and discretionary judgments that are inevitable in such matters. Thus, notwithstanding the emergence of for cause removal provisions for civil service employees and independent agencies, there is a longstanding tradition of executive discretion in government employment. This background suggests that the appointment and removal of some employees would fall within the constitutional exception to the requirement of standards.

With respect to public employment, however, it is important to distinguish between appointment and removal decisions, as well as between the removal of employees who are "at will" and of those whose office is for a term of years or is subject to for cause restrictions. A constitutional requirement of standards would be particularly inappropriate for appointments of officers of the United States, because there may be many qualified people who meet any statutory standards, and the choice among competing candidates is often impossible to articulate in terms of standards.

170. As discussed above, for example, the standards-based approach explains a line of cases from *Yick Wo* to *Morton v. Ruiz* that treats standardless discretion as a violation of due process. See supra notes 163-66 and accompanying text.

171. The President's role in appointments is express, see U.S. CONST. art. II, § 2, cl. 2, while the removal power has been inferred as inherent in the duty to take care that the laws are faithfully executed and the principle of the unitary Executive. See *Myers v. United States*, 272 U.S. 52, 109-10 (1926).

172. See supra notes 167-69 and accompanying text (discussing exception to requirement of standards when the Constitution delegates "decisions to the standardless political discretion" of the President and Congress).

173. Nonetheless, some considerations, such a race, are impermissible. Thus, even if there is no requirement of standards for appointment, a particular appointment might be invalid if it is based on impermissible criteria.
Removal decisions, by way of contrast, do not inevitably involve the same kinds of subjective comparative judgments as hiring. For high level officials exercising significant policy authority, presidential discretion to remove is constitutionally required, but concerning lower level officials who do not make policy, Congress apparently has the authority to impose legal requirements on removal. While Congress is not ordinarily required to impose such standards, it often does so. If Congress provides standards, those standards are legally binding on those responsible for the removal decision, assuming, of course, that the restrictions are constitutionally valid.

The standards-based approach is consistent with the existing case law concerning the President's prerogatives to hire and fire government employees, although our proposal offers a different basis for the outcome of these cases. When the Constitution justifies standardless discretion, as in most appointment and some removal decisions, the Due Process Clause would not apply. Due process would not apply because the President normally would be acting under his own standardless constitutional authority or under statutes that did not contain, and were not required to contain, legal standards governing removal. When, however, Congress creates such statutory standards (and has the constitutional authority to do so), due process would apply because of the existence of statutory standards triggers the application of due process.

2. The Extent of Process Due

The standards-based approach also accommodates Mathews v. Eldridge, which provides the current three-part balancing test for determining how much procedure the government must provide when due process applies. This test considers the private interest to be affected by the government's action, the risk of an erroneous deprivation through the procedures used, and the probable value, if any of additional procedures, and the Government's financial and other burdens on the government in providing additional process. Because the test applies only after it is determined that due process attaches to a given government decision, the standards-based approach would not require changes in the Mathews test.

On the other hand, the standards-based approach raises questions about

175. A possible exception to this premise would be quasi-judicial officers, as to which some protection from political reprisal may be required to preserve the impartiality of decisionmakers. See Wiener v. United States, 357 U.S. 349 (1958) (inferring for cause removal requirements for judges of the War Claims Tribunal).
177. Id. at 334-35.
Mathews' utilitarian calculus. In particular, we are troubled by the possibility that, under Mathews, procedures that are insufficient to ensure official compliance with the law might be consistent with due process because more procedures would cost too much or because the underlying interest is considered to be insufficiently important. From the rule of law perspective, the critical question should be whether there is sufficient legal process to ensure that government officials have complied with applicable statutory or other legal standards in individual cases.

Interestingly, recent decisions applying Mathews have moved in this direction. The Court has increasingly focused on the accuracy component of the Mathews formula; that is, on the question of whether additional procedures would improve the accuracy of the administrative decision. This focus is consistent with the rule of law because it emphasizes compliance with applicable legal standards.

The issue of whether the controversial Mathews test is consistent with the rule of law is beyond the scope of this Article. The critical point in this context is that adoption of the standards-based approach is consistent with Mathews v. Eldridge. This perspective on Mathews, however, suggests more fundamental problems with another iconic doctrine of administrative due process—that due process does not attach to legislative type administrative decisions.

3. Administrative Rulemaking

In Bi-Metallic Investments v. State Board of Equalization, the Court held that due process was not violated when a state agency implemented, without a prior trial-type hearing, an across-the-board increase in the assessed valuation of residential property in the city of Denver, Colorado. This case is currently understood as meaning that procedural due process does not apply at all to rulemaking, but such a view is.

178. See, e.g., Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (upholding limitation on attorney fees in veterans' benefit cases to $10 did not violate due process because attorneys were not necessary to accurate decisions); see also Schweiker v. McClure, 456 U.S. 188 (1982) (upholding the resolution of disputed Medicare claims by private insurers without judicial review because private insurers had no financial stake and thus were fair and impartial adjudicators). By endorsing the focus on accuracy, we do not mean to endorse the Court's conclusion in these cases that the procedures provided were sufficient to ensure fair and accurate decisions.

179. 239 U.S. 441 (1915).

180. The Court distinguished an earlier decision, Londoner v. Denver, 210 U.S. 373 (1908), which held that due process was violated when the city imposed a special property tax assessment on some landowners without a prior hearing. In an opinion by Justice Holmes, the Court in Bi-Metallic reasoned that due process requires a hearing only when a few people were exceptionally affected on individualized grounds. 239 U.S. at 442-43. When rules applied broadly, individualized hearings would be impractical and the political process would provide adequate recourse. Id. at 442.

181. See, e.g., AMAN & MAYTON, supra note 14, at 146 ("If the agency action is not
inconsistent with the rule of law if the administrative adoption of rules is subject to legal standards. Thus, we think a better understanding is that due process applies to rulemaking, but that paper hearings, rather than trial-like procedures, are generally sufficient for fair and accurate rulemaking decisions under *Mathews v. Eldridge*.

This type of procedure is adequate for most rulemaking because the nature of the factual inquiry on which the agency bases its application of the law to formulate a rule does not demand formal adversarial hearings. This understanding would mean that the notice and comment rulemaking provisions of the Administrative Procedure Act are generally adequate to satisfy due process. Adjudicatory procedures are generally considered to be unnecessary to resolve the type of factual disputes that usually arise in rulemaking because these disputes involve "legislative facts," i.e., background policy information. Because this information is typically available in published sources and is not within the peculiar knowledge and experience of affected individuals, oral testimony and cross-examination is far less likely to illuminate the facts. By comparison, formal adjudicatory procedures, such as testimony and cross-examination, are useful to resolve factual disputes involving events within the particular knowledge and experience of individuals. If a rulemaking does involve this latter type of fact, under a standards-based approach due process might require more than notice and comment procedures.

More importantly, under the standards-based approach, due process would require some minimal procedures when one of the exceptions to notice and comment procedures apply, although those procedures need not resemble trial-type hearings or even full notice and comment procedures. Congress has exempted from the APA's rulemaking procedures "military or foreign affairs function[s]" and "matter[s] relating to agency adjudicatory, due process does not apply." (emphasis in original)).

182. In the familiar distinction advanced by Professor Davis, these are "legislative" rather than "judicial" facts. See generally DAVIS & PIERCE, supra note 25, §§ 9.2-9.2A (trial-like procedures are unnecessary because of the legislative character of the facts typically at issue).


185. While regulated entities may have particular knowledge of the impact of a given type of regulation, this is not the "who did what to whom, where and when" kind of facts for which an adversarial hearing is normally required.

186. See PIERCE, supra note 184 (explaining that disputes surrounding legislative facts can generally be resolved by published social or natural science literature rather than through individuals).

187. Id. (describing adjudicative facts as similar to facts presented to a jury in a jury case).

188. An example might be United Air Lines v. Civil Aeronautics Board, 766 F.2d 1107, 1119 (7th Cir. 1985) (Posner, J.) (declining to require additional procedures in connection with a rulemaking in which the agency relied in part on "judicial" facts).
management or personnel or to public property, loans, grants, benefits, or contracts."189 If an agency is acting under statutory standards when it makes rules in these areas, it would be subject to due process, which would require sufficient procedures to ensure that any rules comply with those standards. The Constitution, however, may permit Congress to authorize executive branch decisions in some of these areas without statutory standards, in which case due process would not apply.190

IV. OTHER SOLUTIONS

There is a wealth of academic literature addressing the due process issues arising in the context of government benefits administration. The academic approaches have not been able to resolve the dilemma that confronted the Court in Roth because, like current doctrine, they tend to focus on the nature of the right asserted. This part of the Article reviews these perspectives and explains why we believe the standards-based approach is a superior alternative. To facilitate discussion, we shall group the post-Roth literature into three broad perspectives, which we call the "traditionalist," the "revisionist," and the "universalist" perspectives.191

A. Traditionalists

The traditionalist perspective, exemplified by such notable figures as Judges Bork192 and Easterbrook193 and Professors Richard Pierce194 and Richard Epstein,195 generally oppose the application of due process to government benefits, which they would sharply distinguish from traditional private property. This approach avoids the doctrinal conundrums of current doctrine by positing traditional private property as a constitutional baseline. Traditionalist approaches advance interpretive, conceptual, and policy arguments for limiting due process protections to traditional private property and liberty interests. We disagree with the traditionalists and their arguments.

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190. See supra notes 167-69 accompanying text.
191. These categories are intended only to facilitate a brief overview of the literature and we do not claim that all of the literature discussed fits neatly into one of the three categories. Many commentators share characteristics of more than one approach.
193. See Frank H. Easterbrook, Substance and Due Process, 1982 SUP. CT. REV. 85 (proposing to adopt historical definitions of property and liberty).
194. See Pierce, supra note 7 (praising the due process "counterrevolution" for confining due process to traditional rights).
Contrary to the traditionalist assumption, neither the text nor history of the Due Process Clause compels the conclusion that due process protects only those discrete interests that can be denominated "life," "liberty," or "property." As we demonstrated earlier, there are several plausible readings of "life, liberty and property," including that the phrase is a general reference to individual interests of value, rather than a technical reference to the specified interest listed. Moreover, as we also established earlier, the best historical evidence indicates that the Framers' intention was that due process ensure governmental regularity regardless of the character of the underlying interest, and early judicial applications of the Due Process Clause confirm this history.

Conceptually, the traditionalist interpretation of due process reflects the view that government benefits, which "consist of entitlements to government largesse," are less worthy of protection than private property, which "is created by individuals in the private sphere." The differences between private property and government benefits, however, are much less significant than the traditionalists assume, and should not render the rule of law inapplicable to government benefits.

Both traditional property and government benefits are a form of public good provided by the government with distributional consequences. The provision of government benefits is an affirmative governmental act that entails distributional consequences, but no more so than the government’s recognition and protection of private property. The government’s role in the establishment and enforcement of rules facilitating the private creation, security, and transfer of property is so well accepted that property rights are often regarded as prepolitical, in the sense that their existence does not depend on government. But the creation of private wealth is a public good because private property and contract "rights" would not exist in the absence of government to produce and enforce rules that recognize and protect private wealth.

196. Easterbrook, supra note 193, at 96-97.
197. See supra notes 117-20 and accompanying text.
198. See supra note 120 and accompanying text.
199. See supra notes 60-99 and accompanying text.
200. E.g., Pierce, supra note 7, at 1980.
201. See Frank B. Cross, The Error of Positive Rights, 48 UCLA L. REV. 857, 863-68 (2001) (arguing that positive constitutional rights are logically distinguishable from negative rights and that strong enforcement of positive rights is unlikely and would have negative consequences).
202. A public good is one whose consumption cannot be controlled by its creator, and whose consumption by one consumer does not diminish the possibility of enjoyment by another. Private markets will not produce public goods or will produce an insufficient supply of them because of the resulting "free rider" problem. See generally SYDNEY A. SHAPIRO & JOSEPH P. TOMAIN, REGULATORY LAW AND POLICY: CASES AND MATERIALS 55-56 (3d ed. 2003) (discussing the economic and noneconomic justifications for regulation).
Moreover, both private property rights and government benefits can involve varying degrees of government subsidies and individual initiative. Historically, the government has often facilitated the creation of private wealth, and extensive government support of the private economy continues to this day. Thus, the idea that private property is "solely" the result of a person's individual labor and capital is overstated, as is the corollary notion that government benefits reflect unearned redistributional largesse. Many government benefits, including Social Security, occupational licenses and public employment, involve individual initiative as much as traditional private rights.

To the extent that private property may be the product of individual initiative and ingenuity to a greater extent than wealth created in the public sphere, this distinction is essentially a matter of degree. As a matter of constitutional principle and policy, that difference may well justify a greater level of substantive protection for the creation and retention of private wealth, but it does not follow that this difference matters for purposes of the rule of law. As we previously observed, whether private property or government benefits are involved, arbitrary government action injures the rule of law.²⁰³

Finally, as a matter of policy, traditionalists generally argue that application of due process to government benefits is an unnecessary and overly burdensome intrusion into the administrative process.²⁰⁴ The assertion that due process protections are unnecessary rests on the assumption that political actors will provide adequate procedural safeguards,²⁰⁵ an assumption that, in our view, is belied by both logic and experience. Political actors cannot always be relied on to provide adequate procedures to protect benefit recipients from the wrongful denial of benefits or disregard of legal standards.²⁰⁶ Not only do traditionalists thus understate the need for due process safeguards, we also believe that they overstate the costs. In part, the argument that due process is unduly burdensome confuses the issue of what process is due with whether due process applies at all. More fundamentally, we do not believe that the

²⁰³. See supra notes 26-27 and accompanying text.
²⁰⁴. See Pierce, supra note 7, at 1999 (arguing that the political process adequately protects procedural due process for government benefits); see also Epstein, supra note 195, at 767-71 (arguing that the Court in Goldberg unjustifiably engaged in micromanagement of how best to allocate scarce resources between providing benefits and providing procedures).
²⁰⁵. This issue is, of course, linked with the scope and availability of judicial review. As we shall develop in a companion article, see supra note 8, current judicial review doctrine suffers from many of the same problems as current due process doctrine. These problems, like the due process problems discussed in this Article, can be solved through the adoption of a standards-based approach.
²⁰⁶. See supra notes 50-54 and accompanying text (discussing welfare reform); see also Levy, supra note 84 (passim) (discussing various problematic aspects of the veterans benefit process).
burdens imposed on government by fundamentally fair procedures are undue.\textsuperscript{207}

\textbf{B. Revisionists}

Unlike the traditionalists, revisionists accept the extension of due process to some government benefits, although there are wide variations as to which benefits are protected and why. The common feature of revisionists is that they seek to avoid the current contingent nature of due process by proposing a constitutionally based definition of "property" or "liberty," or both.\textsuperscript{208} The problem with this solution, as compared to the standards-based approach that we propose, is the notoriously difficult task of crafting a constitutional definition for property. Moreover, depending on the particular definition of liberty or property they embrace, revisionist proposals may leave various benefits unprotected or implicate affirmative rights to benefits.

Efforts to define property so as to include some government benefits typically confront the problem of explaining why they do not also create substantive welfare rights to those benefits.\textsuperscript{209} For that reason, one revisionist approach is to retain governmental control of the creation and extent of a benefit, but to establish an independent constitutional test for determining whether an entitlement has been created. Professor Thomas Merrill, for example, proposes a constitutional standard under which government benefits are "property" if positive law confers "an entitlement having a monetary value that can be terminated only upon a finding that some specific condition has been satisfied,"\textsuperscript{210} even if the government disclaims the creation of an entitlement or leaves the door open for withdrawing benefits in the future.\textsuperscript{211}

This proposal prevents the legislature from avoiding the application of

\textsuperscript{207} The actual cost of applying due process in government benefit cases is impossible to quantify. More fundamentally, whether those costs are undue depends on whether they are excessive in light of the benefits from those procedures. In short, this traditionalist argument is a matter of opinion, and one on which we respectfully disagree.

\textsuperscript{208} \textit{See} Bishop v. Wood, 426 U.S. 341, 353 (1976) (Brennan, J., dissenting) (arguing that there is a "federal dimension" to the constitutional definition of property for due process purposes under which entitlement must be measured by the objective reasonableness of a claimant's expectation). One of the authors also argued for such an approach in an earlier article. \textit{See} Levy, supra note 149, at 419-21 (advocating the development of a constitutional definition of property).

\textsuperscript{209} Although revisionists might support the creation of substantive welfare rights, given the Court's consistent rejection of affirmative rights, \textit{see supra} notes 142-46 and accompanying text, it is unrealistic to suppose that the Court would adopt any proposal that required the recognition of affirmative rights.

\textsuperscript{210} Thomas W. Merrill, \textit{The Landscape of Constitutional Property}, 86 VA. L. REV. 885, 961 (2000).

\textsuperscript{211} \textit{See id. at} 963-64 (noting that while the Executive cannot use its discretion to deny entitlements to individuals, the Legislature has the power to broadly deny the right to entitlements in the future).
due process by a simple declaration of "no entitlement," but it would not close most of the gaps created by the entitlement approach. The legislature could prevent the creation of an entitlement through the adoption of standards that leave too much administrative discretion to meet the constitutional definition. Likewise, Professor Merrill would not extend due process safeguards to benefit application decisions, as opposed to terminations, because of the social costs of those procedures, and because "individuals experience a loss of benefits more sharply than they do the failure to gain new benefits."

Ultimately, attempts to adopt a definition of property based on the positive law creating an interest cannot solve the contingent due process problem because the application of due process continues to depend on legislative discretion. Because the legislature retains control over the form of benefits, it can use this discretion to structure the benefit in a manner that avoids incorporating whatever positivist element defines property. Revisionists can only avoid this problem by establishing some constitutional definition of property that is not based on positive law. It is not clear, however, how to create such a constitutional baseline without recognizing some affirmative constitutional rights.

Other revisionist commentators have attempted to avoid the problems of a constitutional definition of property by linking due process protection for government benefits to an alternative conception of "liberty." Judge Stephen Williams, for example, would define liberty to include occupational liberty and freedom of contract, thus providing due process protection for the denial of occupational licenses and of any free governmental service that a taxpayer would have to replace with a private market purchase. He reasons that "the family resemblance between these interests and freedom from incarceration seems clear enough" and their protection is "consistent with the original constitutional framework of limited government and individual liberties."

This relatively narrow view of the liberty interests protected by due

212. See id. at 968 (discussing the reduction in frustrated claimants' strategic use of hearings given the increasingly deferential attitude to the procedural requirements set forth by the legislature).
213. Id. at 967 n.299.
214. See Stephen F. Williams, Liberty and Property: The Problem of Government Benefits, 12 J. LEGAL STUDIES 3, 22 (1983) (arguing that due process should attach to the denial of benefits when the denial forces claimants to pay more in the private market).
process leaves important government benefits beyond the scope of due process. There would be no due process protection, for example, for most government employment.\textsuperscript{216} In this sense, Judge Williams’ approach resembles that of the traditionalists, and has been cited with approval by one of them.\textsuperscript{217}

At the other end of the spectrum, William Van Alstyne would treat “freedom from arbitrary adjudicative procedures as a substantive element of one’s liberty.”\textsuperscript{218} This approach, like the standards-based approach, would apply due process broadly to government benefit decisions,\textsuperscript{219} but this attempt to shoehorn broad protection for government benefits into a conception of liberty requires unnecessarily convoluted and ultimately unsuccessful reasoning. It is circular to argue that one is deprived of “liberty” by the use of arbitrary procedures because one has a liberty interest in being free from arbitrary government actions.\textsuperscript{220} Indeed, Professor Van Alstyne himself concedes that his proposal is tantamount to rephrasing the Due Process Clause to mean that no citizen shall be deprived of “life, liberty or property, or of due process of law, without due process of law.”\textsuperscript{221}

\textbf{C. Universalists}

A final group of commentators would abandon the current entitlement inquiry and would apply due process universally based on some form of open-ended due process balancing. These commentators tend to view the phrase “life, liberty and property” as a unitary concept, much as we do.\textsuperscript{222} Thus, for example, Henry Monaghan and John Ely endorse those pre-entitlement due process cases in which the Court made a “simple pragmatic assessment” of the “importance” of due process to the individual.\textsuperscript{223} They propose that the Court interpret the phrase “life, liberty and property” to “embrace every interest valued by sensible persons,”\textsuperscript{224} which would

\textsuperscript{216} See id. at 28 (suggesting that a government employee has no claims outside of his or her contract).
\textsuperscript{217} See Pierce, supra note 7, at 1996-97 (explaining Williams’ approach as applying due process to government jobs only where “the government has monopoly power in the employment market relevant to the job at issue”).
\textsuperscript{219} In particular, we agree that “the protected essences of personal freedom include a freedom from fundamentally unfair modes of government action, an immunity (if you will) from procedural arbitrariness.” \textit{Id.} at 487.
\textsuperscript{220} See Rubin, supra note 20, at 1097 (1984) (“The idea of freedom from arbitrary action seems promising, but it is circumspect to relate that idea to the introductory phrase about life, liberty or property.”).
\textsuperscript{221} Van Alstyne, supra note 218, at 451.
\textsuperscript{222} See supra notes 117-21 and accompanying text.
\textsuperscript{223} Monaghan, supra note 58, at 407.
\textsuperscript{224} Henry Paul Monaghan, \textit{The Burger Court and “Our Federalism,”} 43 LAW &
ensure that the "government [cannot] seriously . . . hurt you without due process of law."\textsuperscript{225} A variant of this balancing approach emphasizes a dignitary component of due process and would ask whether the challenged process sustains or diminishes individual dignity.\textsuperscript{226}

This kind of open-ended balancing, however, is precisely what the Court sought to avoid when it adopted the entitlement construct for defining property.\textsuperscript{227} Applying due process based on the importance of the interest at stake or based on human dignity requires the Court to engage in the unwelcome task of establishing a constitutional hierarchy of interests and values. As Professor Cynthia Farina has noted, the recognition of "value" and "importance" can take place only within some larger account that justifies the role of property and liberty in our constitutional system.\textsuperscript{228}

Any such effort, however, "inevitably leads to the . . . problem of imposing the entire debate regarding man, meaning, and the state on due process doctrine,"\textsuperscript{229} a situation that the Court understandably wishes to avoid.

Moreover, the Court would also need to find a way to limit the implications of its due process analysis to avoid the recognition of affirmative constitutional rights to important government benefits.\textsuperscript{230} The


\textsuperscript{226} Jerry L. Mashaw, Administrative Due Process: The Quest for a Dignity Theory, 61 B.U.L. Rev. 885, 894 (1981). \textit{See also id. at 886} (stating that the dignity theory holds that "the effects of the process on participants, not just the rationality of substantive results, must be considered in judging the legitimacy of public decisionmaking."); Sanford H. Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 Yale L.J. 319, 350 (1957) (arguing "various traditional procedural requirements of due process indicate the influence of . . . the . . . preservation of the intrinsic dignity of the individual"); Richard B. Saphire, Specifying Due Process Values: Toward A More Responsive Approach to Procedural Protection, 127 U. Pa. L. Rev. 111, 148 (1978) (advocating that the Due Process Clause should be read as prohibiting the government from "interacting with individuals in ways that have the effect of ignoring or infringing their basic individual dignity"). The principal focus of the dignity theory is on the values that the Supreme Court uses to determine the extent of process that due process requires. This approach asks the Court to abandon the utilitarian method the Court now uses to resolve that issue, \textit{see} Mathews v. Eldridge, 424 U.S. 319 (1976) (adopting a balancing test that weighs the costs and benefits of requiring additional procedures), with a "structure of values within which procedures would be reviewed," that includes dignity values. Jerry L. Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors In Search of a Theory of Value, 44 U. Chi. L. Rev. 28, 58 (1976) [hereinafter Three Factors].

\textsuperscript{227} See supra notes 137-49 and accompanying text.

\textsuperscript{228} Cynthia R. Farina, Conceiving Due Process, 3 Yale J.L. & Feminism 189, 204 (1991). Farina argues that the failure of current due process doctrine is the result of preconceived assumptions that shaped the choices confronting the Court, that escaping the positivist trap requires recognition that procedural due process questions raise fundamental questions about the relationship between the individual and government, and that feminist legal theory as a promising beginning for an effort to reconceive that relationship.

\textsuperscript{229} Rubin, supra note 20, at 1091.

\textsuperscript{230} Conversely, as Professor Farina notes, any project of limiting the constitutional definition of property raises the specter of establishing substantive due process limits on
Court has shown no interest in the dignitary theory of due process, for example, perhaps because the theory embraces an affirmative role for the government as an active participant in the development of individuals as moral and political actors and involves an especially murky trigger for applying due process.

Among the universalists, Professor Ed Rubin’s analysis comes closest to our own. Professor Rubin rejects a rights-based due process trigger altogether and emphasizes “the government’s interaction with the individual, rather than the nature of the nonprocedural right that triggers procedural protection.” Based on the historical assumption that at the time of the Bill of Rights due process applied to virtually all government adjudications, Professor Rubin argues for the universal application of due process to all current government adjudications. This result is thought to reflect the dominant view at the time of the Fifth Amendment “about the proper type of interaction between government and individuals,” and the Framer’s “general sense of the fixed limits on state power” that is “in some sense ‘natural’ to this society.”

While we agree with Professor Rubin’s criticisms of the current approach and his focus on the government’s conduct in relation to individuals, his alternative to current doctrine is problematic. Defining the current scope of due process by attempting to reconstruct its historical scope is reminiscent of the Court’s Seventh Amendment jurisprudence,

social legislation. See Farina, supra note 228, at 206 (“No matter how often we are reassured by highly respected voices that it need not be so, we perceive behind attempts to secure property and liberty the dim outlines of a straight-jacket on progressive social change.”).

231. See Rubin, supra note 20, at 1098 (“Properly conceived, [dignity theory] is a theory about the stance that government should take toward the people it rules.”).

232. See Mashaw, Three Factors, supra note 226, at 50-51 (conceding the difficulty with a dignity theory of “defining operational limits on the procedural claims it fosters”).

233. Rubin, supra note 20, at 1100-01 (stating that rejecting the right-based approach does not mean that individual interests will be ignored).

234. Id. at 1101. Rubin argues that such a relationship concept of rights is more consistent with the modern understanding that rights are products of the social order; that is, the definition of relationships between the government and its citizens. Id. at 1099.

235. When the Framers used the terms “liberty” and “property,” Rubin thinks they probably had in mind some definitive set of interests fixed by natural law. Id. at 1091-92. Since modern jurisprudence has abandoned the natural rights tradition, he proposes that the Court interpret the clause by seeking some concept that fulfills the same function now as liberty and property did previously. Id. at 1094. This concept would adopt the same relationship between the government and individuals as was dictated by the “natural rights” understanding of the Framers. Under that understanding, the words “life, liberty and property” were sufficient to include the full range of issues that the courts adjudicated. Thus, due process was a general limit on state power. Although at the time the Fifth and Fourteenth Amendments were adopted most adjudications occurred in courts, most adjudications today occur in administrative agencies. Thus, in order to replicate the coverage of the Due Process Clause in the modern context, it is necessary to apply due process to the “entire, now-expanded range of government adjudications.” Id. at 1095.

236. Rubin, supra note 20, at 1094.
which is hardly a model of coherence.\textsuperscript{237}

Conversely, if Professor Rubin really intends that due process apply to the entire range of government adjudications, which could include any executive decision applying law to fact, we think his approach is overly broad. To the extent that Professor Rubin's approach would extend procedural due process protections to a significant body of decisions that are currently exempt, such as government hiring decisions, it is unlikely to be adopted by the Court. As we previously developed,\textsuperscript{238} Congress should be able to assign certain functions to the discretion of the Executive Branch, assuming that these assignments fall within the constitutional exception for standardless delegation. While our approach would apply due process to a larger array of decisions than current doctrine, it would require less dramatic changes than Professor Rubin's.\textsuperscript{239}

More fundamentally, we believe that the standards-based approach is preferable because it links due process, the rule of law and statutory standards in an integrated framework. Thus, while the standards-based approach starts from similar premises, it provides a superior vehicle for improving due process doctrine.

CONCLUSION

We live in a welfare state. Government benefits are everywhere. If ours is to be a "government of laws and not of men,"\textsuperscript{240} the rule of law, and hence due process, must apply to government benefits. The current entitlement-based approach leaves significant gaps in the application of due process to government benefits, provides at best a shaky foundation for the rule of law, and threatens to undermine the entire concept of property rights.

The standards-based approach is a workable alternative that has its roots in due process cases dating back to the 1800s. This approach resonates with the idea of rule of law by emphasizing and preserving governmental regularity. Except in narrow areas where the Constitution itself permits standardless political discretion, governmental regularity requires legal standards that guide and control the execution of the law. Once legal

\textsuperscript{237} If a public right is not involved, then the Seventh Amendment requires a civil jury if the matter to be decided would have been an action at law at the time of the Bill of Rights. \textit{See} Granfinanciera S.A. v. Nordberg, 492 U.S. at 33, 40-42 (1989) (finding that if a public right is not involved, then the Seventh Amendment requires a civil jury if the matter to be decided would have been an action at law at the time of the Bill of Rights). For criticism of this approach, see \textsc{Jack H. Friedenthal, et al.}, \textsc{Civil Procedure} § 11.4 (2d ed. 1993).

\textsuperscript{238} \textit{See supra} notes 167-69 and accompanying text. In this circumstance, the rule of law is not implicated because administration action does not involve the application and interpretation of legal standards.

\textsuperscript{239} \textit{See supra} notes 170-90 and accompanying text.

\textsuperscript{240} \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) at 163.
standards are in place, it is the duty of all government officials to comply with them, regardless of the character of the right or interest at issue. Due process is a crucial constitutional mechanism for ensuring compliance with legal standards and therefore should apply whenever there are legal standards. The standards-based approach would therefore provide solid constitutional foundations for the rule of law, and it would do so without requiring wholesale changes in current practice or wholesale rejection of historical precedents.

The application of an eighteenth century Constitution to twenty-first century government so as to accommodate modern realities while preserving core principles presents a host of difficult challenges. Application of due process to government benefits need not be one of them.
* * *