

Marbury's Unfulfilled Promise:
Government Benefits and the Rule of Law

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I. Introduction: Not Quite Rights

Virtually everyone in today’s society relies on some form of government benefit, whether in the form of employment, licenses, or monetary benefits.¹ Under the Supreme Court’s current jurisprudence, however, government benefits are “not quite rights” because basic rule of law safeguards, including due process and judicial review, apply only if the legislature says so. A legislature can preclude the application of the Due Process Clause by declining to create an entitlement to a government benefit.² Similarly, according to the “public rights” doctrine of the Court’s current Article III jurisprudence, the legislature may freely delegate the adjudication of benefit decisions to an administrative agency (or other non-Article III forum) and foreclose judicial review of those decisions, except perhaps for constitutional issues.³

We think this is not quite right. Given the centrality of rule of law principles to the constitutional order, we have never been entirely comfortable with legal doctrines that leave basic rule of law safeguards for government benefits dependent upon legislative or administrative discretion, just because the interest at issue is a governmentally created one. Our concerns led us to examine the rule of law and its application to government benefits in greater detail. The more we looked, the more surprised we were by what we found.

We first found that *Marbury v. Madison*,⁴ the seminal rule of law decision in United States constitutional law, is a government benefits case. Insofar as *Marbury* affirmatively indicated that rule of law principles require judicial review of the wrongful denial of government benefits, it suggests there is something fundamentally wrong with the current understanding that Congress can foreclose judicial review of rights as against the government.

¹ 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. Their common feature is that they are benefits (including in principle relief from costs or burdens) that private persons receive from the government. We have chosen the term government benefits carefully to avoid the confusing doctrinal connotations of the procedural due process concept of “new property,” *see infra* notes ___ and accompanying text (discussing “new property”) or the Article III concept of “public rights.” *See infra* notes ___ and accompanying text (discussing public rights). Nonetheless, as we use the the concept of government benefits, it encompasses interests that qualify as new property or public rights.

² *See infra* notes ___ and accompanying text. 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 its termination. *See infra* notes ___ and accompanying text.

³ *See infra* notes ___ and accompanying text.

⁴ 5 U.S. (1 Cranch) 137 (1803).

We next learned that the “due process revolution” of the 1970s was not so revolutionary. According to the conventional wisdom, the Court’s recognition of government benefits (including welfare, licenses, and employment) as property was a revolutionary expansion of due process because such benefits previously were regarded as “mere privileges” to which due process did not apply.⁵ To the contrary, however, beginning with *Marbury* and throughout the nineteenth and early twentieth centuries, the Supreme Court consistently extended basic due process protections to government benefits, although the precise rationale and scope of these safeguards remained murky.⁶ The real due process revolution of the 1970’s was the Court’s requirement that particular interests must qualify as “liberty” or “property” to engage due process safeguards, and the incorporation of “entitlement theory” to define property in terms of whether an external body of law creates a legal entitlement to them.⁷

We also found that *Murray’s Lessee v. Hoboken Land & Improvement Co.*,⁸ the case that is commonly cited to support the idea that Congress can foreclose Article III review of administrative action under the “public rights” doctrine, does nothing of the sort. The case addresses whether Congress can provide for administrative adjudication in the first instance, not whether Congress can foreclose Article III review of such executive determinations. Properly understood, the Court’s reasoning offers little support for complete preclusion of judicial review, starting with the fact that *Murray’s Lessee* does not even cite *Marbury*, let alone distinguish it.

Ultimately, the contingent character of current rule of law jurisprudence is a product of the Court’s adoption of a “rights-based” approach to the rule of law under which the application of due process and judicial review depends upon the character of the right asserted. This rights-based approach is both doctrinally unnecessary and constitutionally unwise. It is unnecessary because the “duty-based” approach to the rule of law that we propose provides a workable alternative that is consistent with constitutional text, history, and precedent and that would solve many of the problems plaguing current doctrine. It is constitutionally unwise because legislative control over the application of basic rule of law safeguards is inconsistent with Chief Justice Marshall’s famous promise in *Marbury* that ours is “a government of laws and not men.”⁹

The duty-based approach that we propose derives from the Hohfeldian nature of rights. Hohfeld recognized that the “flip side” of one party’s right is another party’s duty.¹⁰ Understanding this duality permits us to separate the analysis of whether a person has a substantive right to a given interest from the analysis of whether the government’s treatment of that interest is subject to legal standards. Once these issues are separated, it becomes evident that the availability of rule of law safeguards depends on whether government actors have a duty to comply with legal standards in

⁵ See *infra* note ___ and accompanying text.

⁶ See *infra* notes ___ and accompanying text.

⁷ See *infra* notes ___ and accompanying text.

⁸ 59 U.S. (18 How.) 272 (1855).

⁹ 5 U.S. at 163.

¹⁰ See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* 36-38 (1923) (describing the relationship between rights and duties).

their treatment of a given benefit, not whether someone has a substantive right to that benefit.

This duty-based analysis has two critical implications. First, because government officials have a duty to comply with the law, the Constitution requires due process and Article III review to preserve the rule of law whenever government action is constrained by legal standards,¹¹ although the scope of these rule of law requirements will vary with the nature of the decision and the interest involved. Second, the rule of law, as reflected in both separation of powers and due process doctrine, requires that statutes delegating discretion to administrative actors must contain standards, except with respect to those matters as to which the Constitution itself permits standardless discretion. Under this analysis, the legislature may (in the absence of an affirmative constitutional duty) decide whether or not to provide welfare or other government benefits, but once it chooses to provide benefits, the legislature must provide standards, and these standards engage the rule of law.¹²

The duty-based approach may seem to be a dramatic departure from traditional understandings, but, as we shall demonstrate, such an approach figured prominently in many of the early cases, which often employed both rights-based and duty-based language side-by-side, extending well into the twentieth century. With respect to both procedural due process and judicial review the Court has ultimately chosen the rights-based approach, which has had the impact of making rule of law safeguards contingent on legislative consent as well as making rule of law jurisprudence doctrinally incoherent.

Our argument on behalf of a duty-based rule of law approach proceeds in four parts. First, Part II examines the rule of law in the constitutional order, describing its fundamental role and the importance of due process and separation of powers, including judicial review, as essential safeguards for rule of law principles. Part II also summarizes the current doctrine with respect to due process and judicial review, highlighting the ways in which it fails to live up to *Marbury's* rule of law promise. In Part III, we focus on *Marbury's* treatment of government employment as property, demonstrating that, contrary to the conventional wisdom, the Court has long accorded due process protections to government benefits, even welfare benefits, often without careful inquiry into whether these interests were “property.” In Part IV, we examine the foreclosure of Article III review and the public rights doctrine on which it is based. Again, a close analysis of the early case law indicates that it provides considerably less support for complete foreclosure of review than is conventionally assumed. By clearing up the historical misconceptions that underlie current doctrine, Parts III and IV pave the way for the development of our duty-based approach to the rule of law in Part V. After describing the basic components and application of the duty-based approach, we demonstrate that this approach not only more fully realizes rule of law principles, but it also provides a more workable framework for analyzing many problematic aspects of due process and judicial review doctrine that the rights-based reforms proposed by other critics of the current doctrines.

¹¹ No valuable interests, and was understood that way for much of our constitutional history. *See infra* notes ___ and accompanying text.

¹² *See infra* notes ___ and accompanying text.

II. *Marbury's* Unfilled Promise

Although the “rule of law” has various shades of meaning in different contexts,¹³ its essence is a model of governmental regularity under which public officials are bound by legally enforceable rules that constrain power. The rule of law thus incorporates three interrelated principles: (1) that government officials must have legal authority for their actions; (2) that government actions are bound by law; and (3) that government actions in excess of legal authority or violating legal constraints are invalid.¹⁴ Insofar as *Marbury* articulates and applies these principles in a government benefits case, it would seem to establish that the rule of law and its attendant safeguards, due process and judicial review, apply to the administration of government benefits.

This section develops our basic premise that the Court’s current rule of law jurisprudence leaves *Marbury’s* rule of law promise unfulfilled when government benefits are involved. We begin by reviewing Chief Justice Marshall’s rule of law reasoning in *Marbury*, highlighting its ambiguity concerning whether individual rights or government duties trigger rule of law protections. We then explain why the Constitution envisions both due process and judicial review as necessary for the rule of law and how the Court has nonetheless effectively delegated authority to the legislature to prevent the application of these protections to government benefits. We conclude that the Court’s current approach offers an unstable and unsuitable foundation for the rule of law.

A. *Marbury’s* Rule of Law Analysis

Marbury is a case involving a government benefit, in the form of William Marbury’s claim to a commission as a federal Justice of the Peace, which Secretary of State James Madison refused to deliver after taking office.¹⁵ Chief Justice Marshall reasoned that, while Marbury was entitled to a writ of mandamus to remedy Madison’s wrongful refusal,¹⁶ the Supreme Court lacked original jurisdiction to issue the writ because the statutory provision conferring original jurisdiction was inconsistent with Article III and therefore void.¹⁷ The latter proposition was the occasion for

¹³ See Richard Fallon, Jr., “The Rule of Law” As A Concept In Constitutional Discourse, 97 COLUM. L. REV. 1 (1997).

¹⁴ We do not offer our definition as the “proper” interpretation of the rule of law, but rather as an explanation of how we are using this concept. Nonetheless, our definition reflects the historical understanding of the rule of law, see A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 181-205 (2d ed. 1959), and is consistent with our constitutional structure and traditions. We are confident that most people would readily agree that the rule of law encompasses at least these basic principles.

¹⁵ The plaintiff, William Marbury, had been appointed under Midnight Judge’s Act of 1801, a last-ditch effort by the Federalists (who had lost the last election) to ensconce themselves in power by creating and filling new judicial and executive offices. Marbury’s commission had been signed and sealed, but John Marshall himself, who at the time was serving as Secretary of State, neglected to ensure its delivery before leaving office. His successor as Secretary of State, James Madison, refused to deliver it. For extended discussions of *Marby* in historical context, see James O’Fallon, Marbury, 44 Stan. L. Rev. 219 (1992); William Van Allstyn, *A Critical Guide to Marbury v. Madison*, 1969 Duke L. J. 1.

¹⁶ 5 U.S. (1 Cranch) at 163-73.

¹⁷ *Id.* at 173-80.

Marshall's famous assertion of judicial authority to declare legislative acts unconstitutional, but Marshall also relied on rule of law principles to conclude that Marbury was entitled to a writ of mandamus. Although the rule of law reasoning that underlies the Court's decision is clear, the opinion contains elements of both a rights-based and a duty-based rule of law analysis. This ambiguity opened the door for the Supreme Court to develop its current rights-based triggers for due process and judicial review.

1. The Rule of Law and Public Benefits

Justice Marshall supported his conclusion that Marbury was entitled to a remedy for Madison's failure to deliver his commission with a negative proof premised on core rule of law principles. The first proposition of this proof was that under the rule of law, there is a legal remedy for the wrongful denial of a right.¹⁸ As Marshall put it, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."¹⁹ The second proposition is that the Constitution established a rule of law state, expressed in Marshall's famous pronouncement that ours is a government of laws, not men.²⁰ Marshall then reasoned to a contradiction: "It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."²¹ This contradiction proved the opposite: that the laws must provide a remedy for the wrongful denial of the commission. Marshall took it as a given that the remedy to be provided would be a judicial one, presumably because it is "profoundly the province of the judiciary to say what the law is."²²

Marshall's decision to strike down the statute conferring original jurisdiction to the Supreme Court to issue writs of mandamus as inconsistent with Article III was likewise premised on rule of law principles.²³ For Chief Justice Marshall, the adoption of a written constitution in which the powers of government are limited necessarily implied that the constitution was fundamental or superior law.²⁴ As such, when courts were called upon to resolve cases and controversies, their duty was to apply the superior law – i.e., the Constitution.²⁵ This reasoning rests on all three rule of law principles described above.²⁶ It assumes that there must be a valid basis for government action

¹⁸ *Id.* at 163. Marshall supported this premise by reference to Blackstone's statement that "where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded." *Id.* (quoting Blackstone's Commentaries, Volume 3, at 23).

¹⁹ *Id.*

²⁰ *Id.* (quoted *supra* text at note ____).

²¹ *Id.*

²² *Id.* at 177. Although Marshall makes this point in connection with his discussion of judicial review of legislation, *see infra* notes ____ and accompanying text, it would seem to be equally applicable to judicial review of executive action.

²³ This conclusion was based on the premise that Article III's list of cases within the original jurisdiction of the Supreme Court is an exclusive one. *See id.* at 174-75. While we disagree with this premise, *see infra* notes ____ and accompanying text, that does not refute the rule of law reasoning on which judicial review is based.

²⁴ *See id.* at 176-77.

²⁵ *See id.* at 177-80.

²⁶ *See supra* notes ____ and accompanying text.

insofar as it posits the government as one of limited powers. It reasons from there that the legislature and the judiciary are constrained by law in the exercise of their constitutional duties. And it concludes that legislation in violation of constitutional constraints is illegal and therefore void.

In making these rule of law pronouncements, Marshall was not troubled in the least by the fact that the right at issue – the denial of Marbury’s commission – was a government benefit and not private property.²⁷ Indeed, elsewhere in the opinion, Marshall cited other examples involving government benefits, including veterans pensions²⁸ and patents for public land,²⁹ as obvious cases in which the rule of law required a remedy for wrongful government action. Nor did it trouble Marshall that the right was being asserted against the government, insofar as he rejected any exception from a writ of mandamus based on Madison’s high office.³⁰ More directly, in an often overlooked passage, Marshall rejected any suggestion that sovereign immunity would protect government officials who act in violation of their legal duties.³¹

2. Right or Duty?

Marbury clearly implies that the rule of law applies to government benefits, but it is ambiguous about whether this application is triggered by the presence of a right to the benefit or on the presence of a legal duty that binds government officials.³² Although some portions of *Marbury* acknowledge

²⁷ He simply assumed that “if [Marbury] has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.” 5 U.S. (1 Cranch) at 155; *see also id.* at 162 (“To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.”). While Marshall spoke of the “evidences” of office as the property in question, this was merely a convenient fiction. It is clear from his treatment of the issue in other contexts that the underlying right to serve in the office was at issue. *See id.* at 173 (concluding that there is no alternative legal remedy so as to render mandamus inappropriate because “[t]he value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or nothing.”).

²⁸ *See id.* at 164:

By the act concerning invalids, passed in June 1794, the secretary at war is directed 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 veteran be without a 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?

²⁹ *See id.* at 171 (citing the failure “to record a commission, or a patent for land” as examples of cases in which “it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right to be done an injured individual, than if the same services were to be performed by a person not the head of a department.”) While land may be viewed as traditional private property, a patent for land is a government benefit in the sense that the government creates an individual interest in formerly public lands.

³⁰ *Id.* at 169-73. For further discussion of this aspect of Marshall’s opinion, see *infra* notes ___ and accompanying text (discussion of exceptions).

³¹ *Id.* at 165. For further discussion of this aspect of Marshall’s opinion, see *infra* notes ___ and accompanying text (First Part of the Judicial Review Section).

³² Indeed, given the Hohfeldian relationship between rights and duties, these questions merged on the facts of *Marbury* – Madison’s duty to deliver the commission was the flip side of Marbury’s right to it. As we shall see, however, rights-based and duty-based analysis diverge in critical respects. *See infra* notes ___ and accompanying text

the commission's character as a vested "property" right and seem to adopt a rights-based trigger,³³ it is equally plausible to read the opinion as endorsing a duty-based approach. Marshall characterized Marbury's commission as his property, but did not expressly state that a property right is required to trigger the rule of law requirement of a remedy. More fundamentally, Marshall's simple assumption that the commission was property stands in stark contrast to his careful presentation of alternative rationales to support his conclusion that Marbury's commission had vested,³⁴ suggesting that the character of the interest as a government benefit was not a significant factor.

In addition, two other aspects of the opinion support a duty-based interpretation. First, while Marshall often used the language of rights, at times his language was much broader. For example, in the negative proof discussed above, Marshall stated that the law must provide an individual with a remedy "whenever he receives an injury."³⁵ Later in the opinion he asked the rhetorical question, "[i]s 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?"³⁶ Later in that paragraph, Marshall also asks rhetorically "Is it to be contended that the heads of departments are not amenable to the laws of their country?"³⁷

Second, and more importantly, when Marshall rejected the argument that the Secretary of State was immune from judicial review, he did so using a duty-based interpretation of the rule of law. In rejecting immunity from judicial review, Marshall emphasized that "the question, whether the legality of an act be examinable in a court of justice or not, must always depend on the nature of that act."³⁸ While political questions confided by the Constitution to executive discretion were not

(Part IVA).

³³ For example, Marshall stated expressly that "if he has been appointed, the law continues him in office for five years, and he is *entitled* to the possession of those evidences of office, which, being completed, became his *property*." *Id.* at 155 (emphasis added). Moreover, subsequent passages also refer to the commission as property or as a vested right. *See, e.g., id.* at 162 (concluding that the appointment of Marbury "has conferred legal rights which cannot be resumed"); *id.* (concluding that the refusal to deliver the commission was "violative of a vested right"); *id.* at 163 (reasoning that the United States is not a government of laws "if the laws furnish no remedy for a vested legal right"); *id.* at 167 (reasoning that "the question whether a right has vested or not" is in its nature judicial). In a brief discussion that strongly resonates with modern entitlement theory, Marshall also contrasted this office, which was for a term of years, with an officer who was removable at will. *Id.* Indeed, much of the analysis is strongly reminiscent of the modern two-step due process doctrine, insofar as Marshall first concluded that Marbury had a property right to the commission, and then analyzed what remedy was required.

³⁴ First, Marshall reasoned that the right to office was vested upon the completion of nomination and appointment, and that the commission merely constituted "evidence" of the appointment. Second, he reasoned that if the commission itself was the appointment, then it was completed when the commission was signed and sealed; i.e., delivery was not required. Of course, it was Marshall himself who had failed to deliver the commission, and his ultimate conclusion was self-serving and – to say the least – of questionable ethical propriety. *See id.* at 155-62.

³⁵ *Id.* at 163.

³⁶ *Id.* at 164.

³⁷ *Id.*

³⁸ *Id.* at 165.

reviewable,³⁹ “when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent upon the performance of those acts; he is so far the officer of the law; is amendable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.”⁴⁰ This analysis makes clear that any such exception turns on whether the officer is subject to a legal duty⁴¹ and the critical question for judicial review in *Marbury* was the existence of legal standards constraining official discretion and thereby creating legal duties, not the character of the interest injured by government action.

Marbury established the rule of law as fundamental to the constitutional order.⁴² Indeed, Marshall recognized that the rule of law is a necessary prerequisite for a legally binding constitution and is in that sense “meta-constitutional.” The rule of law must apply if a constitution is to be legally binding as well as a political document. In this manner, *Marbury* holds out the promise of government regularity in the treatment of its citizens, and it does so in the context of a government benefit. Finally, while the rights-based approach suggested by *Marbury* is familiar and comfortable in light of current doctrine, it is not compelled by the opinion.

B. Essential Rule of Law Safeguards

Since the rule of law principles articulated in *Marbury* apply to government benefits, we turn to the question of what constitutional safeguards are necessary in order to ensure that the rule of law

³⁹ *Id.* at 164. Although Marshall did not use the term “political questions,” this discussion (along with the parallel discussion in Marshall’s discussion of the availability of mandamus against the Secretary of State) is the origin of the “political question” doctrine, under which certain issues are not justiciable because they are “textually committed to a coordinate branch,” because there are no “judicially discoverable and manageable standards,” or because various prudential considerations stemming from separation of powers concerns mandate judicial restraint. 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) (arguing that a recent decline in the doctrine reflects an increased assertion of judicial supremacy). The duty-based approach to the rule of law has implications for, and draws upon, the political question doctrine. See *infra* notes ___ and accompanying text.

⁴⁰ *Id.* at 166.

⁴¹ See *id.* at 164-67. Marshall’s repeated emphasis on the character of the government action involved suggests to us that for Marshall, rule of law principles apply whenever government action causing injury is constrained by law. See *id.* at 164:

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? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

See also JOHN E. NOWAK & RONALD ROTUNDA, *CONSTITUTIONAL LAW* 7 (5th ed. 1995) (“Marshall asserts an open-ended power to review executive actions based upon the principle that the executive can have no right to disregard a specific duty assigned to him by law.”).

⁴² See *Yick Wo v. Hopkins*, 118 U.S. 356, 369-70 (1885) (“When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.”).

operates in the administration of such benefits. This section demonstrates why due process and judicial review are both essential to promote the rule of law. The next section explains how the Court has made the applicability of these protections to government benefits contingent on the will of the legislature.

The rule of law is most closely associated, both historically and conceptually, with the constitutional requirement of due process, which was incorporated into two separate constitutional amendments with little, if any, debate or discussion.⁴³ What is known about the origins of due process, however, suggests that the framers of the Constitution were endorsing the rule of law component of the Magna Carta.⁴⁴ Thus, the primary focus of the Due Process Clause was to prevent the arbitrary and abusive exercise of government power, with less emphasis on cataloguing the particular interests to which due process attached.⁴⁵ In any event, there can be little doubt that one of the principal functions of due process is to require that the government act in accordance with the rule of law.⁴⁶

⁴³ Edward Rubin, *Due Process and the Administrative State*, 72 Cal. L. Rev. 1044, 1093 (1984).

⁴⁴ The framers likely understood Chapter 39 of Magna Carta as the origin of the phrase “due process of law,” although this understanding may not be correct. The Magna Carta provides that “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) (emphasis added). Nevertheless, 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). 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 Jurow, *Untimely 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 (1856) (where the Court stated that “[t]he words, ‘due process of law, were undoubtedly meant to convey the same meaning as the words, ‘by the law of the land,’ in Magna Carta.”).

⁴⁵ As Rodney Mott observed:

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. . . . The view that due process of law was considered as a general phrase designed to prevent 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 attached to it.

Rodney L. Mott, *Due Process of Law* 159, 161 (1973).

⁴⁶ See Peter L. Strauss, *Administrative Justice in the United States* 49 (2d ed. 2002):

While the text of the due process clause is extremely general, the fact that it is (uniquely) expressed twice in the Constitution strongly suggests an understanding that its words state a central proposition about the requirements of legal order. Historically, the Clause reflects the Magna Carta of Great Britain, both in its expression of principles of legality and its particular assurance that all would receive the ordinary processes (procedures) of law. They also echo that country’s seventeenth century struggle for political and legal regularity, and the American colonies’ strong insistence during the pre-

Due process not only reflects the basic rule of law concept that government is bound by law, but also incorporates a specific mechanism to ensure it – fair procedures. Procedural safeguards are an essential means of enforcing rule of law principles when government actors apply legal standards to a particular set of facts because the ultimate outcome in any case depends not only on the law, but also the facts to which it applies. Thus, unconstrained discretion over the factual determinations that provide the predicate for lawful government action can defeat the rule of law.⁴⁷ The due process requirements of notice and an opportunity to be heard by an unbiased decisionmaker provides an effective means of constraining factual determinations and the application of the law to those facts. Most directly, a party who is the subject of government action will ordinarily have information that is essential to a fair and accurate decision.⁴⁸ 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. More broadly, 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.

Although the separation of powers is best known for its political function of diffusing governmental authority, it is also has an important rule of law purpose.⁴⁹ Without the separation of legislative and executive power, the requirements that government action be undertaken pursuant to valid legal authority and constrained by legal standards has no meaning. As Richard Stewart has observed, “Insofar as statutes do not effectively dictate agency actions, individual autonomy is

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. . . .

⁴⁷ Concerns over the potential for evasion of the law through abusive factfinding are evident in the text of the Constitution itself, which provides in Article III, § 2, cl. 2, for the 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.” For this reason, the Supreme Court sometimes has scrutinized state court or administrative agency factual determinations more vigorously under the constitutional and jurisdictional fact doctrines. See *infra* notes ___ and accompanying text.

⁴⁸ Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* §9.2, at 7 (1994).

⁴⁹ See Federalist No. 47 (Hamilton) (“The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, many justly be pronounced the very definition of tyranny.”); Massachusetts Constitution, Pt. 1, Art. XXX (“In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”); see generally Alfred C. Aman, Jr. & William T. Mayton, *Administrative Law* 67 (19__) (“[A] combination of powers is bad because it admits *ad hoc* law making, not permanent and general laws but orders cut for the occasion—all according to the will of whomever holds combined powers. Separated powers, on the other hand work to induce government within the rule of law.”); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 *Corn. L. Rev.* 430, 450 (1987) (“A close relation between the rule of law and separation of powers is evident in both the liberal and democratic elements of liberal democratic theory.”). The origins of this concept can be traced to the ancient maxim that no person can be a judge in his or her own cause. Richard J. Pierce, Jr., Sidney A. Shapiro & Paul R. Verkuil, *Administrative Law and Process* 26 (3d ed. 1999).

vulnerable to the imposition of sanctions at the unrulèd will of executive officials”⁵⁰ By separating legislative from executive action, it becomes possible to ascertain and enforce legal constraints on government action. Thus, the “nondelegation doctrine” requires that legislation delegating administrative authority must contain an “intelligible principle” to guide and control agency action and provide a basis for judicial review.⁵¹

Separation of powers also incorporates a specific mechanism for enforcing the rule of law. Article III provides for the establishment of an independent judiciary with jurisdiction to resolve cases and controversies, vesting the courts with authority to oversee legislative and executive compliance with legal standards.⁵² Thus, it is no coincidence that Chief Justice Marshall offered the rule of law as the primary justification for inferring the power of judicial review of both executive and legislative action in *Marbury v. Madison*.⁵³ Moreover, the nondelegation doctrine is directly linked to judicial review, insofar as standards are required not only to constrain the execution of the

⁵⁰ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1676 (1975). To be sure, separation of powers principles are at best imperfectly implemented in the modern administrative state. For example, the Supreme Court has accepted institutional arrangements in which all governmental functions are apparently combined in a single entity on the theory that so long as each branch retains its “core function,” the essential operation of checks and balances is preserved. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 625 (1984) (separation of powers is not violated by combination of functions so long as one branch does not jeopardize the “core function” of another). Likewise, the Court has accepted broad delegations of authority pursuant to open-ended standards, leaving administrative discretion essentially unconstrained and frustrating judicial review. Pierce, Shapiro & Verkuil, *supra* note __, at 36-37. The imperfect realization of separation of powers principles, however, does not undermine their centrality to the operation of the rule of law in our constitutional system. On the contrary, it heightens the need for attention to the preservation of rule of law principles in the modern administrative state. Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Discretion*, 1987 Duke L.J. 387, 425-30.

⁵¹ See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928) (establishing the “intelligible principle” test of nondelegation). The doctrine derives from the constitutional command that “[a]ll legislative powers . . . shall be vested in a Congress of the United States . . .” U.S. Const. art. I, §1. See *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 472 (2001). The intelligible principle requirement implements the rule of law by ensuring that there are legal standards to govern administration of the law and to provide a basis for judicial review. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (explaining difference between legislative veto and administrative delegations in terms of the applicability and enforcement of statutory standards against administrative agency); Peter L. Strauss, Todd Rakoff, Roy A. Schotland, and Cynthia R. Farina, Gellhorn and Byse’s *Administrative Law* 68 (9th ed. 1995) (stating that the doctrine ensures that “Congress has created enough structure to make it possible to assess and/or control the legality of the delegate’s conduct . . .”). For further discussion of the relation between the intelligible principle test’s requirement of standards and the rule of law, see *infra* notes ___ and accompanying text (Part IV).

⁵² In theory, any independent tribunal with the authority to interpret the law and apply it to the facts as found could serve this rule of law checking function, as does (for example) the *Conseil d’Etat* in France. See L. Brown & J. Garner, *French Administrative Law and Process* 1-11 (1985); Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. Int’l L.J. 57, 70-73 (1994). As we shall elaborate, however, in the United States constitutional system only the Article III courts (as opposed to Article I courts) have the requisite independence to conduct such review. See *infra* notes ___ and accompanying text.

⁵³ See *supra* notes ___ and accompanying text (establishing the rule of law basis for *Marbury*).

laws, but also to provide a basis for judicial review.⁵⁴

Although these two constitutional safeguards are distinct protections afforded by a separate constitutional provision, they are interdependent insofar as procedural due process creates the necessary factual record for judicial review of government decisions, and without that record, judges could not perform the checking function that separation of powers requires.⁵⁵ In *American School of Magnetic Healing v. McAnnulty*,⁵⁶ for example, the Supreme Court reasoned that a statute providing for the seizure of mail by the Postmaster General on evidence "satisfactory to him" that fraud had been committed did not foreclose review of whether the facts provided a legal basis for a given seizure. "Otherwise," the Court reasoned, "the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual."⁵⁷

Marbury, which recognizes that the rule of law is fundamental to the constitutional order, holds out the promise of government regularity in the treatment of its citizens. Both due process and judicial review are necessary and essential to achieving this goal. Due process protects the rule of law from an individual rights perspective, affording procedural safeguards against arbitrary and irregular government action. Separation of powers protects the rule of law from a structural perspective by making judicial review a critical check on the legality of government action. Thus, procedural due process and judicial review are both closely linked to the rule of law and, through it, to each other.

C. Government Benefits and the Contingent Rule of Law

The Supreme Court's adoption of a rights-based approach to procedural due process and judicial review has undermined *Marbury*'s promise that the government is subject to the rule of law. Under the rights-based approach, the Court has distinguished between traditional private rights and interests that are created by or asserted against the government. With respect to government benefits, the Court employs a "greater-power-includes-the-lesser-power" analysis that gives the political branches effective discretion to foreclose the application of both due process and judicial review. Government benefits are "property" for due process purposes only if the legislature (or another government body with authority to do so) creates a legal entitlement to them. Likewise, the legislature may foreclose judicial review of government benefit decisions because benefit claims are asserted against the government, which can only be sued with its consent. As will be developed in this section, these doctrinal developments mean that when government benefits are involved, the rule of law is contingent on legislative consent.

⁵⁴ See *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring).

⁵⁵ See Paul Verkuil, *Separation of Powers, The Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 316 (1988).

⁵⁶ 187 U.S. 94 (1902).

⁵⁷ *Id.* at 110. See also *Crowell v. Benson*, 285 U.S. 22 (1932) (construing statute to provide de novo review of questions of law and questions of constitutional and jurisdictional fact to avoid due process and Article III problems).

1. Contingent Due Process

Under current doctrine, due process applies only if there is a deprivation of “life, liberty, or property.” Property rights, moreover, are not created by the Constitution itself, but by some external body of law (such as state or federal statutes or administrative regulations) that confers a “legal entitlement.” This approach crystallized in *Board of Regents of State Colleges v. Roth*,⁵⁸ which held that due process did not apply to the nonrenewal of a one year teaching contract because the teacher had no property interest in renewal of the contract.⁵⁹

Roth is often viewed as part of a broader “due process revolution” that expanded due process protections to various government benefits previously treated as mere “privileges.”⁶⁰ However, as we will discuss,⁶¹ the Court consistently applied due process safeguards to government benefits, including employment, licenses, and monetary benefits, throughout the 19th and 20th centuries. Although the precise rationale for doing so was not clear, the Court did not expressly require the presence of a protected interest or define property by reference to a “legal entitlement” until *Roth*, and the Court’s reasoning did not presuppose such a requirement.

The express requirement of a “legal entitlement” makes the applicability of due process protection contingent on the legislature’s agreement to provide such protections. The Supreme Court has also made clear that the Constitution does not impose affirmative constitutional duties on the government.⁶² Because the government therefore has control over the creation of benefits, it would seem to follow that it also has the power to control the nature and extent of those benefits, including whether there is an “entitlement” to them.⁶³ The upshot of this approach is that due

⁵⁸ 408 U.S. 564 (1972).

⁵⁹ *Id.* at 578. In a companion case, *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court found that there was a property interest in the renewal of a similar teaching contract, because the college published statements of its intent to retain any person who taught for more than seven years so long as his or her performance was satisfactory. The teacher in *Perry* could reasonably rely on these statements, which therefore created a legal entitlement.

⁶⁰ In *Roth* itself, for example, the Court stated that it had rejected the “wooden distinction between ‘rights’ and ‘privileges.’” 408 U.S. at 571.

⁶¹ See *infra* notes ___ and accompanying text.

⁶² See *DeShaney v. Winnebago County Department of Social Services*, 487 U.S. 1216 (1988); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988); *Dandridge v. Williams*, 397 U.S. 471 (1970). In this article, we do not take a position on whether there may be some affirmative constitutional rights, but rather take it as a given that, absent certain narrow circumstances, there are no affirmative constitutional rights to particular benefits. For general discussion, see Susan Bandes, *The Negative Constitution: A Critique*, 88 Mich. L. Rev. 2271 (1990); 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).

⁶³ There are, of course, limits to this “greater power includes the lesser power” argument; the government may not impose standards or conditions on benefits that violate other constitutional provisions. For example, the government could not provide benefits on the basis of race (unless the racial classification is narrowly tailored to meet a compelling

process does not apply in contexts where, although government officials are subject to legal standards, there is no “entitlement” to the government benefit the government is seeking to withdraw.

Recent welfare reform in Wisconsin demonstrates the implications of contingent due process for the rule of law. Wisconsin has eliminated “pretermination” hearings for beneficiaries, and provides only a limited post-deprivation “Fact Finding Review” of some adverse decisions.⁶⁴ These procedures would appear to violate *Goldberg v. Kelly*,⁶⁵ which held that the state must provide full hearings before terminating AFDC benefits.⁶⁶ Wisconsin apparently believes that due process does not apply, however, because both federal⁶⁷ and state law⁶⁸ expressly disclaim the creation of any entitlement to benefits. It is unclear whether Wisconsin can avoid the requirements of due process simply by declaring that there is no entitlement,⁶⁹ but courts have been receptive to arguments against the existence of a property interest in benefits when statutes contain such disclaimers.⁷⁰

The current approach to due process limits the rule of law in another way. Most courts require mandatory language or its equivalent to create a property interest, which would seem to follow from the concept of legal entitlement.⁷¹ Thus, government benefit decisions involving the discretionary

government interest). *See, e.g.*, *Adarand Constructors, Inc., v. Peña*, 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.

⁶⁴ 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, 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, *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).

⁶⁵ 397 U.S. 254 (1970).

⁶⁶ *Goldberg*, which preceded *Roth*, characterized AFDC benefits as property, but left unclear the precise basis for this characterization. For further discussion of *Goldberg*, see *infra* notes ___ and accompanying text.

⁶⁷ *See supra* note ___ and accompanying text.

⁶⁸ *See* Wis. Stat § 49.141(4) (“notwithstanding fulfillment of the eligibility requirements for any component of Wisconsin Works, an individual is not entitled to services or benefits under Wisconsin Works”).

⁶⁹ *See* Richard J. Pierce, Jr., Sidney A. Shapiro & Paul R. Verkuil, *Administrative Law & Process* 243 (3d ed. 1999) (referring to the federal welfare reform statute’s disclaimer of entitlement and asserting 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 an entitlement.”).

⁷⁰ *See, e.g.*, *Washington Legal Clinic for the Homeless v. Barry*, 107 F.3d 32 (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 (8th Cir. 1995) (relying in part on statement of no entitlement to conclude that there was no protected property interest in renewal of gaming license); *Colson v. Silman*, 35 F.3d 106 (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 property interest in individual claims against the county was conceded by parties).

⁷¹ *See* *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 581 (2d Cir.1989) (“the existence of provisions that retain for the state significant discretionary authority over the bestowal or continuation of a government benefit suggests that

application of legal standards apparently are not covered by due process.⁷² In *Welch v. Paicos*,⁷³ 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 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.⁷⁴ The court indicated that an applicant for such a permit has a property right only when permits are routinely granted to all applicants on the basis of objective criteria.⁷⁵

In still other cases, courts have declined to recognize a property interest on the basis of discretion that is unrelated to the application of legal standards for eligibility. A typical example is when benefits are conditioned on the availability of funds, as in *Colson v. Silman*,⁷⁶ in which the Court of Appeals for the Second Circuit held that a state statute providing for emergency medical benefits did not create a property interest.⁷⁷ 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, the court in *Colson* concluded that claimant had no legal entitlement to them.⁷⁸ This analysis is problematic, however, to the extent that it implies that due process would not apply in a case where funds are available and an applicant is denied benefits based on the failure to meet eligibility requirements.⁷⁹

Contingent due process is also inherently unstable. If the existence of "property" is a function of positive law, the state should have the power to qualify the ownership of property, including old property, in any manner it may choose.⁸⁰ Likewise, under the "bitter-with-the-sweet" argument

the recipients of such benefits have no entitlement to them").

⁷² We are not sure how significant this due process gap is, but this sort of statute appears to us more common in the area of permits and licensing, as opposed to benefit programs such as TANF, Social Security, or veterans' benefits. *See, e.g.,* *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667 (3rd 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).

⁷³ 66 F. Supp. 2d 138 (D. Mass. 1999).

⁷⁴ *Id.* at 165-66. *Welch* also addressed the problem of applying *Roth* to applicants for, as opposed to those already receiving, benefits. *See infra* notes ___ and accompanying text.

⁷⁵ *Id.*

⁷⁶ 35 F.3d 106 (2d Cir. 1994); *see also* *Washington Legal Clinic for the Homeless v. Barry*, 107 F.3d 32 (D.C. Cir. 1997); *Eidson v. Pierce*, 745 F.2d 453, 462 (7th Cir.1984).

⁷⁷ The county conceded, however, that its ordinances created a property interest. *See* 35 F.3d at 108.

⁷⁸ *Id.* at 109.

⁷⁹ It is possible to read *Colson* more narrowly in light of the fact that the county conceded that due process applied to individualized eligibility decisions. The claimant argued that the state was obligated to provide a hearing as well, but it is not clear what issues the hearing would address. Insofar as the only issue presented at the state level may have been whether to appropriate funds, the result in *Colson* is unexceptional. Professor Richard Pierce, however, reads *Colson* much more broadly. *See* Richard J. Pierce, *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996).

⁸⁰ *See* Henry Monaghan, *Of "Liberty" and "Property"* 60 Cornell L. Rev. 405, 440 (1977) (using example of a hypothetical statute which established that "no person who bought a car after the statute was passed would be deemed

forcefully advanced by (then) Justice Rehnquist in *Arnett vs. Kennedy*,⁸¹ legislative control over the creation and definition of a property interest carries with it the power to define that interest in part by reference to the procedures to be followed when it is terminated. The Court has rejected these arguments by judicial fiat, but has been unable to offer a coherent explanation of why this should be so.⁸²

One final uncertainty in current doctrine derives from the Court's suggestion in *Roth* that property consists of beneficial interests that a party has "already acquired," which invites courts to distinguish between the initial application for a government benefit and the termination or other adverse decision respecting benefits already being received.⁸³ Because a person who is applying for a benefit has not yet acquired it, the language of *Roth*, taken literally, would render due process wholly inapplicable to benefit applications, regardless of whether there is an entitlement. In later cases the Court has characterized the question as an open one and declined to resolve it.⁸⁴ The federal courts of appeals have uniformly rejected a flat distinction between applications for benefits and benefits already received, and focus instead on whether there is sufficiently mandatory language to create a legal entitlement to benefits once eligibility requirements are met.⁸⁵ Nonetheless, it appears that the requirement of mandatory language is applied especially strictly in the context of benefit applications.

2. Contingent Judicial Review

to have a "right to continued' ownership as against the state.").

⁸¹ 416 U.S. 134, 151-55 (1974) (plurality opinion).

⁸² See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (rejecting bitter-with-the-sweet argument); *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1982) (rejecting argument that announcement of future intentions to condition building permits deprived property owner of any reasonable expectation of right to build on property).

⁸³ *Roth* stated flatly that due process protects "the security of interests that a person *has already acquired* in specific benefits." 408 U.S. at 576 (emphasis added).

⁸⁴ See *American Mfrs. Mut. Ins. Co. v. Sullivan*, 596 U.S. 40, 990 n.13 (1999) (reserving question whether due process required a hearing at some time before insurance benefits are denied as not reasonable and necessary); *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. National Assn. 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); *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].") (O'Connor, J., joined by Brennan and Marshall, JJ., dissenting from denial of certiorari) (citations omitted); *Peer v. Griffith*, 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).

⁸⁵ See *Mallette v. Arlington County Employees' Supplemental Retirement System 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.") (collecting cases).

The Court has also made judicial review of government benefits contingent on legislative consent. Under the “public rights” doctrine, which applies for purposes of analyzing Article III constraints on administrative adjudication, Congress may delegate the adjudication of public rights to administrative agencies without any involvement of Article III courts, including the foreclosure of judicial review.⁸⁶ Because public rights are traditionally defined as rights arising against the government, and government benefit claims by definition are asserted against the government, government benefits are usually regarded as public rights. In other cases involving foreclosure of review or jurisdiction stripping legislation, the Court has suggested that judicial review of constitutional claims may not be foreclosed, but it has generally assumed that judicial review of the factual and legal basis for ordinary government benefit claims may be statutorily precluded.

A mid-nineteenth century decision, *Murray’s Lessee v. Hoboken Land and Improvement Company*,⁸⁷ is the origin of the public rights doctrine. In *Murray’s Lessee*, the Court stated broadly that:

there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible to judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.⁸⁸

In contrast, Congress may delegate the adjudication of “private rights” to administrative agencies only as “adjuncts” to the courts, which must retain the “essential attributes of judicial power,” including meaningful judicial review.⁸⁹

Public rights have traditionally been defined as rights against the government, which would include all forms of government benefits. This understanding derives from references in *Murray’s Lessee* to the doctrine of sovereign immunity:⁹⁰ because sovereign immunity prevents the government from being sued without its consent, a claimant must be satisfied with whatever remedy

⁸⁶ See, e.g., Strauss, *supra* note ___, at 632 (stating that the “whole point” of the public rights doctrine is that “no judicial involvement at all was required -- executive determination alone would suffice.”) (emphasis in original).

⁸⁷ 59 U.S. (18 How.) 272 (1855).

⁸⁸ *Id.* at 284. Subsequent cases have endorsed the public rights doctrine. See *Granfinanciera, S.A., v. Nordberg*, 492 U.S. 33 (1989); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Crowell v. Benson* 285 U.S. 22 (1932).

⁸⁹ See *Crowell v. Benson*, 285 U.S. 22 (1932). Article III permits this arrangement because juries, masters, and commissioners had historically been assigned the function of fact-finders in law suits between private parties subject to appellate review by Article III judges. See *id.* at 51-53; *Pierce, Shapiro, & Verkuil, supra* note ___, at 75.

⁹⁰ In addition to the sovereign immunity rationale for the public rights doctrine, the Court has also indicated that public rights determinations are executive in character without fully explaining why. See *infra* notes ___ and accompanying text. Currently, the precise rationale and scope of the public rights doctrine remain uncertain. See *infra* notes ___ and accompanying text.

the government is willing to provide.⁹¹ As such, Congress may assign the adjudication of public rights to an administrative agency and foreclose review of its decisions without violating Article III.

The public rights doctrine is currently in a state of disarray.⁹² While recent decisions confirm the continued vitality of the public rights doctrine, they sever it from its traditional moorings in sovereign immunity by extending it to cases in which the government is not a party. Unfortunately, however, the Court has not fully developed an alternative executive power rationale that has become increasingly prominent, leaving the precise scope and rationale for the doctrine unclear. In addition, the Court has vacillated over whether public rights are an exception to Article III or merely a factor to be considered as part of a larger analysis. This uncertainty is compounded by two other lines of cases dealing with the statutory preclusion of review and with Congress's power to make "exceptions" to the Article III jurisdiction of the federal courts. These cases seem to operate independently of the public rights doctrine (and of each other), and suggest that, while there would be serious problems with congressional efforts to prevent the courts from hearing constitutional claims, judicial review of administrative action in ordinary cases can be foreclosed.

Thus, although *Marbury's* promise of judicial review was uttered in the context of a government benefit, in practice Congress is free to foreclose judicial review in ordinary benefit cases.⁹³ The significance of this discretion is illustrated by a consideration of the importance of judicial review in enforcing the rule of law in the administration of Social Security disability benefits during the 1980s. After the election of President Reagan, the Social Security Administration (SSA) adopted a series of highly restrictive policies and practices that resulted in sharply increased rates of denial or termination of benefits.⁹⁴ While some of these policies and practices and resulting denials and terminations were legitimate responses to concerns about abuse of the system, the agency itself admitted that it wrongfully terminated benefits to hundreds of thousands claimants.⁹⁵ Moreover, the courts found that many of the agency's policies and practices were contrary to applicable statutory standards and in some instances flagrantly so.⁹⁶ Although the SSA often resisted these judicial

⁹¹ This is the same kind of "greater-power-includes-the-lesser-power" reasoning that characterizes the entitlement construct of due process. See *supra* notes ___ and accompanying text.

⁹² This paragraph summarises doctrinal developments that will be discussed more fully *infra* notes ___ and accompanying text.

⁹³ For purposes of the public rights doctrine, it does not matter whether benefits are conferred as a matter of legal entitlement so as to qualify as property under current procedural due process doctrine.

⁹⁴ See Susan Gluck Mezey, *No Longer Disabled: The Federal Courts and the Politics of the Social Security Administration* (1988); Debra Cofer, *Judges, Bureaucrats and the Question of Independence: A Study of the Social Security Administration Hearing Process* (1985); Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 B.Y.U. L. Rev. 461 (Report prepared for the Federal Courts Study Committee).

⁹⁵ See *Schweicker v. Chilicky* 487 U.S. 412, 416 (1988).

⁹⁶ See, e.g., *City of New York v. Heckler*, 578 F. Supp. 1109 (E.D.N.Y. 1983) (finding that SSA had employed an illegal and clandestine policy of presuming that claimants who did not meet regulations defining per se disabling ailments disabilities could perform unskilled work without regard to individual circumstances of claimants), *aff'd*, 742 F.2d 729 (2d Cir. 1984), *aff'd sub nom.* *Bowen v. City of New York*, 476 U.S. 467 (1986); see also *Mental Health Ass'n v. Schweicker*, 554 F. Supp. 157 (D.Minn. 1982) (same), *aff'd sub nom.* *Mental Health Ass'n v. Heckler*, 720 F.2d 965 (8th Cir. 1983).

decisions through a formal policy of “nonacquiescence”⁹⁷ and used unpublished policies and bureaucratic practices to influence administrative decisionmakers,⁹⁸ it was eventually forced to abandon or modify most of its restrictive practices.⁹⁹ Throughout this process, judicial review proved to be an essential safeguard for the rule of law in the administration of Social Security benefits.

The impact of the lack of judicial review is illustrated by events at the Veterans Administration (VA). Prior to 1989, VA benefit decisions were final and not subject to judicial review except for a narrow exception.¹⁰⁰ In 1989, in response to nearly unanimous complaints by veterans organizations about the lack of fair and responsive adjudication by the VA,¹⁰¹ Congress established an Article I court, now known as the U.S. Court for Appeals of Veterans Benefits (CAVC), which has jurisdiction to review factual and legal conclusions of the VA,¹⁰² but there has been little improvement. The VA has over 600,000 pending claims,¹⁰³ and the agency takes an average of two and one-half to three years to process a claim.¹⁰⁴ Moreover, over the last seven years, CAVC has remanded nearly 70 percent of the appeals it has heard,¹⁰⁵ and the VA takes nearly five times as long to process a remand as an original claim.¹⁰⁶ The high remand rate may reflect the VA’s failure to get it right the first time, but the CAVC has also exhibited excessive tolerance for VA delay and inipetitude by failing to interpret its powers and the VA’s mandate in ways that could speed

⁹⁷ Under the nonacquiescence policy, the SSA would issue rulings specifically directing administrative decisionmakers to apply regulations or policies that had been invalidated by federal courts of appeals, even in the circuits where the decisions were rendered. *See Levy, supra* note ___, at 503-07.

⁹⁸ For example, under the “Bellmon Review Program” the SSA targeted administrative law judges with high rates of allowing benefits for review on the agency’s own motion. *Id.* at 497-99. Other practices are described *id.* at 484-506.

⁹⁹ *See, e.g., id.* at 485 & n. 126 (citing authorities).

¹⁰⁰ Although federal courts were barred from engaging in judicial review of VA decisions, many recognized an exception that allowed district courts to consider challenges to VA regulations and policies under the Administrative Procedure Act (“APA”). *See, e.g.,* Evergreen State College v. Cleland, 621 F.2d 1002, 1007-08 (9th Cir. 1980); University of Maryland v. Cleland, 621 F.2d 98, 100-01 (4th Cir. 1980); Merged Area X (Education) v. Cleland, 604 F.2d 1075, 1078 (8th Cir. 1979); Wayne State Univ. v. Cleland, 590 F.2d 627, 631-32 (6th Cir. 1978).

¹⁰¹ *See* Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans’ Judicial Review Act: The VA Is Brought Kicking and Screaming Into the World of Meaningful Due Process*, 46 Me. L. Rev. 43, 44-45 (1994) (describing the events leading to the passage of the Veterans Judicial Review Act).

¹⁰² *See* Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1989) (defining organization, jurisdiction, procedure and other provisions of the new court). Congress also authorized the Federal Circuit to engage in limited review of CAVC decisions. *See* 38 U.S.C. § 7292(d)(1) (establishing jurisdiction to review CAVC decisions only on its interpretation of governing statutes).

¹⁰³ VA Claims Processing Task Force, Report to the Secretary of Veterans Affairs, at 9 (Oct. 2001). In 1992, the VA had 531,078 pending claims, while the number was 342,683 claims in 1996. *Id.*

¹⁰⁴ *Id.* at ___. The VA can take as long as seven years to resolve a claim. *Id.*

¹⁰⁵ *See* CAVC, Annual Reports (available at www.vetapp.uscourts.gov/AboutCourt/AnnualReport.asp).

¹⁰⁶ As of July 2001, the regional offices took at average of 184.2 days to render a decision on an initial claim and an average of 672 days to process a remand from the CAVC or the BVA. This delay has increased since 1995 when the processing time for a remand was 561 days. VA Claims Processing Task Force, *supra* note ___, at ___.

decisionmaking and improve its accuracy.¹⁰⁷ At least one informed observer has attributed these problems to the CAVC's Article I status.¹⁰⁸

D. Reconstructing the Rule of Law

From what has been said so far, it should be evident that the Supreme Court's current rule of law jurisprudence is inconsistent with the promise of *Marbury v. Madison*. Insofar as *Marbury* was a government benefits case, the basic rule of law principles it articulated must be considered fully applicable to government benefits. Due process and judicial review, the fundamental constitutional safeguards for the rule of law, should therefore apply to government benefits. Under current doctrine, however, the application of rule of law safeguards is contingent on legislative consent. The contingent character of the rule of law is the product of the Court's adoption of a rights-based approach to both due process and judicial review.

Although due process and judicial review are distinct issues, they have common rule of law underpinnings and exhibit similar doctrinal problems that stem from a common response to *Marbury's* ambiguity about what triggers the rule of law. In both areas, the Court has chosen to focus on the nature of the "right" at issue as a means of determining whether due process or judicial review is required. Due process applies only if a government benefit constitutes property. Judicial review is not required for public rights, except when constitutional rights are asserted. The adoption of the rights-based approach to both due process and judicial review has, through parallel logic, left the application of these rule of law safeguards to legislative discretion.

To begin with, although the terminology is different, the Court differentiates in each area between traditional private rights and government benefits: government benefits are "new property" for procedural due process and "public rights" for Article III purposes. Next, the Court reasons in both areas that the greater governmental power to deny something to the claimant includes the effective power to control the application of rule of law safeguards. For purposes of procedural due process, because there is no affirmative constitutional right to benefits, the government need not provide them as a matter of entitlement, thus precluding the creation of a protected property interest. For purposes of judicial review, because sovereign immunity applies when a claim is asserted against the government, a claimant must be satisfied if the government provides only an administrative remedy. Finally, in both areas, the contingent character of the rule of law for government benefits is inherently unstable, leads to confusing doctrine, and threatens to undermine

¹⁰⁷ See James T. O'Reilly, *Burying Ceaser: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 Ad. L. Rev. 223 (2001) (explaining ways the CAVC could have, but has not, improved VA decisionmaking); Bill Russo, *Ten Years After the Battle for Veterans Judicial Review: An Assessment*, Fed. Law., June, 1999, at 29 (same).

¹⁰⁸ O'Reilly, *supra* note __, at 228: "[T]he reading of dozens of CAVC decisions convinces the reader that the CAVC does not exhibit the will to compel the VA to deliver timely and accurate service to those who present claims before the CAVC. The CAVC itself seems captive of a dysfunctional system." O'Reilly compares the more favorable record of Article III review of social security cases, discussed previously, and recommends that Congress abolish the CAVC and adopt the Social Security appeals model for VA. *Id.* at 224, 255.

rule of law safeguards for traditional private property.¹⁰⁹

The contingent character of rule of law safeguards is not merely an academic issue. The Court's experience with McCarthyism demonstrates that governmental authority over "mere privileges" can be abused with devastating consequences for affected individuals, particularly if politically unpopular groups are involved.¹¹⁰ More broadly, political actors have incentives to undervalue rule of law safeguards that even relatively popular groups such as veterans may not be able to overcome.¹¹¹ These difficulties can be further illustrated by considering the issue in *Goldberg v. Kelly*¹¹² – whether there should be a pretermination hearing before a state revokes welfare benefits.¹¹³ Pretermination hearings, the costs of which are born by the government, can prevent the erroneous termination of benefits,¹¹⁴ the costs of which are born by claimants.¹¹⁵ Welfare

¹⁰⁹ In the due process area, the problem is the legislative power to condition entitlements, which could include the entitlement to traditional private property. *See supra* notes ___ and accompanying text. In the judicial review area, the expansion of public rights to include some private rights might permit the legislature to replace some traditional private causes of action with some sort of administrative adjudication. *See infra* notes ___ and accompanying text. We think either result is unlikely, but the logic of the analysis would seem to support them.

¹¹⁰ According to political process theory, judicial enforcement of the constitutional safeguards is particularly appropriate when the actions of political institutions adversely affect the politically powerless. *See* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) (proposing a political process failure theory of constitutional interpretation); Jessie Choper, *Judicial Review and the National Political Process* (1980) (same); *see also*, Edward L. Rubin, *Due Process in the Administrative State* 1044, 1103 (1984) (due process clause should be interpreted to account for democracy's inability to protect the rule of law.).

¹¹¹ Veterans first started petitioning Congress to subject VA to judicial review in the 1950s. Hagel and Horan, *supra* note ___, at 44. There have been dozens of studies over the years detailing the failures of the VA and urging reform by the VA itself, *see, e.g.*, Veterans Administration, *Reengineering Claims Processing: A Case for Change* (1996); Inspector General, Veterans Administration, *Summary Report on VA Claims Processing Issues* (1997); Veterans Benefits Administration, *Reengineering the Compensation and Pension Claims Process* (1998); VA Claims Processing Task Force, *supra* note ___, and by outside organizations, *see, e.g.*, National Academy of Public Administration, *Management of Compensation and Pension Benefits Claim Processes for Veterans* (1997).

¹¹² 397 U.S. 254 (1970).

¹¹³ Jerry Mashaw argues that the professionalism and goal orientation of care givers, caseworkers, and other professionals, may be the best way to ensure regularity in the implementation of social welfare programs. *See* JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY CLAIMS* 222 (1983) (bureaucratic rationality as practiced by the Social Security Administration (SSA) is a promising form of administrative justice), but in light of subsequent developments, one can no longer be confident that administrative officials share a broad commitment to the goals of the social welfare system. *See* Richard E. Levy, *Social Security Claimants with Developmental Disabilities: Problems of Policy and Practice*, 39 U. KAN. L. REV. 529 (1991) (concluding that in 1980s focus shifted at SSA from providing benefits to cost-cutting and fiscal constraint), William H. Simon, *Legality, Bureaucracy, and Class in Welfare System*, 92 YALE L.J. 1198, 1223 (1983) (describing shift in public benefit system from "social welfare" to bureaucratic mentality).

¹¹⁴ The evidence in *Goldberg* showed that the New York welfare agency reversed 37% of its initial decisions at post-termination hearings, Brief for Appellees, *supra* note ___, at 38-39, and the error rates were even higher in other states. Note, *Due Process and the Right to a Prior Hearing in Welfare Cases*, 37 FORD. L. REV. 604, 611 & n.47 (1969).

¹¹⁵ 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.

recipients can bring little political pressure on the government to undertake these costs, as the tenor of the recent welfare reform movement suggests. It is indeed a paradoxical system of the rule of law that leaves the application of its basic protections to the discretion of political actors.

In sum, notwithstanding the fact that *Marbury's* rule of law promise was made in the context of a government benefit case, current doctrine generally leaves the applicability of basic rule of law safeguards contingent on legislative consent, with potentially devastating consequences for those who rely on government benefits. The root of these difficulties is the rights-based approach to due process and judicial review, which must be reexamined as part of a larger effort to reconstruct the rule of law. As we shall demonstrate in the remainder of this article, this rights-based approach was not compelled as an historical matter, and the alternative, duty-based approach to the rule of law suggested in *Marbury* offers a more workable foundation for a coherent rule of law jurisprudence that is fully operational in the government benefit context.

III. Reconsidering Rights-Based Due Process

Conventional wisdom assumes that before the due process revolution of the early 1970s, “new property” interests such as government employment, licenses, and welfare benefits were entirely beyond the scope of due process because of the right-privilege distinction.¹¹⁶ On closer examination, however, it is clear that the conventional wisdom is wrong. Starting with *Marbury* and continuing throughout the period leading up to the due process revolution, the Court consistently applied due process to various “new property” interests, although it carried forward *Marbury's* ambiguity about what triggered the application of due process. The real due process revolution was not the extension of due process safeguards to some government benefits, but rather the adoption of a strict requirement that benefits qualify as “property” and the use of entitlement theory to define the property interests. This problematic construct is not directly compelled by due process. To the contrary, the Court painted itself into this corner by relying on rights-based reasoning.

A. A Brief History

This section establishes the long pedigree of due process protection of government benefits, starting with *Marbury* and continuing throughout the 19th and 20th centuries. We also explain the Supreme Court’s lack of clarity concerning why due process attached to these benefits. We demonstrate that, although these early cases can be understood as relying on a rights-based trigger, that interpretation is not compelled by them, and many of the cases suggest a duty-based trigger as an alternative.

1. Historical Protection of New Property

Long before the due process revolution, the Court applied due process protections to three paradigmatic examples of “new property” – government employment, occupational licenses, and pension benefits. Contrary to the conventional wisdom, these early cases (like *Marbury*) do not

¹¹⁶ For a forceful statement of the conventional wisdom, see Pierce, *supra* note ____ (counterrevolution article).

show any inclination to distinguish sharply between government benefits and private rights for constitutional purposes.

Government employment, notwithstanding *Marbury*, is often seen as a paradigmatic of example of a “mere privilege.”¹¹⁷ Cases such as *Bailey v. Richardson*,¹¹⁸ in which the court rejected a government employee’s claim that his termination by the President without a hearing violated due process, proclaimed broadly that “the due process clause does not apply to the holding of government office.”¹¹⁹ Notwithstanding such broad pronouncements, however, the actual practice of the courts was very close to current doctrine. Due process did not apply in cases like *Bailey*, when employment was “at will,” because of the lack of statutory or other constraints on firing and the President’s inherent removal power.¹²⁰ When employment is subject to the complete discretion of government officials, there are no legal standards by which such decisions are to be made and thus no basis for the application of due process principles.¹²¹ As in *Marbury*, however, the courts historically did not hesitate to apply due process to government employment when it was for a specified term of years and removal was limited to specified causes.¹²² The expansion of government employment due process cases relates more to the decline of employment at will than to any dramatic change in the underlying constitutional doctrine.¹²³

¹¹⁷ Consider, for example, Justice Holmes famous dictum that a person “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). 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 220-21, 29 N.E. at 518.

¹¹⁸ 182 F.2d 46 (D.C.Cir. 1951), *aff’d by equally divided Court*, 341 U.S. 918 (1952).

¹¹⁹ *Id.* at 57. The court also stated 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.” *Id.*

¹²⁰ Thus, for example, even in *Bailey v. Richardson*, the court also stated that:

[i]n the absence of statute or ancient custom to the contrary, executive offices are held at the will of the appointing authority, not for life or for fixed terms. If removal be at will, of what purpose would process be? To hold office at the will of a superior and to be removable therefrom only by constitutional due process of law are opposite and inherently conflicting ideas. Due process of law is not applicable unless one is being deprived of something to which he has a right.

Id. at 58.

¹²¹ As we shall develop more fully below, appointment of officers and removal of those who may be terminated at will are areas with respect to which standardless discretion may be permissible under our duty-based approach to the rule of law. *See infra* notes ___ and accompanying text. This conclusion is not based, however, on the fact that such employment is government benefit, but rather derives from the character of such decisions as political, rather than legal, matters.

¹²² *See Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938) (invalidating repeal of teacher tenure law under which teacher had gained tenure); *Hall v. Wisconsin*, 103 U.S. 5 (1880) (holding that government employee’s contract could not be terminated by repeal of authorizing legislation).

¹²³ This decline of at will employment reflected the expansion of civil service protections throughout the twentieth century, *see generally* Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. Pa. L. Rev. 942, 954-61(1976), and the erosion of the President’s absolute power to remove executive officers. *Compare* *Myers v. United States*, 272 U.S. 52 (1926) (ascribing virtually unlimited removal authority to the President as inherent in the Article II) *with* *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) (upholding statutory for

In a similar vein, the Court did not hesitate to apply due process to occupational licenses so as to ensure governmental regularity.¹²⁴ Despite its initial conclusion in *The Slaughterhouse Cases*¹²⁵ that pursuit of a calling was not protected by the 14th Amendment, the Court applied the minimum rationality requirement of due process to occupational licenses in *Dent v. West Virginia*, an 1889 decision upholding the rationality of continuing educational requirements as a condition for retaining a license to practice medicine.¹²⁶ Although this early case involved substantive due process,¹²⁷ by the time of its 1926 decision in *Goldsmith v. U.S. Board of Tax Appeals*,¹²⁸ the Court held that notice and a hearing was required before an attorney could be precluded from practice before the Board of Tax Appeals.¹²⁹

Even as to monetary benefits that might be regarded as “largesse,” there were early indications

cause restriction on removal of FTC commissioner who performed “quasi-legislative” and “quasi-judicial” functions) and *Wiener v. United States*, 357 U.S. 349 (1958) (using clear statement principles to justify interpretation of silent statute as imposing for cause restriction on removal of quasi-judicial officer as a matter of due process).

¹²⁴ 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 *Bell v. Burson*, 402 U.S. 535 (1971) (requiring due process before the revocation of a driver’s license).

¹²⁵ 83 U.S. (16 Wall.) 36 (1873). The Court’s primary focus in the analysis was on the Privileges and Immunities Clause, which it construed to exclude the privileges and immunities of state citizenship, including the right to pursue a calling. It concluded rather easily and without much discussion that there was no violation of due process.

¹²⁶ 129 U.S. 114, 122-25 (1889).

¹²⁷ Many of these cases involve substantive due process and allied principles, see, e.g., *Fleming v. Nestor*, 363 U.S. 603 (1960) (applying minimum rationality standard of due process to termination of Social Security old age insurance benefits notwithstanding conclusion that these benefits were not vested property rights); *Dent v. West Virginia*, 129 U.S. 114 (1889) (applying minimum rationality requirement to suspension of license to practice Medicine), but there is no reason to suppose that the interests that will trigger due process should differ as between its substantive and procedural components.

¹²⁸ 270 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.”)

¹²⁹ *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963), is another “pre-revolutionary” case. See also *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957) (denial of admission to state bar violated due process because applicant’s refusal to answer questions about his political associations was insufficient basis for concluding that he lacked the requisite moral character and fitness for admission to the bar). *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, *id.* at 451, the Court did not refuse to apply due process, but rather concluded that the restriction was sufficiently reasonable to satisfy its requirements. See *id.* at 53 (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. See *id.* at 451 (“[The state] could at least require disclosure of [criminal] convictions as a condition for admission and leave it to a competent board to determine, 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)).

that due process applied. As noted above, *Marbury* itself gave veterans' benefits as an example as to which the rule of law required government officers to carry out a legal duty.¹³⁰ In *Dismuke v. United States*, a 1936 decision that also involved a veteran's annuity, the Court expressly noted that while the government is not required to create claims against itself, when it does so, elementary notions of due process attach.¹³¹ By 1951, the notion that procedural safeguards ought to attach to government benefits was sufficiently established that 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."¹³² Even in *Flemming v. Nestor*,¹³³ 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.¹³⁴

2. Right or Duty?

While the Court's early government benefit cases reflect a clear pattern of applying due process safeguards, they are far less clear about precisely why due process attached. Carrying forward the underlying ambiguity of *Marbury*, many of the cases used the language of property rights and entitlement in describing the benefits in question, but they did not expressly require the presence of a legal entitlement to trigger due process. Other cases incorporated duty-based considerations. Most often, however, the Court simply assumed that due process applied and was relatively unconcerned about what triggered its application. Ultimately, however, none of the cases expressly required the presence of a protected interest, such as property, as a precondition of due process, and some cases are directly inconsistent with such a requirement.

The government licensing cases, in particular, often used the language of vested rights or entitlements to describe the interest in question.¹³⁵ Sometimes, however, the Court's analysis

¹³⁰ See *supra* notes ___ and accompanying text.

¹³¹ 297 U.S. 167, 171-72 (1936).

¹³² *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 166 & n.13 (1951) (Frankfurter, J., concurring) ((citing *Dismuke*)).

¹³³ 363 U.S. 603 (1960).

¹³⁴ For further discussion of *Flemming*, see *infra* notes ___ and accompanying text.

¹³⁵ In *Dent v. West Virginia*, 129 U.S. 114 (1889), for example, which held that a continuing education requirement to maintain a license satisfied the minimum rationality requirement of substantive due process, the Court reasoned that "[t]he interest, or, as it is sometimes termed, the 'estate,' acquired in [the practice of a profession]—that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken." *Id.* at 121. On the facts of *Dent*, which involved failure to meet continuing education requirements, the Court upheld the limitation as rational in light of the state's important interest in protecting the health and safety of its citizens. See *id.* at 122-25. Likewise, in *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926), the Court expressly referred to a government benefit as an entitlement, concluding that because the petitioner was "within the class of those entitled to practice under the [Board of Tax Appeals'] rules, he should not have been rejected upon charges of unfitness without giving him an opportunity by notice for hearing and answer." *Id.* at 123.

intermingled the language of rights and duties.¹³⁶ Like *Marbury*, none of the cases considered it necessary to engage in extensive analysis of whether or why the interests in question constituted property, suggesting that the Court did not consider such a determination to be a prerequisite for the application of the Due Process Clause.¹³⁷ 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 defined interests. Instead, the Court employed an open-ended balancing approach that incorporated elastic concepts such as basic standards of "decency and fairness."¹³⁸ 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.¹³⁹

That the Court did not require a property right to trigger due process was pointedly illustrated by *Flemming v. Nestor*,¹⁴⁰ 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.¹⁴¹ This conclusion implied that Social Security benefits

¹³⁶ In *Dismuke v. United States*, a veterans benefit case, the Court linked due process and compliance with statutory duties when it observed 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 that is arbitrary and 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 . . ." 297 U.S. 167, 171-72 (1936). But, the Court continued, "the 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." *Id.*

¹³⁷ See KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TEXT* 127 (1959); LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 678-79 (2d ed. 1988) ("in assessing the dictates of 'fundamental fairness,' 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."); 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 due process clause when it wants to.").

¹³⁸ *Richin 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 . . .").

¹³⁹ See, e.g., *Cafeteria & Restaurant Workers Union v. McElory*, 367 U.S. 886, 895 (1960) (considering "the precise nature of the government function involved as well as . . . the private interest that has been affected by governmental action").

¹⁴⁰ 363 U.S. 603 (1960).

¹⁴¹ 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." 363 U.S. 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 soundly be analogized to that of a holder of an annuity, whose rights 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 interest" whose termination violated due process. See *Nestor v. Folsom*, 169 F.Supp. 922 (D.D.C. 1959) .

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.”¹⁴² While the Court ultimately upheld the statute,¹⁴³ 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.¹⁴⁴

B. The Real Due Process Revolution

It follows from the foregoing discussion that the “recognition” of “new property” interests in the 1970s was hardly revolutionary, and that the key decisions of the revolution, *Goldberg v. Kelly*¹⁴⁵ and *Board of Regents v. Roth*,¹⁴⁶ must be reevaluated. In this section we contend that the real due process “revolution” was not, as is often assumed, *Goldberg’s* extension of due process protections to government benefits. The real revolution was the definitive adoption in *Roth* of an explicit, two step due process analysis that incorporated a strict requirement of a protected “liberty” or “property” interest to engage due process safeguards, and of a positivist entitlement construct for determining when government benefits constitute property.

1. *Goldberg*

Goldberg is typically identified as the opening salvo of a due process revolution that effected a dramatic expansion of the application of procedural due process to a wide array of “new property” and liberty interests.¹⁴⁷ Under this view, *Goldberg’s* application of procedural due process safeguards to welfare benefits was a major departure from prior doctrine, as were subsequent decisions applying due process to other government benefits such as licenses and government employment. As the history discussed in the previous section amply demonstrates, however, these decisions are hardly a departure from precedent. Likewise, a closer examination of *Goldberg* confirms that it is not so revolutionary.

To begin with, the question of whether welfare benefits constitute property for due process purposes was not even before the Court in *Goldberg*. The State of New York *conceded* that due process applied, a litigation strategy that only makes sense if the applicability of due process to

¹⁴² *Id.*

¹⁴³ The Court reasoned that Congress might rationally conclude that payment of benefits to individuals living outside of the country would not further the statutory goals of stimulating the national economy or that the public purse should not contribute to the support of persons deported on specified grounds. *Id.* at 611-12.

¹⁴⁴ While the analysis is consistent with a threshold protected interest requirement for due process, the application of that requirement clearly did not evoke any significant attention.

¹⁴⁵ 397 U.S. 254 (1970).

¹⁴⁶ 408 U.S. 564 (1972).

¹⁴⁷ See, e.g., Pierce, *supra* note ____ (counterrevolution article).

welfare benefits had already been clearly established at the outset of the case.¹⁴⁸ Nor did the Court's discussion of the issue in dicta suggest that it was doing anything revolutionary. 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'"¹⁴⁹ and 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.¹⁵⁰

The Court's explanation, although truncated, embraces the role of due process in promoting the rule of law. The Court observed that the termination of a government benefit such as welfare involved the legal determination of whether a person was entitled under a statute to retain the benefit and that the resolution of this issue was "important" to recipients, who were confronted by "brutal need" if benefits were terminated.¹⁵¹ In other words, the Court was concerned that government action in violation of the law had a significant detrimental impact on people. *Goldberg*, like earlier cases, did not resolve the ambiguity about what triggered due process, however. The definitive resolution of these questions came in *Roth*, which adopted the current two step approach to due process and defined property as a legal entitlement.

2. *Roth*

The true due process revolution was a methodological one in which the poorly defined balancing approach of earlier cases was replaced by the modern two step due process inquiry and the associated entitlement construct of property.¹⁵² Both the protected interest requirement and the entitlement construct crystallized in *Roth* appear largely to be the creation of Justice Stewart, who wrote the opinion in *Roth* and offered little support for either doctrinal development.

The key passage for the establishment of 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

¹⁴⁸ 397 U.S. at 261-62 (noting that the state "does not contend that procedural due process is not applicable to the termination of welfare benefits.").

¹⁴⁹ *Id.* at 262 ("The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right.'")

¹⁵⁰ *See id.* at 261-63. The Court also noted that the termination of welfare benefits adjudicates "important rights," and quoted (in a footnote) Charles Reich's observation that "modern society is built around entitlements," suggesting the Court's approval of his "new property" idea. *Id.* at 262 n.4 citing Charles Reich, *Individual Rights and Social Welfare: The Emerging Issues*, 74 *YALE L.J.* 12435, 1255 (1965).

¹⁵¹ 397 U.S. at 261.

¹⁵² *See* Henry Paul Monaghan, *Of "Liberty" and "Property"*, 62 *Corn. L. Rev.* 405, 410 ("The analytical framework of these decisions [*Roth* and its progeny] represents an important and acknowledged break with traditions developed over the last half-century which appeared to be firmly embedded in our constitutional order").

paramount. But the range of interests protected by procedural due process is not infinite.”¹⁵³

Justice Stewart acknowledged that “a weighing process has long been part of the determination of the *form* of hearing required in particular circumstances by procedural due process,”¹⁵⁴ 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.”¹⁵⁵ Finally, Justice Stewart recognized that “‘liberty’ and ‘property’ are broad and majestic terms” and that the right-privilege distinction had been rejected,¹⁵⁶ 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.”¹⁵⁷

It is striking how little authority Justice Stewart relied on for the key propositions in this discussion. He cited no authority for the proposition that due process is limited only to liberty and property interests. The Court had not previously made the requirement of a protected interest an explicit threshold requirement for the application of due process and the only case that Justice Stewart cited offers weak support, at best, for his conclusion.¹⁵⁸

¹⁵³ 408 U.S. at 569-570.

¹⁵⁴ *Id.* at 570 (emphasis in original text).

¹⁵⁵ *Id.*

¹⁵⁶ It is particularly ironic that the court cited *Bailey v. Richardson* as an example of the now rejected right-privilege distinction, insofar as *Bailey* was actually limited to employment at will, *see supra* notes ___ and accompanying text, and the Court in *Roth* actually applied nearly identical reasoning to conclude that there was no entitlement to renewal of the contract. *See infra* notes ___ and accompanying text.

¹⁵⁷ *Id.* at 571-72.

¹⁵⁸ Justice Stewart cited only to *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), another opinion that he wrote which was handed down the same day. 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,’” *Id.* (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)), which is more consistent with a balancing approach than a protected interest requirement. The passage 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.” *Id.* (emphasis added). For this proposition Justice Stewart cited only *Fuentes v. Shevin*, 407 U.S. 67 (1971), another of his own opinions in a case decided the previous year. *Morrissey*, 408 U.S. at 481. The citation to *Fuentes* was only a general citation that did not reference a particular page. *Fuentes* 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, 407 U.S. at 84, and 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. In none of these three opinions did Justice Stewart identify a Supreme Court decision other than his own that expressly required the presence of a “protected” liberty or property interest to trigger due process. *See 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 threshold requirement.

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

Moreover, while Justice Stewart's point may seem self evident from the text of the Due Process Clause, this is not the only plausible reading of the text. While Justice Stewart read the phrase "life, liberty, or property" as a technical reference to the specific interests listed, reading the phrase "life, liberty, or property" as a general reference to interests of value has support in the Constitution itself. In particular, it is instructive to compare the language of the Fifth Amendment's Due Process and Takings Clauses. For while the Due Process Clause refers to "property," the Takings Clause incorporates the more technical and specific term "private property."¹⁵⁹ While 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. Most clearly, it seems to dispel any argument that due process applies only to private property. More broadly, it tends to suggest that the Framers did not use the term property in the due process clauses with a highly technical meaning in mind.

The historical context also tends to support a broader reading. As discussed earlier, the history of the Due Process Clause does not clearly reveal any specific intention of the Framers, but it is likely that the Framers intended to model the clause on chapter 39 of the Magna Carta.¹⁶⁰ As Ed Rubin has pointed out, this connection suggests the Framers' emphasis "was on the concept of due process, not on liberty or property."¹⁶¹ Moreover, as is the case today, the term "property" had various meanings at the time of the drafting and ratification of the Constitution and the Bill of Rights.¹⁶²

Justice Stewart's conclusion that the interest in *Roth* was not a protected interest presented the occasion for the adoption of the entitlement approach to defining property interests. He began this

any due process safeguards. 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 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.

¹⁵⁹ "[N]or shall private property be taken for public use without just compensation." U.S. CONST. AMEND. V.

¹⁶⁰ See *supra* note __ and accompanying text.

¹⁶¹ Rubin, *supra* note __, at 1093.

¹⁶² See Steven Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 Va. L. Rev. 187, 189 (1984).

discussion of the issue with the declaration that “procedural [due process] protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.”¹⁶³ After briefly reviewing cases applying due process to monetary benefits, government employment, and licenses, Justice Stewart concluded that for a property interest to arise, a person must have “more than a unilateral expectation,” he or she “must have a legitimate claim of entitlement.”¹⁶⁴ Justice Stewart then summarily concluded:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits or that support claims of entitlement to those benefits.¹⁶⁵

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 authority for his initial definition of property as “already acquired interests,” a conception that led to considerable confusion in later cases dealing with applications for benefits.¹⁶⁶ Justice Stewart did base the entitlement approach on a synthesis of several government benefit cases, many of which used the language of entitlement and involved benefits that could be characterized as creating entitlements. As discussed above, however, these cases did not even attempt to define property, much less adopt a clearly articulated entitlement construct.¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹

All of this is not meant to prove that Justice Stewart’s approach was wrong (although we believe that it was), but rather to demonstrate that the protected interest requirement and entitlement construct in *Roth* were dramatic departures from the jurisprudence that had previously prevailed. In light of the difficulties associated with entitlement theory, these developments certainly warrant reconsideration.

C. The Right(s) Turn?

¹⁶³ *Id.* at 576.

¹⁶⁴ *Id.* at 577.

¹⁶⁵ *Id.* at 577. Because the state law created “absolutely no interest in re-employment,” Roth had no property interest and due process did not apply. *Id.* at 578. The Court distinguished *Goldberg v. Kelly* on this basis. *Id.*

¹⁶⁶ See *supra* notes ___ and accompanying text.

¹⁶⁷ See *supra* notes ___ and accompanying text.

¹⁶⁸ Cite to debates on the nature of property.

¹⁶⁹ Private contracts create property interests, for example, but whether the terms of the contract create property interests depends not only on the terms agreed upon but also on the application of the law to those terms. Thus, when state contracts are involved, we must be careful to differentiate between that state’s control, as a contracting party, over the terms of employment, and its control as a law-creating entity over the legal implications of those terms.

Government benefits have long been protected by due process, but the Court did not expressly adopt contingent due process until the late 1960s and early 1970s. As we have shown, the Court’s choice of a rights-based approach was not dictated by prior cases, and it could have easily chosen the duty-based approach that we favor instead. The Court, however, was apparently attracted to a rights-based approach to solve an important problem that it perceived. In the context of the poorly defined balancing approach of the pre-*Roth* doctrine, language in cases like *Goldberg* suggested there might be a substantive due process right to basic needs such as food and shelter. The Court was not prepared to accept affirmative welfare rights, but simply reversing direction and overruling a series of recent decisions was not a viable option either. The entitlement construct of *Roth* appeared to offer the Court a solution to this dilemma. In practice, however, this turn to the right(s) proved unworkable. What the Court failed to grasp was that the duty-based approach would have solved the same dilemma, but without making due process contingent on legislative approval.

While other constitutions may embrace the social welfare state and create affirmative constitutional rights to government benefits, ours does not.¹⁷⁰ Our government was created, like all governments, to secure the benefits of collective action.¹⁷¹ Constitutional rights, however, are phrased as negative restrictions on government, and the political theory at the time the Constitution was drafted did not conceive of the social welfare state. Moreover, the recognition of affirmative rights is particularly difficult to justify as an institutional matter, because it forces the courts to make decisions about the allocation of limited governmental resources, which is a political rather than judicial function.¹⁷² Thus, notwithstanding some suggestions to the contrary, the United States Supreme Court does not recognize affirmative constitutional rights, except in narrow situations where there are particular justifications.¹⁷³

Some of the Court’s decisions leading up to *Roth*, however, might be read to support affirmative “welfare rights,”¹⁷⁴ a proposition that was advocated by some legal services lawyers.¹⁷⁵ In the equal

¹⁷⁰ See generally Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* 1436-97 (collecting materials on social welfare rights in various countries).

¹⁷¹ See generally, Richard E. Levy, *Federalism and Collective Action*, 45 Kan. L. Rev. 1241 (1997).

¹⁷² Even where affirmative constitutional rights have been explicitly articulated, judicial enforcement has been problematic. See Jackson & Tushnet, *supra* note ___, at 1440-76.

¹⁷³ 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 Department of Social Services*, 487 U.S. 1216 (1988); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988). The Court has recognized positive 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 ___ 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.

¹⁷⁴ See Frank I. Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 9 (1969) (arguing that the Court’s decisions should be understood as a right to “minimum protection from economic hazard”); see also Laurence Tribe, *American Constitutional Law* 1336 (2d ed. 1988) (arguing that emerging notions that government has an affirmative obligation somehow to provide at least a minimally decent subsistence with respect to

protection area, for example, the Court's fundamental rights jurisprudence had afforded some affirmative rights for the poor.¹⁷⁶ It is not such an incredible leap from these propositions to the conclusion that there is some sort of fundamental rights or enhanced scrutiny status for welfare benefits under equal protection or due process.¹⁷⁷

The Court, however, quickly rejected this suggestion. Only two weeks after *Goldberg*, the Court decided *Dandridge v. Williams*,¹⁷⁸ which applied the rational basis test to uphold a maximum cap on welfare benefits available to any one family.¹⁷⁹ The *Dandridge* opinion, which like *Roth* was written by 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.¹⁸⁰ 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.¹⁸¹

the most basic human needs . . . fit quite naturally into a conception of bodily integrity . . . ”) (citing Michelman).

¹⁷⁵ See generally Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement* (1993); Samuel Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 58 Minn. L. Rev. 211 (1973).

¹⁷⁶ For example, 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); *Douglas v. California*, 372 U.S. 353 (1963) (requiring state to provide an attorney for indigent criminal defendants on appeal). Of particular relevance here 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 that such protection is necessary because without it people lack the means to acquire food and shelter.

¹⁷⁷ 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)

¹⁷⁸ 397 U.S. 471 (1970).

¹⁷⁹ *Id.* at 483-487. The Court expressly distinguished *Shapiro* as involving the fundamental right to travel. *Id.* at 484 & n.16.

¹⁸⁰ *Id.* at 486-87.

¹⁸¹ See *Collins v. City of Harker Heights, Tex.* 503 U.S. 115 (1992) (holding that there is no constitutional right to a safe public workplace); *DeShaney v. Winnebago County Department of Social Services*, 487 U.S. 1216 (1988) (holding there is no constitutional right to protection from an abusive parent); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988) (holding that indigents have no right to subsidized busing to public schools); *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973) (declining to recognize a fundamental 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)

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.¹⁸² This analysis makes the importance of welfare or other government benefits to recipients, as stressed in *Goldberg*, 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. A return to traditional common law definitions of property could not be squared with the “new property” cases, even if the common law baselines are less clear and well established than is conventionally assumed. More fundamentally, the use of common law baselines is commonly associated with the discredited substantive economic due process jurisprudence of the *Lochner* era.¹⁸³ Any effort to develop constitutionally based property rights would force the Court to recognize a constitutional right to welfare or overrule *Goldberg*. The positivistic entitlement approach to property in *Roth* solved this problem for the Court. Welfare benefits were property because the state made them property by creating an entitlement. Critically, however, the state had no constitutional obligation to provide benefits or to do so as a matter of entitlement.

Roth represents an evolutionary blind alley. As natural and attractive as its analysis may appear to be, it cannot provide a workable approach to due process. As many have recognized,¹⁸⁴ the failure of the Court to adopt a constitutionally based definition of property places due process protection on a foundation of sand, effectively delegating the determination of whether due process applies to the legislature. As we will develop more fully in Part IV of the Article, the problems with entitlement theory, as well as the broader problems associated with defining property,¹⁸⁵ can be avoided with a duty-based analysis that does not incorporate a threshold protected interest requirement. This strategy avoids endorsing government benefits as substantive rights and yet does not make due process protections contingent on whether a legislature declares government benefits to be an entitlement.

¹⁸² 408 U.S. at 570-71 (emphases in original).

¹⁸³ See Levy, *supra* note ___, at 390-92 (*Lochner* article).

¹⁸⁴ See *infra* notes ___ and accompanying text (discussing academic literature concerning due process).

¹⁸⁵ Ironically, this approach to defining property, while serving “conservative” goals of avoiding welfare rights, accepts the social construction of property and thus threatens to undermine traditional property rights. In other words, contrary to natural law theories of property, *Roth* recognizes that all property is dependent upon government for its existence. It is the adoption of laws protecting interests that makes them property. If this is true, however, then the ownership rights in traditional private property are no different than welfare rights – both can be defined out of existence by the government if it chooses not to provide legal protection for them. This is surely not what the conservatives on the Court had in mind.

IV. Reconsidering the Public Rights Doctrine

The Court’s adoption of a “rights-based” approach to due process has made the rule of law contingent on legislative agreement to create an entitlement subject to rule of law protections. In similar fashion, the Court has allowed Congress, except for constitutional rights, to foreclose judicial review of government benefit claims, as reflected in the longstanding foreclosure of Article III judicial review of veteran’s benefit decisions. Although the precise basis for this assumption has not been clearly articulated, it appears largely to rest on the public rights doctrine, which places public rights, including government benefits, entirely outside the scope of Article III. Reliance on the public rights doctrine to foreclose judicial review, however, is misplaced. The doctrine originates with *Murray’s Lessee*,¹⁸⁶ a nineteenth century case that addressed a different issue – whether the executive branch could engage in first-instance adjudication of a case before there was judicial review. Although parts of *Murray’s Lessee* can be read to support a “public rights” doctrine, the case can be better explained using the duty-based approach to the rule of law that we favor.

A. A Brief History

Current doctrine apparently permits Congress to foreclose judicial review of government benefits claims, which are “public rights” because they are asserted against the government. This is certainly implied by the Court’s broad pronouncement in *Murray’s Lessee* that “Congress may or may not bring [matters involving public rights] within the cognizance of the courts of the United States, as it may deem proper.”¹⁸⁷ Nonetheless, the Supreme Court has been never fully explained what public rights are or why they should be exempt from the restrictions of Article III. This uncertainty can be traced back to *Murray’s Lessee* itself, which does not clearly define or explain public rights and which contains suggestions of both a sovereign immunity and an executive power rationale.¹⁸⁸ The ambiguity of *Murray’s Lessee* has been carried forward into more recent decisions, and has been the cause for some disagreement within the Court. Overall, this area of the law is hopelessly confused and sorely in need of repair if the promise of *Marbury v. Madison* is to be fulfilled.

1. The Ambiguity of *Murray’s Lessee*

Murray’s Lessee arose as an “action of ejectment” involving a dispute between private parties over title to land originally owned by one Samuel Swartwout.¹⁸⁹ Swartwout had been a customs collector for the United States who had failed to turn over to the federal government over \$1 million

¹⁸⁶ 59 U.S. (18 How.) 272 (1855).

¹⁸⁷ *Id.* at 283.

¹⁸⁸ Professor Fallon, for example, identifies four distinct rationales for the doctrine: (1) sovereign immunity; (2) historical views of unreviewable executive discretion that were broader than current understandings; (3) the right-privilege distinction; and (4) the inevitability of executive decisions involving application of law to fact and the impracticality of initial adjudication of all such decisions by Article III courts. See Richard Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 952-53 (1988).

¹⁸⁹ *Id.* at 274.

in customs payments that he had collected.¹⁹⁰ Swartwout had also defaulted on debts to private creditors, and one of them was the plaintiff in this case. The defendants had purchased some of Swartwout's property that had been seized by the United States and resold in a distress sale, pursuant to a statute authorizing the Treasury Department to conduct an administrative audit of the accounts and to issue a distress warrant placing a lien on the land of a tax collector whose account had been found deficient.¹⁹¹ The plaintiff, who wanted to recover the land owned by the defendants to satisfy the debt owed him by Swartwout, argued that the government's sale of the land to the defendants was invalid because the government's seizure of Swartwout's land had been invalid. Specially, the plaintiff argued that the distress warrant procedure violated Article III and the Due Process Clause. The court rejected these claims and permitted the defendants to keep the property.¹⁹² The Court's analysis, however, left unclear the precise basis for approval of the government's seizure and sale of the property.

Throughout the Court's analysis in *Murray's Lessee*, it referred to the fact that the United States was a party to the seizure of the property and that Congress did not have to consent to a judicial remedy for the tax collector to contest the seizure.¹⁹³ Since this rationale starts with the assumption that there is no judicial remedy without the consent of Congress, it clearly implies that review may be completely foreclosed when public rights are involved. Thus, it is hardly surprising that many observers read the public rights doctrine as authorizing Congress to preclude judicial review of executive action that does not involve constitutional issues.¹⁹⁴

But *Murray's Lessee* also contains passages that are suggestive of an alternative rationale based on the notion that the determination of public rights may be an executive action.¹⁹⁵ In particular, at the outset of its discussion of the Article III issue, the Court stated:

¹⁹⁰ *See id.*

¹⁹¹ *See id.* at 274-75.

¹⁹² *Id.* at ____.

¹⁹³ For example, the Court phrased the question as "whether [the] subject matter is necessarily, and without regard to the consent of congress, a judicial controversy." 59 U.S. (18 How.) at 281. Likewise, in rejecting one of the plaintiff's arguments, the Court reasoned that the argument "assumes that the entire-subject matter is or is not, in every mode of presentation, a judicial controversy, essentially and in its own nature, aside from the will of congress to permit it to be so; and it leaves out of view the fact that the United States is a party." *Id.* at 283. In the same discussion, the Court also distinguished between government and private actors who pursue nonjudicial remedies, observing that while the private actor is subject to suit, the public officer "cannot be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its consent." *Id.* Finally, the Court stated that "though no suit can be brought against the United States without the consent of congress, yet congress may consent to have a suit brought . . ." *Id.*

¹⁹⁴ *See* Michael Asimow, Arthur Earl Bonfield & Ronald M. Levin, *State and Federal Administrative Law* 636 (1998) ("The consensus of the commentators is that Congress can deprive the federal courts of the power to review some disputes (such as claims for Medicare benefits), but cannot deny litigants a federal forum for the assertion of constitutional claims.").

¹⁹⁵ *Cf.* Craig A. Stern, *What's A Constitution Among Friends – Unbalancing Article III*, 146 U. Pa. L. Rev. 1043, 1060 (1998) (arguing that if application of law to facts by Article I tribunals does not constitute "authoritative" resolution of disputes, it is not inherently a judicial action that violates Article III).

That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all of those administrative duties the performance of which involves inquiry into the existence of facts and the application to them of rules of law.¹⁹⁶

The Court then gave examples of other executive actions which are judicial in this sense, including calling forth the militia pursuant to statute and seeking extradition of prisoners pursuant to treaty.¹⁹⁷ Insofar as executive and judicial power could thus overlap, it was necessary for the plaintiffs to “show not only that the adjustment of the balances due from accounting offenses may be, but from their nature must be, controversies [within the meaning of Article III.]”¹⁹⁸ It was in response to this question that the Court “uttered famous words,” quoted earlier, that launched the public rights doctrine.¹⁹⁹ If the public rights doctrine refers to a category of quasi-judicial decisions where executive and judicial functions overlap,²⁰⁰ then the doctrine applies to first instance administrative adjudication, and the question of whether such executive decisions are subject to judicial review must be resolved separately.²⁰¹

2. Public Rights and the Administrative State

With the rise of the administrative state, *Murray’s Lessee* took on a talismanic importance for the reconciliation of administrative adjudication with Article III. In a series of decisions, the Court has relied on the distinction between public and private rights when considering the constitutionality of administrative adjudication.²⁰² These decisions carried forward the underlying ambiguity from *Murray’s Lessee* concerning the rationale for the public rights doctrine. Moreover, recent decisions have created further uncertainty as to whether the public right/private right distinction should be treated categorically or merely as one factor in the analysis, and as to when and why public rights

¹⁹⁶ *Id.* at 280. This functional analysis of the overlap between executive and judicial action has a surprisingly current ring to it.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 57 (1989) (Scalia, J., concurring).

²⁰⁰ *See Stern, supra* note __, at 1062 (“What makes a matter one of public rights is . . . whether the right is one that falls to the executive to determine as a matter of public administration, at least for the time being.”).

²⁰¹ In *Marbury*, for example, the delivery (or nondelivery) of the commission in question was an executive act, but it also involved the application of law to fact in the sense that Madison made an initial determination of whether Marbury was entitled to the commission. The propriety of allocating this initial decision to the executive branch was not in doubt, but it did not follow that judicial review was foreclosed. To the contrary, it was implicitly required by the rule of law. In the same sense, a determination that a claimant is or is not entitled to a particular government benefit may be one that may be assigned initially either to the executive branch or the judiciary, but that does not answer the question whether, if it assigned to the executive, judicial review may be foreclosed.

²⁰² The public rights doctrine has also been used to uphold the creation of “legislative” or “Article I” courts whose judges do not meet Article III requirements, such as the Tax Court and the Court of Claims. *See generally* Fallon, *supra* notes __ at 921-23. For purposes of our analysis, these tribunals are no different than administrative agencies performing judicial functions.

may include rights arising between private parties under comprehensive regulatory schemes.

In *Crowell v. Benson*,²⁰³ the next landmark case involving Article III and administrative adjudication, the Court approved the adjudication of a workers compensation claim by an administrative tribunal. It again distinguished public and private rights, stating in dicta that the “mode of determining [public rights] is completely within congressional control.”²⁰⁴ This case, however, involved a private right arising between private parties. The Court held that an agency can adjudicate such private rights only if Article III courts retained de novo review over questions of law and of constitutional or jurisdictional fact.²⁰⁵ The Court in *Crowell* did not elaborate on the rationale for the public rights doctrine, although it gave examples that are consistent with the executive power rationale.²⁰⁶ At the same time, the Court indicated that judicial review was not required in public rights cases,²⁰⁷ which tends to support the sovereign immunity rationale.

The uncertainty of the rationale for public rights was explicitly noted in the next major decision invoking the doctrine, *Northern Pipeline Co. v. Marathon Pipe Line Co.*,²⁰⁸ which invalidated provisions of the Bankruptcy Code conferring on bankruptcy courts broad jurisdiction over common law claims involving a debtor’s estate. In his plurality opinion in *Northern Pipeline*, Justice Brennan distinguished bankruptcy court adjudication of common law claims from other accepted categories of legislative courts, including the adjudication of public rights. After quoting from

²⁰³ 285 U.S. 22 (1932).

²⁰⁴ *Id.* at 50 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)). *Bakelite* upheld the Court of Claims as a legislative court, identifying such claims as falling in the class of cases “arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.” *Id.* *Bakelite* expressly relied on sovereign immunity, noting that

Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands, or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.

Id. at 452. Congress subsequently proclaimed that the Court of Claims (as well as the Patent Court) was an Article III court and the reasoning of *Bakelite* has been drawn into question by the Supreme Court. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 531, 547-49 (1962).

²⁰⁵ *See* 285 U.S. at 51-61. The Court then construed the statute to permit such review (so as to avoid constitutional difficulty) and approved the trial court’s de novo determination that the agency lacked jurisdiction.

²⁰⁶ *See id.* at 51 (“Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.” (citing cases))

²⁰⁷ *See id.* at 50 (“Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.”) (quoting *Bakelite*). The executive power rationale might support preclusion of review for a narrow class of cases in which the Constitution permits it, i.e., where the question is a nonjusticiable political question, and some of the cases (including *Murray’s Lessee*) may be explained on this ground. *See infra* notes ___ and accompanying text.

²⁰⁸ 458 U.S. 50 (1982).

Murray's Lessee, the plurality opinion noted both rationales for the public rights doctrine:

This doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued. . . . But the public-rights doctrine also draws upon the principle of separation of powers, and a historical understanding that certain prerogatives are reserved to the political Branches of Government.²⁰⁹

Justice Brennan found it unnecessary to define public rights with great precision because “at a minimum” they only arise when the government is a party, which was not the case in the context of the bankruptcy adjudication in question.²¹⁰ Having determined that the bankruptcy courts did not fall within the public rights or any other legislative court exception to Article III, Justice Brennan ultimately concluded that the bankruptcy courts’ broad jurisdiction was unconstitutional because it transferred the “essential attributes of judicial power” to non-Article III courts.²¹¹

Justice Brennan’s categorical distinction between public and private rights evoked a concurring opinion from (then) Justice Rehnquist, joined by Justice O’Connor, relying on a narrower ground for the decision.²¹² Justice O’Connor’s participation in the Rehnquist dissent foreshadowed her authorship of two later decisions, *Thomas v. Union Carbide*²¹³ and *CFTC v. Schor*,²¹⁴ in which she rejected a categorical distinction between public and private rights. *Thomas* is significant because it arose between private parties, yet Justice O’Connor noted that the right at issue “bears many of the characteristics of a public right” because it involved “an agency administering a complex regulatory scheme.”²¹⁵ In light of this relationship, she concluded that “Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”²¹⁶ This

²⁰⁹ *Id.* at 67 (citations to *Murray's Lessee* and *Ex parte Bakelite* omitted).

²¹⁰ *Id.* at 69. Justice Brennan’s discussion also indicated that public rights arise only with respect to matters that “could have been determined exclusively” by the legislative or executive branch. *Id.* at 68. This view of the doctrine is quite narrow, and we would agree with it insofar as foreclosure of judicial review is concerned. *See infra* notes ___ and accompanying text.

²¹¹ *See id.* at 84-85.

²¹² *Id.* at 89-92.

²¹³ 473 U.S. 568, 585-86 (1985).

²¹⁴ 478 U.S. 833, 851, 853-54 (1986).

²¹⁵ 473 U.S. at 589. The right was a statutory right to compensation for use of pesticide data for “follow on” registrants, who were permitted to rely on data submitted by the initial registrant. If the initial and follow on registrant could not agree on reasonable compensation, the statute provided for mandatory and binding arbitration, with very limited judicial review.

²¹⁶ *Id.* at 593-94. The arbitration mechanism at issue in *Thomas*, permitted review only for fraud, misconduct, or misrepresentation and for constitutional errors, *id.* at 592, but the Court concluded that this preserved the “appropriate exercise of the judicial function.”

language would later be used to expand the definition of public rights.²¹⁷

As a doctrinal matter, *Schor* is more significant because it purported to adopt a new and comprehensive test for administrative adjudication.²¹⁸ In *Schor* the Court upheld the administrative adjudication, subject to judicial review, of state common law contract claims asserted as counterclaims in an adjudication of alleged violations of the federal commodities laws. In analyzing the Article III issue, the Court articulated and applied a three factor test which considers:

the extent to which the “essential attributes of judicial power” are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.²¹⁹

Within the context of this test, Justice O’Connor expressly rejected the *Marathon* plurality’s categorical treatment of the public rights doctrine, which became only a factor to be considered within the context of the second factor of the test.²²⁰

Justice O’Connor’s treatment of the public rights doctrine focused on the executive power rationale for the doctrine. In both *Schor* and *Thomas* she observed that “the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that ‘could be conclusively determined by the Executive and Legislative Branches’, the danger of encroaching on the judicial powers’ is less”²²¹ Conversely, Justice O’Connor never mentioned sovereign immunity or congressional consent as a factor, and in *Thomas* even suggested that public rights may extend to cases in which the government is not a party.²²²

3. The *Granfinanciera* Wrinkle

²¹⁷ See *infra* notes ___ and accompanying text. It is unclear from *Thomas* whether the Court concluded that the right was a public right or merely that, although it was a private right, its public rights features permitted administrative adjudication with limited judicial review.

²¹⁸ 478 U.S. at 851.

²¹⁹ *Id.* The essential attributes factors was itself to be evaluated in light of various considerations, including the breadth of jurisdiction vested in the non-Article III tribunal, the scope of judicial review, and the ancillary judicial powers vested in the non-Article III tribunal. See *id.* at 851-53.

²²⁰ See *id.* at 853. (“this Court has rejected any attempt to make determinative for Article III purposes the distinction between public and private rights”) (citing *Thomas*).

²²¹ *Id.* at 853-54 (quoting *Thomas* at 589 (quoting *Marathon* at 68)).

²²² Under the *Schor* test, the scope of judicial review of public rights is only a factor in assessing the constitutionality of administrative adjudication of public rights. On the other hand, judicial scrutiny of administrative adjudication of public rights would apparently be less “searching” than what appears already to be a very loose test for private rights. See *id.* at 854. This point was explicit in *Thomas*, where Justice O’Connor observed that a majority of the Court did not “endorse the implication of the private right/public right dichotomy that Article III has no force simply because a dispute is between the Government and an individual.” 473 U.S. at 586 (citing *Northern Pipeline*, 458 U.S. at 68 n.20 and 70 n.23).

Schor seemed to bring some order to this area by crafting a comprehensive, if open-ended, test. This clarity, however, was short-lived because of the Court’s decision in *Granfinanciera, S.A. v. Nordberg*,²²³ decided only three years later. *Granfinanciera* was a Seventh Amendment case challenging the constitutionality of adjudication of preferential transfer claims in bankruptcy by the bankruptcy courts without a jury. The Court’s opinion, written by Justice Brennan (who also authored the *Marathon* plurality), expressly incorporated the Article III public rights doctrine into its Seventh Amendment analysis.²²⁴ Justice Brennan then returned to the more categorical assumption that public rights could be freely assigned to administrative adjudication without violating the Seventh Amendment or, by extension, Article III.²²⁵ The Court then further confused existing doctrine by adopting an expanded definition of public rights, which would include “‘a seemingly private right that is so closely integrated into a public regulatory scheme with limited involvement by the Article III judiciary.’”²²⁶

Granfinanciera did not attempt to explain the public rights doctrine, although its analysis is inconsistent with the sovereign immunity rationale and seems to focus on administrative adjudication as execution of the law.²²⁷ Nonetheless, its analysis seems to reinvigorate the categorical approach to the public rights doctrine, which – taken together with the new, broader definition of public rights – threatens to undermine judicial review as a rule of law safeguard for some private rights.²²⁸ Thus, for example, Aman and Mayton caution that under *Granfinanciera*, “‘almost any private, common-law sort of action may be converted by Congress to a matter of public right and thereby moved outside the zone of Article III courts.’”²²⁹

²²³ 492 U.S. 33 (1989).

²²⁴ *Id.* at 53:

Indeed, our decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question of whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal. For if a statutory cause of action . . . is not a ‘public right’ for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court And if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature.

²²⁵ The analysis, however, did not address the availability of judicial review.

²²⁶ *Id.* at 54 (quoting *Thomas*, 473 U.S. at 593-94). The Court also cited *Thomas* as rejecting the view that “‘a matter of public rights must at a minimum arise ‘between the government and others.’” *Id.* (quoting Justice Brennan’s *Marathon* plurality, 458 U.S. at 69, which in turn quoted *Ex parte Bakelite*, 279 U.S. at 451). Even applying the broader definition of public rights, the majority concluded that a fraudulent conveyance action in bankruptcy was not a public right and invalidated the adjudication of such claims without a jury.

²²⁷ *See id.* at 51-55.

²²⁸ This is another parallel between public rights analysis and the entitlement approach to new property, which also threatens to undermine the status of traditional private property rights for due process purposes. *See supra* notes ____ and accompanying text.

²²⁹ Aman & Mayton, *supra* note ____, at 122. Ironically, two other leading administrative law authorities have criticized *Granfinanciera* for precisely the opposite reason, that it threatens to render administrative adjudication

The majority's reasoning provoked a concurring opinion from Justice Scalia, who flatly rejected the expanded definition of public rights and emphasized the sovereign immunity rationale from *Murray's Lessee*.²³⁰ After an extensive discussion of *Murray's Lessee*, Justice Scalia continued:

It is clear that what we meant by public rights were not rights important to the public, or rights created by the public, but rights *of the public* – that is, rights pertaining to claims brought by or against the United States. For central to our reasoning was the device of waiver of sovereign immunity, as a means of converting a subject which, though its resolution involved a “judicial act,” could not be brought before the courts, into the stuff of an Article III “judicial controversy.” Waiver of sovereign immunity can only be implicated, of course, in suits where the government is a party.²³¹

Justice Scalia disagreed not only with the expansion of public rights doctrine to include some rights between private parties, but also to the open ended analysis of *Schor*, and would apparently envision a very strict limitation on non-Article III adjudication of private rights between parties.²³²

We think that few will disagree with our conclusion that the public rights doctrine is a mess. First, it remains unclear whether the public rights doctrine rests on an executive power rationale or a sovereign immunity rationale, although the general trend appears to be away from sovereign immunity.²³³ Second, it is unclear whether the presence of a public right categorically removes the case from Article III requirements, or is simply a factor to be considered. As a result, the implications of the public rights doctrine for the preclusion of judicial review remain uncertain. Finally, it is unclear the extent to which rights arising between private parties may be characterized as public rights and why this would be so. It is time to return to square one and unravel the mystery of *Murray's Lessee*, a task which we undertake in the following section.

B. Whose Right?

Most discussions of the public rights doctrine quote the famous passage from *Murray's Lessee* without engaging in an extensive discussion of the case itself. This is hardly surprising because *Murray's Lessee* is a difficult case to fathom, as it involves a complex factual setting and its analysis is dense and epigrammatic. Nonetheless, on close examination, the case makes perfect sense, albeit not as conventionally understood. In this section, we will offer an alternative interpretation of the

involving private parties unconstitutional. See Kenneth C. Davis & Richard J. Pierce, Jr., I Administrative Law Treatise at 99-101 (3d ed. 1994).

²³⁰ See 492 U.S. at 65-71.

²³¹ *Id.* at 68 (emphasis in original). As we shall discuss more fully below, we think Justice Scalia was half right. He was right in his characterization of public rights as rights belonging to the public, but he was wrong insofar as he understood the device of sovereign immunity as central to the analysis. See *infra* notes ___ and accompanying text.

²³² See *id.* at 69-71.

²³³ Sovereign Immunity did not figure into the Court's analysis in *Thomas*, *Schor*, or *Granfinanciera*. The influence of Justice Scalia's concurring opinion in *Granfinanciera* is not yet clear.

public rights doctrine of *Murray's Lessee* based on the recognition that the “public right” in that case was not a right asserted *against* the government, but rather a right asserted *by* the government *on behalf of the public*. This interpretation leads to two critical conclusions. First, the sovereign immunity rationale for the public rights doctrine simply makes no sense as a justification for the result in the case. Second, the government’s role is relevant not because it could invoke sovereign immunity, but rather because the assertion of public rights by government actors is an executive act. Critically, this analysis explains why administrative adjudication in the first instance is consistent with Article III, but it says nothing about whether judicial review of such action may be foreclosed.

1. What Really Happened in *Murray's Lessee*?

As explained earlier, *Murray's Lessee* involved the government’s seizure of property owned by a tax collector whose accounts were determined by audit to be in default. The government subsequently conveyed the property to the defendant. The plaintiffs, who claimed the same property under a private judgment against the collector, argued that the procedure by which the government had seized the tax collector’s property violated due process and Article III, which made the government’s conveyance to the defendant void. The Court rejected the plaintiff’s due process argument in light of a history of summary execution against the property of defaulting tax collectors.²³⁴ The Court then turned to the Article III issue and analyzed whether the Treasury Department’s audit of Swartwout was a judicial act that violated separation of powers.

The Court’s analysis began with the recognition that there was an inevitable overlap between executive and judicial actions, insofar as many executive actions involve the determination of facts and the application to them of legal rules.²³⁵ The Court acknowledged that Congress could not “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty,”²³⁶ but it was not enough for the plaintiffs to show that the action might have been made the proper subject of judicial resolution. Instead, the plaintiffs were required to show that particular subject matter of the claim was “necessarily, and without regard to the consent of congress, a judicial controversy.”²³⁷

The Court expressed “little doubt” that the type of audit that the Treasury Department undertook could have been the subject of judicial power,²³⁸ but it was convinced that such matters

²³⁴ *See id.* at 275-80. (relying on longstanding British, state, and federal practices). Thus, the Court concluded, while “‘due process of law’ generally implies and includes actor, reus, iudex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings,” there are exceptions to this rule under which “process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial.” *Id.* at 280.

²³⁵ *See id.* at 280-81. This passage is quoted and discussed *supra* notes ___ and accompanying text.

²³⁶ *Id.* at 284.

²³⁷ *Id.* at 281. The Court concluded that it was not, supporting its conclusion by reference to broad congressional powers with respect to taxation and the historical practice discussed in connection with the due process inquiry. *See id.* at 281-282.

²³⁸ *Id.* at 281.

could also be resolved by the executive branch.²³⁹ The Court justified this conclusion on the basis of historical practice, referencing historical practice by both the federal and state governments in the United States and by the British government.²⁴⁰ The plaintiffs, who had apparently anticipated this holding, argued that while Congress might have assigned the matter to either the executive or the judiciary, it could not do both. Thus, the argument continued, Congress had assigned the matter to the judiciary by permitting the tax collector to appeal the results of the audit after posting a bond and “it was not for the government to say that the subject matter was not within the judicial power.”²⁴¹

The Court, however, rejected the plaintiffs’ argument that, having established judicial review of the Department’s adjudication, Congress was required to assign the entire matter to the judiciary, in the process paving the way for the typical modern administrative arrangement whereby an agency adjudicates a matter and is subject to judicial review after it reaches a result. Congress had authorized the Treasury Department to audit the accounts of a tax collector, and if the person owed money to the government, to act to recover the money that was owed. After the government engaged in this initial determination of whether the tax collector was in arrears, Congress established a method by which the person could get judicial review of the legality of subsequent government action. This analysis demonstrates that the critical issue in the case was the constitutionality of first-instance adjudication by the executive branch and not the foreclosure of judicial review.

It was in the context of responding to this either-or argument against first instance adjudication followed by judicial review that the Court introduced the public rights concept, the function of which was to explain why the matter could be resolved by a procedure that employed both executive and judicial components. The Court disputed the premises of the plaintiffs’ argument, which wrongly assumed “that the entire subject matter is or is not, in every mode of presentation, a judicial controversy essentially and in its own nature, aside from the will of congress to permit it to be so; and it leaves out of view the fact that the United States is a party.”²⁴²

The Court then elaborated on how a matter could be subject to both executive and judicial cognizance by reviewing “some settled rules”:

Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extrajudicial remedies for both. An instance of extra-judicial redress of a private wrong is, the recapture of goods by their lawful owner; of a public wrong, by a private person, is the abatement of a public nuisance; and the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents.²⁴³

²³⁹ *See id.* at 281-82.

²⁴⁰ *See id.* at 281-82.

²⁴¹ *Id.* at 282 (footnote added).

²⁴² *Id.* at 283.

²⁴³ *Id.* at 283.

We believe that the Court’s reference to “public wrongs” is an overlooked antecedent referent for the concept of “public rights.” After all, a “public wrong” is simply the violation of a “public right” or a right belonging to the public.²⁴⁴

Consider, for example, the Court’s example of a “public nuisance,” as a “public wrong” that is redressed by the actions of a private party. According to well-established law, a “public nuisance is based on an infringement of the rights of the community, must affect an interest in common to the general public, and unlike a private nuisance, does not necessarily involve ownership or use of land by either party.”²⁴⁵ When viewed in this context, the Court’s subsequent conclusion that Congress may assign “public rights” to either executive or judicial determination takes on a different cast. A right is not a public right because it is asserted against the government, but rather because it is asserted by the government on behalf of the public. The assertion of these rights by the government, whether judicially (e.g., through prosecution of a criminal action) or extrajudicially (through administrative enforcement), is an executive function.

2. Not Sovereign Immunity

Thus, the function of the public rights doctrine in *Murray’s Lessee* was to explain why the application of law to fact in the first instance could be assigned to an executive agency in the first instance and yet be subject to judicial review. It is based on the recognition that executive and judicial functions often overlap, and that enforcement of the public interest as defined by statute is an executive function. Critically, sovereign immunity was never an issue in *Murray’s Lessee* and cannot explain the result.

The controversy giving rise to the decision was between two sets of private parties: Swartwout’s creditors and the persons who had purchased Swartwout’s land from the government. The defendants, who were private parties, did not assert and could not have asserted a sovereign immunity defense. The defendants took title from the government, and the government might have asserted sovereign immunity as a defense if Swartwout had challenged the audit upon which the government’s seizure of his property was based.²⁴⁶ Congress, however, had waived any potential sovereign immunity claim by providing an action by a customs collector to challenge the determination of a deficit, on the condition that the collector provide a surety.²⁴⁷ Although the Court

²⁴⁴ This is also Justice Scalia’s understanding of a public right, which he nonetheless links with the sovereign immunity rationale for the doctrine. *See supra* notes ___ and accompanying text. As we discuss more fully below, if our understanding of the meaning of a “public right” is correct, it has nothing to do with sovereign immunity. *See infra* notes ___ and accompanying text.

²⁴⁵ Robert L. Glicksman, *A Guide to Kansas Common Law Actions Against Industrial Pollution Sources*, 33 KAN. L. REV. 62, 643 (1985).

²⁴⁶ In this sense, the government was analogous to a private creditor taking an extrajudicial remedy to recover on a debt. The private creditor would be subject to a lawsuit if the extrajudicial action was illegal. It is unclear why the government should be immunized for an illegal act to recover on a debt.

²⁴⁷ *See id.* at 285 (reasoning that the availability of judicial review did not disprove the necessity of a summary procedure because the requirement of a surety obviated that necessity).

clearly assumed that because of sovereign immunity Congress could have foreclosed review altogether and provided for the exclusive determination of these matters in the Executive Branch, its statements to that effect are unnecessary to the decision.

Moreover, the argument that sovereign immunity gives Congress the power to preclude judicial review of first instance adjudication by the Executive Branch proves either too much or too little. The property on which the warrant was exercised – Swartwout’s “right” – was traditional private property.²⁴⁸ Thus, if sovereign immunity converts the administrative attachment and sale of private property into a public right as to which no judicial remedy is required, the government can use summary procedures to take whatever private property it might choose and leave the owner without recourse. This would surely convert the Takings Clause into a hollow shell,²⁴⁹ and by similar logic the government could violate any constitutional right with impunity simply by acting first and declining to waive sovereign immunity. Of course, we doubt that the Court would accept this logic, but if *Murray’s Lessee* is based on sovereign immunity, there would not appear to be any basis for drawing a distinction between government benefits and private property.²⁵⁰

One might confine the implications of the sovereign immunity rationale in *Murray’s Lessee* by limiting it to the context of a defaulting tax collector or similar claims, which present special circumstances that arguably justify summary administrative procedures. The temptations of collecting large sums of money and the potential consequences to public fisc create a special need for speedy and effective remedies in the case of a default. In addition, a tax collector’s particular responsibilities as the receiver of public monies might justify the conditioning of such a position on the acceptance of summary procedures for recovery of wrongly withheld funds. These features of the case were emphasized in the earlier portions of the Court’s opinion in *Murray’s Lessee* addressing the due process issue.²⁵¹ Confined in this manner, however, the public rights doctrine

²⁴⁸ A different situation would be presented if the government had only attached the actual tax monies Swartwout failed to remit or property that was directly traceable to it, but the statute in question permitted the warrant to attach to all of a tax collector’s land, *see id.* at 274, and there was no suggestion in the case that Swartwout had purchased the land with tax monies.

²⁴⁹ In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315-316 & n. 9 (1987), the Court indicated that the Fifth Amendment provided a self-executing constitutional remedy for takings violations, and rejected the argument that the principle of sovereign immunity altered that conclusion. Nonetheless, Justice Scalia took the opposite view in his dissent in *Webster v. Doe*, 486 U.S. 592, 613 (1988): “No one would suggest that, if Congress had not passed the Tucker Act, 28 U.S.C. § 1491(a)(1), the courts would be able to order disbursements from the Treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation.” *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 137-39 (1999) (discussing sovereign immunity constraints on recovery for government takings).

²⁵⁰ *But cf.* Ann Woolhandler, *Old Property, New Property, and Sovereign Immunity*, 75 Notre Dame L. Rev. 919 (2000) (relying on history of sovereign immunity to distinguish between new and old property for purposes of determining whether remedies are constitutionally required). We would reject this distinction for purposes of judicial review for the same reasons that we would reject it for purposes of procedural due process. *See infra* notes ___ and accompanying text.

²⁵¹ 285 U.S. at 276-80. Although that discussion was in relation to the Court’s due process analysis, the Court itself indicated that the due process and Article III issues were interrelated. *See* at 275 (stating that the Article III issue “can

is quite narrow, and certainly would not support its extended application in the modern administrative state.

The Court's discussion of sovereign immunity is also inconsistent with *Marbury* itself, which (in an often unnoticed passage) distinguished between personal injury from the king to a subject, which the common law presumed to be impossible, and injury to property, for which the law ““furnishes various methods of detecting the errors and misconduct of those agents by whom the king has been deceived and induced to do a temporary injustice.””²⁵² Thus, *Marbury* assumes that sovereign immunity does not apply to claims that government actors have violated the law. The problem is that *Murray's Lessee* and the sovereign immunity rationale for public rights fail to distinguish between suits against the United States (or the government), to which sovereign immunity applies, and suits against government officers who violate the law, to which sovereign immunity does not apply.²⁵³

Indeed, in *United States v. Nourse*,²⁵⁴ an 1835 decision involving the same statute at issue in *Murray's Lessee*, Chief Justice Marshall took a decidedly different view of the need for judicial review of the Treasury Department's audit of the accounts:

It would excite some surprise if, in a government of laws and principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process, and levy on the person, lands, and chattels of the debtor, any sum he might believe to be due, leaving to that debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast upon the legislature of the United States.²⁵⁵

best be considered under another inquiry” relating to the plaintiffs' due process objections). This was true both from the perspective of governmental necessity (the procedures act as some security against defalcation), and from the contractual perspective (by accepting the position, the collector consents to this mode of procedure). The Court relied primarily on historical practices, but these considerations are implicit in those practices.

²⁵² 5 U.S. (1 Cranch) at 166 (citing Blackstone, Vol. III. p. 255).

²⁵³ See *Ex Parte Young*, 209 U.S. 123 (1908). Similarly, in his later discussion of the propriety of a writ of mandamus, Marshall indicated that the same remedies were available against government officials as against private parties. See 5 U.S. (1 Cranch) at 170:

If one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

Subsequent cases have qualified the ability to sue government officials and are difficult to reconcile, leaving the scope of this form of remedy unclear. See *infra* notes ___ and accompanying text.

²⁵⁴ 34 U.S. (9 Pet.) 8 (1935).

²⁵⁵ *Id.* at 28-29.

This language clearly resonates with *Marbury*'s promise that the rule of law requires a remedy for wrongful executive action.

3. Public Rights in First Instance Adjudication

Once it is recognized that the concept of public rights in *Murray's Lessee* referred to the government's pursuit of extrajudicial remedies to protect the public interest, the Court's discussion of the overlap between executive and judicial power comes into sharper focus. When Congress enacts a statute, the public interest served by that statute can be enforced judicially by private parties if Congress provides for a private right of action²⁵⁶ or by government officials through a criminal prosecution or other enforcement action.²⁵⁷ Alternatively, Congress can authorize extrajudicial remedies which may be privately or publicly enforced. The public enforcement by government officials of both judicial and extrajudicial remedies is an executive function. Both kinds of executive action, moreover, require that officials make judgments about the facts and the application of the law to those facts.²⁵⁸

This understanding has important implications for the scope of the public rights doctrine. As an initial matter, the doctrine only justifies action resembling adjudication as part of a decision to use an extrajudicial remedy.²⁵⁹ It therefore says nothing about whether judicial review of that decision must be available. In fact, the cases that discuss the public rights doctrine all involved statutory schemes incorporating some form of judicial review.²⁶⁰ Thus, notwithstanding the dicta in *Murray's Lessee* or the suggestions in some later decisions such as *Crowell* and *Marathon*,²⁶¹ the Court has not relied on the public rights doctrine to justify the foreclosure of review.²⁶² Thus, provided that adequate procedures are followed to satisfy due process and there is judicial review sufficient to preserve the courts' Article III role, application of the public rights doctrine to permit first instance administrative adjudication under federal laws is perfectly consistent with the rule of

²⁵⁶ Many environmental statutes, for example, contain citizen's suit provisions.

²⁵⁷ This would be the case for criminal laws as well as many regulatory regimes.

²⁵⁸ Indeed, even the purely executive decision whether to seek an indictment requires a judgment about whether the accused is guilty of alleged misconduct and whether that misconduct constitutes a violation of a criminal statute.

²⁵⁹ In *Murray's Lessee* it would be incident to using a distress warrant and forced sale of a tax collector's property to enforce the public interest in receipt of tax monies.

²⁶⁰ As Richard Fallon pointed out, for example, "[n]o modern case . . . holds that Congress may cut off all judicial review of the administration of an entitlement program." Fallon, *supra* note ___, at 963. Likewise, "[e]xisting law provides a right of appeal to an Article III court from the decisions of all legislative courts set up to adjudicate public rights disputes." *Id.* at 971.

²⁶¹ See *supra* notes ___ and accompanying text.

²⁶² The closest the Court has come in this regard is *Thomas v. Union Carbide*, in which the Court upheld a statute providing for a very limited scope of review. As we will discuss further, *infra* notes ___ and accompanying text, our duty-based approach suggests that *Thomas* is wrong in this regard. In preclusion of review cases, the Court seems to approach the issue as a due process matter or as part of a broader issue of congressional authority to make exceptions to the jurisdiction of the Article III courts. See *infra* notes ___ and accompanying text.

law.²⁶³

This view of the doctrine may also explain why some rights arising between private parties might be considered public rights if they are an integral part of the enforcement of a comprehensive regulatory regime. The key point would be that the initial determination of these rights is incidental to the enforcement of the regulatory regime, which as described above may be executive in character even if it involves the application of law to fact. This was arguably the case in *Thomas*, where the rights arising between private parties were incident to the enforcement of a pesticide registration scheme. Congressional authority to permit the administrative determination of rights between private parties may well be constrained by broader separation of powers concerns implicated by removing first instance adjudication from the federal courts,²⁶⁴ but first instance administrative adjudication of such matters does not threaten the rule of law if that adjudication meets due process requirements and the rule of law function of the courts is preserved through judicial review.

C. Foreclosure of Judicial Review

With a proper understanding of the public rights doctrine, it is possible to consider the foreclosure of judicial review from a fresh perspective, unclouded by assumptions engendered by sovereign immunity. We turn to this task in this section. The Supreme Court has addressed the foreclosure of review in two sets of cases: one considers whether preclusion of review violates due process and the other whether it violates Article III. The law in both areas is muddled and the cases in one area generally do not refer to the cases in the other area. In general terms, however, the doctrine in both areas assumes that Congress cannot preclude judicial review of constitutional issues but that Congress can preclude judicial review of ordinary issues. The Court, however, has not authoritatively resolved either point or offered a rationale for either proposition. To the extent that preclusion of such ordinary claims prevents the courts from performing their rule of law function of ensuring that government officials comply with the law, this doctrine is inconsistent with the promise of *Marbury v. Madison*.

1. Due Process

²⁶³ Indeed, in general terms, the analysis of both public rights and private rights cases could easily be conflated under the *Schor* test. From a duty-based perspective, however, the nature of the right asserted would be a relatively minor issue, and the critical focus would have to be the scope of judicial review. *See infra* notes ___ and accompanying text (discussing minimum scope of review under a duty-based approach). As noted previously, however, there may be an independent interest in having first instance adjudication in an Article III court (e.g., the right to a jury trial) that is not addressed in our analysis. *See supra* notes ___ and accompanying text.

²⁶⁴ Likewise, the Seventh Amendment may apply to such determinations. Our view of the public rights doctrine would permit first instance administrative adjudication, but the Seventh Amendment might require that a jury trial be available at some point. We will not delve into the question whether such trials could be held by administrative adjudicators (or legislative courts).

Beginning with *American School of Magnetic Healing v. McAnnulty*,²⁶⁵ through the leading case of *Johnson v. Robison*,²⁶⁶ and culminating with a number of more recent decisions, the Supreme Court has permitted judicial review of administrative decisions notwithstanding statutory provisions that apparently foreclosed it. While some of the cases employ broad rule of law reasoning that is reminiscent of *Marbury* and might be read to suggest that judicial review must be available to correct any unlawful administrative action, more recently the cases focus narrowly on the foreclosure of particular constitutional claims. Thus, while many commentators assume that due process requires a judicial forum for constitutional claims (and the Supreme Court has suggested as much), this requirement does not apply to foreclosure of review for ordinary administrative decisions.

The *McAnnulty* case is an early example of broad rule of law reasoning. The Postmaster General determined that the School of Magnetic Healing's claims of being able to teach its customers how to use the power of the mind to cure sickness were fraudulent and stopped delivery of the company's mail.²⁶⁷ Because the statute in question authorized the Postmaster to take such action upon evidence "satisfactory to him,"²⁶⁸ he argued that his decision was nonreviewable. The *McAnnulty* Court disagreed, reasoning that because the Postmaster General's action "was a clear mistake of law as applied to admitted facts . . . the courts must have power in a proper proceeding to grant relief."²⁶⁹ "Otherwise," the Court continued "the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld."²⁷⁰

McAnnulty takes a broad rule of law based approach and arguably implies that judicial review of the legality of administrative action is constitutionally required. Nonetheless, *McAnnulty* is limited in several important respects. First, in the years since *McAnnulty*, the Court has seldom relied on its broad reasoning to avoid preclusion of review in nonconstitutional cases, and the continued vitality of this reasoning is in doubt.²⁷¹ Second, even in *McAnnulty*, the Court was willing

²⁶⁵ 187 U.S. 94 (1902).

²⁶⁶ 415 U.S. 361 (1974).

²⁶⁷ See 187 U.S. at 95-102 (recounting the facts and proceedings in detail).

²⁶⁸ See Rev. Stat. § 3929 (quoted 187 U.S. at 100 n.1).

²⁶⁹ 187 U.S. at 110.

²⁷⁰ *Id.* See also *id.* at 108 (asking rhetorically "Has Congress intrusted the administration of these statutes wholly to the discretion of the Postmaster General, and to such an extent that his determination is conclusive upon all questions arising under those statutes, even though the evidence which is adduced before him is wholly uncontradicted, and shows, beyond any room for dispute or doubt, that the case, in any view, is beyond the statutes, and not covered or provided for by them?").

²⁷¹ For example, although the Court used broad rule of law reasoning in *Leedom v. Kyne*, 358 U.S. 185 (1958), the case has not been the fountainhead of much subsequent law. *But cf.* *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 680 (characterizing the contention that Congress "intended no review at all of substantial constitutional and statutory challenges to the Secretary's administration of Part B of the Medicare program" as "an

to assume for purposes of the case that “the determination by the Postmaster General of any material and relevant questions of fact arising in the administration of the statutes of Congress relating to his department” was conclusive.²⁷² In other words, judicial review could be precluded in ordinary cases.²⁷³ Third, *McAnnulty* relied on statutory interpretation to avoid constitutional problems, leaving the existence of an underlying constitutional right of review unresolved. Finally, *McAnnulty* mixed the language of individual rights and legal regularity, leaving the precise rationale for and scope of any right to review unclear.

While *McAnnulty* arguably applies broadly to all claims of illegal agency action, the majority of more recent cases narrowly construing statutory preclusion of judicial review do so in the context of particular constitutional challenges to administrative action or to the statutes authorizing that action. The leading example of this sort of decision is *Johnson v. Robison*,²⁷⁴ which involved equal protection and free exercise challenges to the denial of veteran’s benefits to individuals who had been classified as conscientious objectors and performed alternative civilian service. The Court considered (and rejected) these claims notwithstanding a statute providing that “the decisions of the Administrator on any question of law or fact under any law administered by the Veteran’s Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.”²⁷⁵ The Court reasoned that this provision did not foreclose review of constitutional challenges to the statute denying benefits because such challenges arise under the Constitution, not under any veterans benefit law.²⁷⁶ Although the Court did not discuss the constitutional difficulties that might arise from a contrary construction, this problem was clearly lurking in the background.

In the aftermath of *Robison*, the Court has frequently construed statutes otherwise foreclosing review to permit consideration of constitutional claims.²⁷⁷ In light of these decisions, most

extreme position”) (emphasis added); *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968) (construing statute precluding review of selective service classification except as a defense to a criminal prosecution so as to permit an injunction against a violation of the plain and unequivocal language of other provisions of the statute).

²⁷² *Id.* at 107.

²⁷³ *Accord Leedom v. Kyne*, 358 U.S. at 188-91 (distinguishing prior cases recognizing foreclosure of review on the ground that in this case the NLRB violated a clear statutory provision granting a right); *Oesterreich*, 393 U.S. at 238-399 (employing similar reasoning).

²⁷⁴ 415 U.S. 361 (1974).

²⁷⁵ Former 38 U.S.C. § 211(a) (quoted *id.* at 365 n.5).

²⁷⁶ *Id.* at 367. The Court also reasoned that application of the provision to constitutional claims was not necessary to the congressional purpose of preventing the courts and the agency from being burdened with time consuming litigation over benefit claims and of preventing the courts from becoming involved in the complex technical decisions involved in veterans benefit cases. *See id.* at 368-73.

²⁷⁷ *See, e.g., I.N.S. v. St. Cyr.*, 533 U.S. 289 (2001) (construing barring review of deportation of aliens to permit review of pure questions of law because foreclosure of such review would raise serious constitutional questions as to whether the writ of habeas corpus had been unconstitutionally suspended); *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991) (construing statute precluding review of decisions on applications for immigration amnesty to permit a due process challenge to procedures followed); *Webster v. Doe*, 486 U.S. 592 (1988) (construing statute barring review of

commentators assume that it would violate due process to deny a judicial forum for the resolution of constitutional claims, and the Court has often suggested the same in dicta.²⁷⁸ Nonetheless, both the Court and commentators typically distinguish between constitutional and statutory claims,²⁷⁹ and the assumption in the cases and of many commentators is that Congress can foreclose judicial review of statutory claims.²⁸⁰

Indeed, in recent years, the Court has seemed increasingly willing to read ambiguous statutes as foreclosing review when constitutional claims are not involved, and nothing in the reasoning of these cases suggests that there are any constitutional problems with reading the statutes in question to foreclose review. Thus, for example, the Court articulated a reverse presumption against review when prosecutorial inaction is at issue in *Heckler v. Chaney*.²⁸¹ Subsequently, in *Lincoln v. Vigil*,²⁸² the court held that allocation of lump-sum appropriations is “committed to agency discretion” and thus foreclosed from review under the Administrative Procedure Act.²⁸³ Likewise, one leading administrative law textbook observes that in the lower courts “[t]here seems to be a modest trend in favor of finding agency decisions committed to agency discretion.”²⁸⁴

2. Article III and the Exceptions Clause

The cases dealing with the statutory preclusion of review seem to assume that the constitutional issue arises under the Due Process Clause, but preclusion statutes also have obvious Article III implications. The effect of such a statute is to remove a category of cases “arising under” federal law from the cognizance of the federal courts. Thus, they raise the same issues as those presented by other “jurisdiction stripping statutes” that remove cases from the cognizance of the

decisions by the Director of the CIA to dismiss employees so as to permit review of constitutional claims); *see also* *Bowen v. Michigan Academy of Physicians*, 476 U.S. 667 (1986) (construing statute vesting review of Medicare reimbursement claims involving small amounts to private fiscal intermediaries without judicial review so as to permit constitutional and statutory challenges to agency regulations).

²⁷⁸ *See, e.g., Thomas*, 473 U.S. at 592-93; Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and Synthesis*, 124 U. Pa. L. Rev. 45, 93 (1975) (“There exists a due process right to an independent judicial determination of constitutional rights . . .”).

²⁷⁹ This distinction was articulated expressly by Justice Brandeis in his concurring opinion in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 77 (1936), which stated that “[w]hen dealing with constitutional rights (as distinguished from privileges offered by the government) there must be the opportunity of presenting in an appropriate proceeding at some time, to some court, every question of law raised.” More recently, in *Dalton v. Specter*, 511 U.S. 462, 471-76 (1994), the Court sharply distinguished between constitutional and statutory claims, holding that statutory challenges to military base closure decisions were foreclosed under the applicable statute.

²⁸⁰ *See infra* notes ___ and accompanying text (discussing commentators who assume that Congress can foreclose review).

²⁸¹ 470 U.S. 821 (1985).

²⁸² 508 U.S. 182 (1993).

²⁸³ *See* 5 U.S. § 701(a)(2) (20___).

²⁸⁴ Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein & Matthew L. Spitzer, *Administrative Law and Regulatory Policy* 1014 (5th ed. 2002) (citing cases). The authors continue, however, that “the trend remains modest and cautious, and judicial review is the general rule.” *Id.* (citing cases).

courts. From an Article III perspective, the foreclosure of review therefore concerns the scope of the Exceptions Clause of Article III, which provides that “in all other cases [besides those enumerated as within the original jurisdiction of the Supreme Court] the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions and under such Regulations* as the Congress shall make.”²⁸⁵ If this language is taken literally, it would appear to permit Congress to preclude judicial review of administrative action by making exceptions to the Article III jurisdiction of the federal courts. A literal reading, however, cannot be reconciled with the constitutional role that *Marbury* assigns to the courts. Like the preclusion cases, the jurisdiction stripping cases have confounded the Court and produced no clear answers.

The scope of congressional authority to limit federal jurisdiction has given rise to one of the oldest and most famous debates regarding the federal courts.²⁸⁶ No less a figure than Justice Story took the position that the entire judicial power must vest somewhere in the federal courts, a proposition that formed the premise of his argument for appellate jurisdiction over state court decisions in *Martin v. Hunter’s Lessee*.²⁸⁷ This view draws strength from general separation of powers doctrine and the rule of law, insofar as removal of cases from the jurisdiction of the courts deprives them of the ability to “say what the law is.” While this position has some supporters,²⁸⁸ it has never commanded a clear majority of the Court, and a variety of statutory provisions exclude at least some categories of Article III cases and controversies decisions from the jurisdiction of the federal courts.²⁸⁹

At the other extreme is the view that Congress has plenary authority to create exceptions to

²⁸⁵ U.S. Const. Art. III, § 2, cl. 2 (emphasis added).

²⁸⁶ The debate includes Hart and Wechsler as famous participants. Compare Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953) (arguing that Congress may not limit jurisdiction so as to destroy the essential function of the courts) with Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001 (1965) (arguing that Congress has the authority to decide the extent to which federal courts would be used); see generally Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 165-77 (2d ed. 2002) (describing four different approaches taken on this issue). Each of the major Federal Courts casebooks devotes substantial attention to this issue as well. See Michael G. Collins, Robert N. Clinton & Richard A. Matasar, *Federal Courts, Theory and Practice* 33-73 (1996); David P. Currie & Harry N. Wyatt, *Federal Courts: Cases and Materials* 98-113 (4th Ed. 1990); Richard H. Fallon, Daniel J. Meltzer & David Shapiro, *Hart & Wechsler’s The Federal Courts and the Federal System* 348-87 (4th ed 1996); Howard P. Fink, Linda S. Mullenix, Thomas D. Rowe, Jr. & Mark v. Tushnet, *Federal Courts in the 21st Century* 163-91 (1995). For further discussion of the debate, see *infra* notes ___ and accompanying text.

²⁸⁷ 14 U.S. (1 Wheat.) 304, 330 (1816) (If, then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*) (emphasis in original).

²⁸⁸ See, e.g., Akhil Amar, *The Two Tiered-Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499; Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 138 U. Pa. L. Rev. 1596; Theodore Eisenberg, *Congressional Authority to restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498 (1974); Leonard Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157 (1960); see also Lawrence Sager, *Foreward: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 55 (1981) (opposing selective withdrawal of jurisdiction).

²⁸⁹ See generally Nowak & Rotunda, *supra* note ___ at 36-47.

the jurisdiction of federal courts whenever it chooses.²⁹⁰ The Court appeared to endorse this view in *Ex parte McCardle*,²⁹¹ which upheld dismissed a constitutional challenge to incarceration by Reconstruction era military governments on the ground that Congress had repealed the Supreme Court’s jurisdiction to consider appeals of habeas corpus petitions. The opinion contained broad language suggesting that Congress has unlimited power to strip the federal courts of jurisdiction pursuant to the Exceptions Clause,²⁹² but the Court was also careful to note that the repeal of the statute did not completely prevent the consideration of the matter by the Court, because an alternative basis for jurisdiction – a petition for writ of certiorari – remained available.²⁹³ The Court has subsequently backed away from *McCardle*, most notably in *United States v. Klein*,²⁹⁴ which rejected a congressional effort to strip the courts of jurisdiction to decide the effect of a presidential pardon.

The broad language of *McCardle* is inconsistent with *Marbury*’s conception of the judicial function and thus the Court and most commentators have moved to something of an uneasy middle ground. Among the intermediate positions are the view that the “essential functions” of the judiciary must be preserved²⁹⁵ and the view that congressional authority to divest the courts of jurisdiction must be exercised in conformity with other constitutional provisions.²⁹⁶ These interpretations accept the initial proposition that the Exceptions Clause authorizes Congress to remove cases entirely from the jurisdiction of the federal courts, but attempt to identify some external constitutional limits on that power. We believe, however, it is possible to read the Exceptions Clause itself to support the conclusion that there must be Article III review of administrative action.²⁹⁷

To begin with, Article III vests and defines the judicial power of the United States in mandatory terms. Section 1 provides that the “judicial Power of the United States, *shall* be vested” in the Supreme Court and lower courts.²⁹⁸ Likewise, Section 2 provides that the “judicial Power *shall*

²⁹⁰ See Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895 (1984).

²⁹¹ 74 U.S. (7 Wall.) 506 (1869).

²⁹² *See id.* at 514 (“We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.”).

²⁹³ *See id.* at 515 (“Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.”). Later that same year the Court exercised that jurisdiction in *Ex parte Yerger*, 75 U.S. 8 (Wall.) 85 (1869).

²⁹⁴ 80 U.S. (13 Wall.) 128 (1871).

²⁹⁵ This was Hart’s view. *See supra* note ____.

²⁹⁶ *See* Nowak & Rotunda, *supra* note ____ at 39-40.

²⁹⁷ Beyond the text, the historical material is “at best, incomplete.” Michael L. Wells & Edward J. Larson, *Original Intent and Article III*, 70 Tulane L. Rev. 75 (1995).

²⁹⁸ U.S. Const. Art III, § 1 (emphasis added).

extend” to certain categories of cases and controversies.²⁹⁹ The natural reading of this language is that the full extent of the judicial power must be vested in the federal courts, a construction that parallels the provisions of Articles I and II, both of which are generally understood to be mandatory concerning the vesting of executive and legislative power respectively. The understanding of the Exceptions Clause that Congress can preclude appellate review of administrative action is at odds with these other provision of Article III, an internal drafting contradiction that is out of character with the otherwise elegant drafting of the constitutional text.

The Exceptions Clause itself is likewise poorly drafted if its purpose was to permit some components of the judicial power to be entirely removed from the federal courts. It is does not qualify the vesting of jurisdiction over cases and controversies, but rather is located in a clause allocating the original and appellate jurisdiction of the Supreme Court:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court *shall* have original Jurisdiction. In *all* the other Cases before mentioned, the supreme Court *shall* have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.³⁰⁰

The highlighted language carries forward the implication that the vesting of jurisdiction is mandatory. More fundamentally, the power to make exceptions is phrased not in reference to the jurisdiction of federal courts generally, but in reference to the *appellate* jurisdiction of the Supreme Court.

Once the context and language are considered, it is sensible to read the Exceptions Clause as addressing the allocation of cases between the Supreme Court’s original and appellate jurisdiction.³⁰¹ Certain cases must be within the Court’s original jurisdiction, but the Exceptions Clause permits Congress to add to that jurisdiction by moving cases from the Court’s appellate to its original jurisdiction.³⁰² In contrast to the conventional reading of the Exceptions Clause, which is in tension

²⁹⁹ U.S. Const. Art III, § 2, cl. 1 (emphasis added).

³⁰⁰ U.S. Const. Art III, § 2, cl. 2 (emphases added).

³⁰¹ We are by no means the first to offer such an interpretation. See Dean Alfange, Jr, *Marbury v. Madison and Original Understandings of Judicial Review: in Defense of Traditional Wisdom*, 1993 Sup. Ct. Rev. 329, 397 & n.313 (collecting authorities); see also Mark Strasser, *Taking Exception to Traditional Exceptions Clause Jurisprudence: On Congress's Power to Limit the Court's Jurisdiction*, 2001 Utah L. Rev. 125. *Contra* Akhil R. Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. Chi. L. Rev. 443, 447 (1989); James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 Colum. L. Rev. 1515 (2001).

³⁰² Chief Justice Marshall’s reasoning in *Marbury* justified the inference of exclusivity on the basis that this was the only reading that gave any effect to the language in question. 5 U.S. (1 Cranch) at 174-75. But this assumption is simply not true. The Clause makes perfect sense as a minimum requirement of original jurisdiction cases that can be enlarged, but not diminished. We recognize the irony of relying heavily on *Marbury*’s rule of law analysis but ultimately rejecting the reading of Article III that provided the basis for the assertion of power to invalidate legislation as unconstitutional. Nonetheless, this disagreement with *Marbury* is unrelated to its rule of law reasoning.

with the rest of Article III and which creates various doctrinal problems discussed previously,³⁰³ the allocational interpretation of the clause is logically coherent. It is logical to require that cases which are especially important to the federal system must be heard originally by the Supreme Court.³⁰⁴ Likewise, it is logical to provide for the enlargement of that original jurisdiction to include other cases that Congress considers sufficiently important to warrant the exercise of that jurisdiction. At the same time, this reasoning does not permit Congress to encroach upon the essential functions of the judiciary by excluding cases from the jurisdiction of the federal courts, and thus avoids any contradiction with the mandatory language of the Vesting Clause and Article III's definition of the judicial power.

3. Not the Right(s) Question

The preclusion of review and jurisdiction stripping cases, coupled with the conventional understanding of the public rights doctrine, leaves judicial review of government benefit claims to legislative discretion, at least when nonconstitutional claims are involved. This hardly seems consistent with *Marbury*, whose rule of law justification for judicial review is fully applicable to claims that executive action violates statutory requirements.³⁰⁵ In the area of judicial review, as in the area of due process, the Court's failure to protect the rule of law as to government benefits derives from its misplaced focus on the nature of the right involved, rather than the duty of government actors to comply with the law. In our view, reorienting the judicial review question to the question of legal duties would force the court to ask the right question (not the rights question) about judicial review: whether Congress may vest in the executive branch unreviewable discretion to resolve a particular issue.

The ambiguities inherent in the concept of rights have contributed to the Court's problematic jurisprudence of judicial review. First, the focus on rights fostered the misplaced reliance on sovereign immunity in *Murray's Lessee*. Although one may conceive of rights belonging to the public as a whole that may be asserted *by* the government, we normally associate rights with individual interests asserted *against* the government. Thus, the conventional account of *Murray's Lessee* assumes that the "right" at issue derived from an underlying property right that might have been asserted against the Department of the Treasury, which brings sovereign immunity into play. As we explained above, however, the public right at issue in that case was the "right" to tax moneys wrongfully retained by a tax collector and this right was enforced extrajudicially by the Treasury's enforcement of the law through extrajudicial remedies, which brings the executive authority issue into play. Second, the rights-based analysis of judicial review has also led the Court to treat

³⁰³ See *supra* notes ___ and accompanying text.

³⁰⁴ Indeed, this would seem consistent with the Court's recent emphasis on the "dignity" of states. See *Federal Maritime Com'n v. South Carolina State Ports Authority*, 122 S.Ct. 1864, 1874 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.").

³⁰⁵ Indeed, *Marshall's* premise that where there is a right, there is a remedy, was articulated in the context of explaining why mandamus must be available to compel the Secretary of State to deliver the commission, which was a statutory claim based on a provision giving Marbury the office for a term of years. See *supra* notes ___ and accompanying text.

statutory rights as less important than constitutional rights for purposes of preclusion of review and jurisdiction stripping statutes. Of course, only constitutional rights can be asserted against the legislature as a basis for challenging statutes, but it does not follow that statutory rights are of lesser significance for rule of law purposes. Indeed, we think that the rule of law is a constitutional right.³⁰⁶

From a duty-based perspective, the defects of the current law become clear. Administrative determination of government benefits is an executive function that is authorized by and subject to statutes. Under the rule of law, government officials are bound to comply with those statutes. Yet current doctrine permits the legislative foreclosure of judicial review, thus removing the judiciary as a check on whether the executive branch has ignored the dictates of the law. This is hardly consistent with *Marbury's* rule of law promise. As we shall develop more fully in Part IV of the Article, we think that the rule of law requires a judicial remedy for executive action in violation of the law, with the exception of those decisions which the Constitution permits to be decided in the unreviewable discretion of the political branches.

V. A Duty-Based Approach to the Rule of Law

To this point, we have established that current due process and judicial review doctrine respecting government benefits effectively permits Congress to control the availability of these fundamental rule of law safeguards. This contingent rule of law jurisprudence is inconsistent with *Marbury*, which articulated its rule of law promise in the context of a government benefit case. Contingent rule of law and its associated doctrinal conundrums are the product of the Court's rights-based approach to the application of both due process and judicial review. The rights-based approach causes confusion because of the ambiguity inherent in the concept of rights and the problematic implications of establishing a right to government benefits. This approach, however, is not required by the constitutional text, history, or precedent; with respect to both due process and judicial review it is a relatively recent development based on misconceptions concerning earlier cases. In this part of the article, we present our alternative, duty-based approach to the rule of law and explain why we think it is superior to both current doctrine and various alternative approaches suggested in the academic literature.

A. Getting it Right

A duty-based approach draws on the basic rule of law premise that government actors have a duty to comply with the law. Conceptually, this premise clearly implies that the rule of law and its attendant constitutional safeguards attach whenever there are legal standards that apply to executive action. Moreover, while there is generally no affirmative constitutional duty to provide benefits, if

³⁰⁶ In this sense, executive action in violation of the law, if left without a remedy, would violate the constitutional rights of those adversely affected. The Supreme Court has rejected the proposition that "ultra vires" executive action violates a constitutional right, *see Dalton v. Specter*, 511 U.S. 462, 471-76 (1994), and we agree that not every executive violation of a statute becomes a constitutional violation. The violation occurs when the aggrieved party is left without a judicial remedy.

the government chooses to do so, standardless discretion in the administration of those benefits is also inconsistent with the rule of law. In this section of the article, we discuss these principles and their implications, addressing the basic components of duty-based rule of law analysis and the duty-based solutions to the problems of current doctrine.

1. Legal Standards and Rule of Law Safeguards

From a duty-based perspective, when government officials are subject to standards they are bound by them, even if there is room for the exercise of discretion within those standards. Thus, the essential rule of law safeguards of due process and judicial review apply to government benefit decisions made pursuant to statutory standards. To preserve the rule of law, due process requires procedures that are reasonably adapted to the fair and accurate determination of the factual and legal basis for government action. Likewise, there must be sufficient judicial review of the factual and legal basis of government action so as to ensure fidelity to the law and prevent arbitrary action or abuse of power. While the precise scope and content of these safeguards will necessarily vary depending on the circumstances, some basic considerations are fairly clear.

In contrast to current due process doctrine, under a duty-based approach, the statutory trigger for due process protections would be the presence of legal standards that bind government officials, whether or not those standards create an entitlement to a benefit. In rule of law terms, government actors have a duty to comply with these standards, even if there is room for some discretion in their application. When individuals may be adversely affected by the application of those standards, due process would require procedures that would ensure a fair and accurate determination of the facts and application of the law to the facts.³⁰⁷

In determining what procedures are required, the focus must be on what procedures are reasonably necessary to make a fair and accurate determination respecting the benefit at issue. The precise content of these procedures necessarily would depend on the nature of the factual and legal issues to be resolved, and informal procedures may well be sufficient in many cases. In this respect, our approach would not be so different from the current approach to determining “process due”

³⁰⁷ Under this view due process would apply to rulemaking as well as adjudicatory decisions. From a rule of law perspective, administrative rules adopted pursuant to statutory authority are no less subject to legal constraints than adjudicatory decisions. Thus, our analysis would in principle require that rulemaking procedures be sufficient to ensure fair and accurate decisions. Under current doctrine, by contrast, procedural due process does not apply to across-the-board, rulemaking type decisions. *See Bi-Metallic Investments v. State Board of Equalization*, 239 U.S. 441 (1915) (holding that due process is not applicable unless there are a few people, exceptionally affected, on individualized grounds). While this case is currently understood as rendering due process as inapplicable to rulemaking, 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. *See generally* I Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* §§9.2-9.2A (3d ed. 1994) (trial-like procedures are unnecessary because of the legislative character of the facts typically at issue). This approach would preserve the informal rulemaking provisions of the Administrative Procedure Act, *see* 5 U.S.C. §553, but it might raise questions about some of the applications of the exceptions to those procedures.

under *Mathews v. Eldridge*,³⁰⁸ although we are not entirely comfortable with *Mathews*'s utilitarian calculus. In particular, we are troubled by the possibility under *Mathews* that procedures which are insufficient to ensure that government officials comply with the law might be consistent with due process if they cost too much. Recent decisions, however, tend to focus 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.³⁰⁹ This emphasis is fully consistent with our duty-based approach to the rule of law.

The duty-based approach to the rule of law also suggests that administrative determinations involving application of law to facts must be subject to judicial review³¹⁰ and that total preclusion of judicial review in such cases would be a violation of the rule of law, whether viewed from an Article III or due process perspective.³¹¹ On the other hand, the rule of law would not ordinarily require a trial de novo by Article III courts. Deferential review would be permissible provided sufficient scope of review is retained to permit reviewing courts to fulfill their rule of law function.

³⁰⁸ 424 U.S. 319 (1976).

³⁰⁹ See, e.g., *Walters v. National Association 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); *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).

³¹⁰ This conclusion can be accommodated with sovereign immunity. *Marbury* certainly implied that sovereign immunity is not a bar to review, and as demonstrated in part III, sovereign immunity is not relevant to a proper understanding of the public rights doctrine. Although sovereign immunity is clearly in considerable tension with the rule of law, the doctrine has received new life in the Supreme Court's recent federalism decisions, see, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress may not abrogate 11th Amendment immunity pursuant to the commerce power and overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)); *Alden v. Maine*, 527 U.S. 706 (1999) (extending sovereign immunity to action against states in state courts); *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (same); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666 (1999) (same); see also *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (applying *Alden*), and it seems unlikely that the Court would repudiate it as to the federal government. Nonetheless, sovereign immunity should not stand as a complete bar to judicial review, because suits against government officials for declaratory and injunctive relief are available under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). The Court's federalism cases emphasize that this avenue for the vindication of federal statutory and constitutional rights remains available. See, e.g., *Alden*, 527 U.S. at 756-57.

While this form of review may not make damages available, if government benefits are wrongly withheld courts would presumably be able to require administrative officials to comply with the law. A critical issue might be whether a reviewing court must be able to order the disbursement of monetary benefits, insofar as the Court has held that federal courts may not order retroactive payment of benefits unlawfully withheld by state officials under the Eleventh Amendment. See *Edelman v. Jordan*, 415 U.S. 651 (1974). There is, however, a critical difference between ordering a state (or the federal government) to pay damages for a tortious act and requiring the disbursement of funds appropriated by the legislature pursuant to a statutory requirement.

³¹¹ Whether partial preclusion presents a problem would depend on the circumstances. Except perhaps where delay would lead to the permanent loss of an irreplaceable interest, the preclusion statutes that affect only the timing of judicial review would not present a serious problem. On the other hand, partial preclusion cases that prevent particular parties from seeking review, see, e.g., *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984), are problematic if they leave those injured by the improper application of the law without a remedy.

First, courts must retain the power to “say what the law is,” at least to the point of correcting violations of the clear statutory text or failure to apply correctly statutory standards or factors. Second, courts must have the authority to ensure that there is a valid factual basis for executive action. Third, courts must be able to review the rationality of the connection between the facts found and the statutory basis for action.

The federal courts must retain jurisdiction to review the factual determinations made by executive branch adjudicators, because without such authority, the courts are not in a position to ensure the rule of law. As discussed earlier,³¹² factual findings can be manipulated to evade legal constraints and judicial review could be easily defeated if it did not include review of factual determinations as well as legal conclusions.³¹³ This recognition is reflected in the text of Article III itself, which provides that the Supreme Court’s appellate jurisdiction extends to both “Law and Fact.”³¹⁴ For this reason, the Supreme Court has at times engaged in de novo review of “constitutional facts” that determine the outcome of individual rights claims.³¹⁵ We do not suggest that judicial review of agency findings in ordinary cases must be de novo, but the courts must retain sufficient review of facts and the application of law to facts to preserve the rule of law.

In general terms, current scope of review doctrine under the Administrative Procedure Act corresponds to these requirements.³¹⁶ Nonetheless, more limited review may violate the rule of law. In particular, we have doubts about the current veteran’s benefit regime, which precludes Article III review of factual determinations except as to constitutional fact,³¹⁷ and the limitation of review in

³¹² See *supra* note ___ and accompanying text.

³¹³ See *Allentown Mack Sales and Service v. NLRB*, 522 U.S. 359, 376 (“An agency should not be able to impede judicial review, and indeed even political oversight, by disguising its policymaking as factfinding.”)

³¹⁴ U.S. Const. Art. III, §2.

³¹⁵ In *Crowell v. Benson*, for example, the Court suggested that there must be de novo review of administration decisions respecting both constitutional and “jurisdictional” facts, construing the statute in question to permit it. See *supra* note ___ and accompanying text. Although the jurisdictional fact doctrine has fallen into disuse and de novo review of constitutional facts is not consistently applied, these doctrines underscore the need for some factual review to prevent abuse. See, e.g., *Bose Corp. v. Consumer’s Union*, 466 U.S. 485 (1984) (engaging in independent review of trial court’s finding of actual malice to support First Amendment defense to product disparagement claim); *Norris v. Alabama*, 294 U.S. 587 (1935) (rejecting state court factual determination that African-Americans were not excluded from the jury pool); see generally Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985).

³¹⁶ 5 U.S.C. § 706 permits reviewing courts to set aside agency decisions, inter alia, if they are contrary to law, arbitrary and capricious, or not supported by substantial evidence (in formal adjudications). Under *Chevron U.S.A., Inc.*, 467 U.S. 837 (1984), courts may reverse an administrative construction of a statute if the construction violates the clear statutory text or is otherwise based on an impermissible or unreasonable construction of a statute. Under either the substantial evidence or arbitrary and capricious standard of review courts may reverse agency decisions that are not supported by an adequate factual basis in the record. The arbitrary and capricious standard of review also requires that the agency articulate the connection between the facts found and the choice made, and this form of review focuses on the adequacy of the agency’s explanation. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983).

³¹⁷ In particular, under 38 U.S.C. § 7292(d)(2) (200__), the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over veterans benefit appeals, “may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case,” except for

Thomas v. Union Carbide to fraud, misconduct, or misrepresentation or constitutional error.³¹⁸

2. A Requirement of Standards

The model of governmental regularity embodied by the rule of law implies a general principle of nonarbitrariness³¹⁹ in governmental action, which in turn implies that governmental action must be constrained by standards. Thus, while the rule of law is not the source of substantive rights,³²⁰ the rule of law generally requires the legislature to incorporate statutory standards to guide and control the administration of government benefits. A standardless statute violates the rule of law because it “lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented.”³²¹ The requirement of statutory standards, which exists independently of any substantive constitutional right to any particular benefit, is reflected in both separation of powers and due process doctrine. As suggested by *Marbury* itself, standards may not be required if the matter is a political, rather than a legal, question; i.e., it falls within the legally unconstrained constitutional discretion of the political branches of government. Such an exception, however, would be based on the nature of the decision rather than on the nature of the interest at stake.

A requirement of statutory standards is most closely associated with separation of powers and the nondelegation doctrine. While the doctrine is ordinarily understood as policing the boundary between legislative and executive action for purposes of the Vesting Clause of the Constitution,³²²

constitutional claims.

³¹⁸ See *supra* notes ___ (discussing limitation of review of arbitral awards under FIFRA to claims of fraud, misconduct, or misrepresentation, or constitutional error).

³¹⁹ See *Yick Wo v. Hopkins*, 118 U.S. 356, 369-70 (1885) (“When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.”)

³²⁰ It does constrain legislative action, however, by requiring constitutional authority for statutes (i.e., a legislative act must be rationally related to a legitimate purpose) and invalidating statutes that violate constitutional prohibitions or limits. This reasoning may shed light on the doctrine of unconstitutional conditions, which has defied coherent explanation and applications. See generally Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism*, 70 B.U.L. Rev. 593 (1990). The unconstitutional conditions doctrine posits that even though a person has no substantive right to a particular government benefit, the government may not impermissibly condition those benefits on the relinquishment of constitutional rights. See, e.g., *Sherbert v. Werner*, 374 U.S. 398 (1963) (invalidating the denial of unemployment benefits for persons who refuse particular jobs on religious grounds). At the same time, however, the Court has held that the mere denial of a benefit does not burden any constitutional rights. See *Maher v. Roe*, 432 U.S. 464 (1977) (denial of Medicaid benefits for abortions did not burden abortion rights). While we will not attempt a definitive resolution of this complex area here, a duty-based rule of law approach to these problems would suggest that the critical question is whether the particular ground for the denial of a government benefit is precluded by the substantive rights provision in question.

³²¹ *Yick Wo v. Hopkins*, 118 U.S. 356, 372-73 (1886) (quoting *City of Baltimore v. Radecke*, 49 Md. 217 (1878)).

³²² U.S. Const. Art. I, § 1; see *Whitman v. American Trucking Associations*, 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

it also serves an important rule of law function by separating the creation of law from its implementation and thereby constraining the action of government officials by legally binding standards.³²³ Put differently, the absence of standards is not only a violation of the Vesting Clause, but also a violation of the rule of law. 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.³²⁴

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.³²⁵ These due process 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. An early example of this sort of reasoning is *Yick Wo v. Hopkins*,³²⁶ which objected to the standardless discretion granted to officials in determining eligibility for licenses to

text permits no delegation of those powers . . .”). 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 n. 16 (1983) (distinguishing between the legislative character of the legislative veto and the executive character Attorney General’s decision which was vetoed because “that 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 not so checked”).

³²³ *See supra* notes ___ and accompanying text (discussing the need for separation of power to make the operation of the rule of law possible).

³²⁴ *See, e.g., Aman & Mayton, supra* note ___, at 34-36; I. Kenneth C. Davis, *Administrative Law Treatise* 297-308 (2d ed. 1978). This possibility received some support from the famous (among administrative law scholars, anyway) decision in *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (Leventhal, J.), 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 v. American Trucking Associations*, 531 U.S. 457 (2001) (reversing *American Trucking Associations v. EPA*, 175 F.3d 1027 (D.C. Cir.), 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.

³²⁵ *See generally* Breyer, Stewart, Sunstein & Spitzer, *supra* note ___, at 490-515 (collecting and discussing cases involving a requirement of rules and the converse requirement of individualized discretion); *Aman & Mayton, supra* note ___, at 71-73 (discussing rule of law implications of cases).

³²⁶ 118 U.S. 356, 372-73 (1886).

run a laundry.³²⁷ Several court of appeals decisions in the late sixties and early seventies echo this principle, as exemplified by *Holmes v. New York Public Housing Authority*,³²⁸ 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 standards³²⁹

The Supreme Court's decision in *Morton v. Ruiz*,³³⁰ 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.³³¹

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.³³² A legal entitlement is the very antithesis of unconstrained discretion. Thus, unconstrained discretion could not violate due process because the existence of unconstrained discretion means that there is no entitlement and due process does not attach. Under a duty-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.³³³

The requirement that Congress create standards to guide administrative discretion, however, is

³²⁷ The force of this discussion is not undermined by the Court's ultimate holding that the application of these standards in practice reflected discrimination against persons of Chinese descent in violation of equal protection. *See* 118 U.S. at 374.

³²⁸ 398 F.2d 262 (2d Cir. 1968); *see also* *White v. Roughton*, 530 F.2d 750 (7th Cir. 1974); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

³²⁹ *Id.* at 265 (citing *See Hornsby v. Allen*, 326 F.2d 605, 609- 610 (5 Cir. 1964) (applying this principle in a licensing case).

³³⁰ *See, e.g.*, 415 U.S. 199 (1974).

³³¹ *Morton v. Ruiz* has been sharply criticized, *see* Kenneth C. Davis, *Administrative Law Surprises in the Ruiz Case*, 75 Colum. L. Rev. 823 (1975), but the Supreme Court continues to cite it with approval. *See, e.g.*, *Barnhart v. Walton*, 122 S. Ct. 1265, 1271 (2002).

³³² *But see* *Baker-Chaput v. Cammett*, 406 F. Supp. 1134 (D.N.H. 1976) (suggesting that statutory eligibility creates an entitlement and that procedural due process requires standards to protect that entitlement).

³³³ 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.

not absolute. *Marbury* itself recognized that some decisions may be committed to the unreviewable discretion of political actors, giving rise to the political question doctrine.³³⁴ Under the current formulation of this doctrine, an issue is nonjusticiable if it has been textually committed by the Constitution to a coordinate branch of government or if there is a lack of judicially discoverable and manageable standards.³³⁵ Although the recognition of such political questions is in some tension with the rule of law, political question cases typically arise where there are especially compelling reasons for relying on the judgment of political actors and limiting the involvement of the judiciary. In such cases, subjecting executive decisions to procedures and judicial review could undermine the effective operation of government. Under a duty-based approach, standardless discretion would be permissible where the political question doctrine would apply.

Some of the leading cases holding that review of particular decisions is foreclosed under the Administrative Procedure Act can be understood in these terms. Indeed, many of the cases emphasize traditional executive prerogatives in explaining why judicial review is foreclosed. In *Heckler v. Chaney*,³³⁶ for example, the Court held that prosecutorial decisions by administrative officials are presumptively nonreviewable, comparing it to prosecutorial discretion in criminal matters, which “has long been regarded as the special province of the Executive Branch”³³⁷ Similarly, national security considerations within the President’s foreign relations powers were implicated in *Webster v. Doe*,³³⁸ which held that decisions of the Director of the CIA to terminate an employer were not reviewable (except for constitutional claims). Likewise, *Lincoln v. Vigil*,³³⁹ can be explained in terms of traditional executive prerogatives relating to the allocation of discretionary budget items.³⁴⁰

3. Securing the Rule of Law

The duty-based approach outlined above is superior to the current rights-based approach because it eliminates the contingent character of due process and judicial review while avoiding the concerns that led the Court to move toward a rights-based approach. It does so by separating the question of

³³⁴ See *supra* notes ___ and accompanying text.

³³⁵ See *Nixon v. United States*, 506 U.S. 224, 228 (1993) (“A controversy is 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)).

³³⁶ 470 U.S. 821 (1985) (concluding that the decision of the FDA not to take action against allegedly unapproved use of drugs for lethal injection was committed by law to agency discretion and hence unreviewable).

³³⁷ *Id.* at 832 (“Finally, we recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’” (quoting U.S. Const. Art. II, § 3)).

³³⁸ 486 U.S. 592 (1988).

³³⁹ 508 U.S. 182 (1993).

³⁴⁰ See *id.* at 192 (“The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion.”).

an underlying substantive right to a given benefit from the question of what triggers the rule of law. Insofar as the duty-based approach focuses on the question of legal standards that constrain arbitrary and abusive government action, moreover, it focuses on the right questions from the rule of law perspective. It thus provides more coherent answers to the doctrinal conundrums described throughout this article. While the duty-based approach provides more secure constitutional foundations for the rule of law and would require some expansion of both due process and judicial review, it would not entail a dramatic restructuring of current government benefits administration.

Most clearly and fundamentally, the duty-based approach solves the underlying circularity of the entitlement construct of due process because it separates the question of a substantive right to benefits from the question of whether due process attaches. The Supreme Court was apparently led to adopt the entitlement construct for due process in order to avoid any inference that there is a substantive constitutional right to a particular kind of government benefit (or, conversely, an affirmative duty to provide the benefit).³⁴¹ Under the duty-based approach there need be no concern about the implications of a “right” to benefits or about the judicial creation of property interests,³⁴² because the government retains discretion over the creation and extent of benefit systems. Nonetheless, if the government does provide benefits, the rule of law requires standards that constrain the administration of benefits, and these standards trigger rule of law safeguards. Thus, the rule of law cannot be evaded by the simple declaration that there is no entitlement to benefits, or by the incorporation of some discretion as to some aspects of a benefit. By the same token, the “bitter-with-the-sweet” problem³⁴³ disappears under a duty-based approach, because congressional discretion over the character of the interest created is unrelated to the constitutional requirement of due process.

The duty-based approach to the rule of law also offers a much more rational approach to the availability of judicial review by focusing on the nature of the government decision, i.e., whether it subject to legal standards, rather than the character of the right at issue. It does not permit Congress to foreclose review just because a claim is asserted against the government, a sovereign immunity based rationale for the public rights doctrine that would swallow the rule of law if taken to its logical extremes.³⁴⁴ At the same time, it accommodates the need for standardless discretion for certain kinds of purely political decisions when there is a constitutional basis for it.³⁴⁵

³⁴¹ See *supra* note ___ and accompanying text.

³⁴² Although the application of rule of law does not depend on the existence of an entitlement, the duty-based approach still relies on positive law to trigger the application of due process, thus eliminating the necessity that the Court create a constitutional definition of property for purposes of triggering due process, which it has shown no interest in doing. As discussed in the next section, 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. See *infra* notes ___ and accompanying text.

³⁴³ See *supra* notes ___ and accompanying text.

³⁴⁴ See *supra* notes ___ and accompanying text.

³⁴⁵ See *supra* notes ___ and accompanying text (suggesting that some recent preclusion cases can be understood in political question terms).

In addition to providing more secure constitutional foundations for the rule of law, the duty-based approach provides a coherent framework for analyzing a variety of issues arising out of the administration of government benefits. As discussed earlier,³⁴⁶ for example, the rights-based entitlement construct of due process has had difficulty accounting for initial applications for government benefits and licenses, insofar as that approach conceives of property as an already acquired interest. While most lower courts have extended procedural due process to applications for benefits and licenses as well as terminations or revocations, they have had some difficulty explaining why. More fundamentally, it appears that these cases would require, in order for due process to attach, that applicable statutes leave no discretion to deny a benefit or a license. Under the duty based approach, the distinction between applications and terminations for benefit programs or licenses would be irrelevant, since both decisions would be constrained by standards and the existence of a property right would not matter.³⁴⁷

This analysis also has implications for government employment, a form of government benefit that presents distinctive problems.³⁴⁸ The President has special constitutional responsibilities for the oversight of executive officials, including the appointment and removal of those officials. The President's role in appointments is express,³⁴⁹ 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.³⁵⁰ 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 employees would fall within the political question exception to the requirement of standards.³⁵¹

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, because there may be many qualified people who meet any statutory standards, and the choice among competing

³⁴⁶ See *supra* note ___ and accompanying text.

³⁴⁷ By way of contrast, however, there would be a difference between applications for employment and removal from office, which are governed by different levels of political discretion. See *infra* notes ___ and accompanying text.

³⁴⁸ Similar issues arise with respect to other government contracts. Indeed, employment is a species of contract. More fundamentally, both areas cast the government in a proprietary, rather than a regulatory role, in the sense that is engaging in economic activity as a participant.

³⁴⁹ See Art. II, § 2, cl. 2.

³⁵⁰ See *Myers v. United States*, 272 U.S. 52 (1926).

³⁵¹ Thus, for example, Marshall assumed in *Marbury v. Madison* that Marbury's claim depended on the fact that his office was by law for a term of years, and distinguished at will employment. See *supra* note ___.

candidates is often impossible to articulate in terms of standards.³⁵² Removal decisions, by way of contrast, do not inevitably involve the same kinds of subjective comparative judgments as hiring. For officials exercising significant policy authority, presidential discretion to remove is constitutionally required, but as to lower level officials who do not make policy, Congress apparently has the authority to impose legal requirements on the termination of officers.³⁵³ While Congress is not ordinarily required to impose such standards,³⁵⁴ when it does these standards are legally binding on those responsible for the removal decision.³⁵⁵ Such standards would engage the rule of law.³⁵⁶ Thus, the duty-based approach to the rule of law offers a powerful explanation of current doctrine concerning government employment.

B. *Comparison to Other Proposals*

There is an enormous literature concerning the constitutional requirements of due process and judicial review. While we build on some of the criticisms advanced in this literature, our duty-based approach to the rule of law offers a unique perspective on these issues for two principal reasons. First, the literature generally conceives of due process and judicial review as distinct issues and does not address them through a comprehensive theory of the rule of law. Second, the alternatives in the literature, by and large, continue to focus on the rights at issue and cannot completely avoid the troublesome implications of rights-based analysis. Thus, the duty-based approach is the only alternative that provides solid constitutional foundations for the rule of law and a coherent framework for analyzing both due process and judicial review issues. This section relates our analysis and arguments to the literature on due process and judicial review.

1. **Procedural Due Process**

The literature on due process in general, and the “new property in particular,” can be grouped into three broad perspectives.³⁵⁷ First, “traditionalists” are sharply critical of the due process revolution (as conventionally understood), arguing that due process should be confined to “traditional” liberty and property interests as defined by reference to some historical conception of

³⁵² Nonetheless, some considerations, such as 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. The operation of constitutional norms to make certain criteria invalid would not engage procedural due process or judicial review of the employment decision as a whole, but a judicial remedy for such a constitutional violation might well be required. *See infra* notes ___ and accompanying text.

³⁵³ *See Morrison v. Olson*, 487 U.S. 654 (1988) (upholding for cause removal provisions for the independent counsel); *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

³⁵⁴ 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).

³⁵⁵ Assuming, of course, that the restrictions are constitutionally valid.

³⁵⁶ *See infra* notes ___ and accompanying text.

³⁵⁷ 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.

the Framers' understanding of these terms. Second, "revisionists" agree that some government benefits should be protected, but seek to revise the analysis to avoid some of the doctrinal difficulties of the entitlement construct. Third, "universalists" argue that due process should be generally applicable to government adjudications, regardless of the interests at stake, criticizing *Roth's* entitlement construct and seeking a more expansive conception of the rights that trigger due process.

The traditionalist approach, exemplified by such notable figures as Judges Bork³⁵⁸ and Easterbrook³⁵⁹ and Professors Richard Pierce³⁶⁰ and Richard Epstein,³⁶¹ advance interpretive, conceptual, and policy arguments against the extension of due process protections beyond traditional private property and liberty interests. From an interpretive perspective, traditionalists argue that the Framers intended to protect only the discrete set of interests that were encompassed by the terms "property" and "liberty" at the time the Bill of Rights was adopted.³⁶² Conceptually, the traditionalist approach defends limiting the definition of "property" to traditional property on the ground 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."³⁶³ 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.³⁶⁴

We disagree with all of the arguments noted above. As part I of this article demonstrates, the traditionalist interpretation of the Due Process Clause is not supported by the historical record, which suggests that the Framers were more concerned with the rule of law and governmental regularity rather than with identifying a limited class of interests to be protected.³⁶⁵ Moreover, as part II demonstrates, the Court's consistent historical practice since *Marbury v. Madison* was to extend due process protections to government benefits.³⁶⁶ Conceptually, the differences between private property and government benefits are much less significant than the traditionalists assume, and should not render the rule of law inapplicable to government benefits.³⁶⁷ Both traditional property and government benefits are a form of public good provided by the government with

³⁵⁸ See Robert Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash. U.L.Q. 695 (1979).

³⁵⁹ See Frank Easterbrook, *Substance and Due Process*, 1982 Sup. Ct. Rev. 85 (proposing to adopt historical definitions of property and liberty).

³⁶⁰ See Pierce, *supra* note ____.

³⁶¹ See Richard Epstein, *No New Property*, 56 Brook. L. Rev. 747 (1990).

³⁶² Easterbrook, *supra* note ___, at 96-97.

³⁶³ E.g. Pierce, *supra* note ___, at 1980.

³⁶⁴ See Pierce, *supra* note ___, at 1999 (arguing that the political process adequately protects procedural due process for government benefits); Epstein, *supra* note ___, 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).

³⁶⁵ See *supra* notes __ and accompanying text (discussing framers' intentions).

³⁶⁶ See *supra* note __ and accompanying text.

³⁶⁷ While one might distinguish between negative and positive *substantive* rights, see Frank Cross, *The Error of Positive Rights*, 48 U.C.L.A. L. Rev. 857, 863-68 (2001), the question here is whether the government is bound by the rule of law in the administration of benefits.

distributional consequences³⁶⁸ and both can involve varying degrees of government subsidies and individual initiative.³⁶⁹ Finally, the assertion that due process safeguards are either unnecessary or excessively burdensome is, in our view, belied by experience.³⁷⁰

Revisionists accept the extension of due process to some government benefits under the current two step methodology, but offer a constitutionally based definition of “property” and/or “liberty.” By constitutionalizing the definition of protected interests, revisionists seek to avoid the circularity of the entitlement construct and limit legislative control over the application of due process.³⁷¹ Revisionist proposals afford either narrow or broad protection, depending on how property or liberty is defined. While such proposals would generally improve on the circularity of current doctrine by denying the government unlimited discretion to determine whether a given benefit is property, they focus on the nature of the right affected by government action and thus cannot solve all the problems associated with the rights-based approach.

The circularity of the entitlement construct can be avoided by creating a constitutional definition of property that includes at least some government benefits, but this is a notoriously difficult task. Given the Court’s refusal to recognize an affirmative constitutional right to benefits, any definition of property must accommodate legislative discretion over the creation of benefits and therefore must incorporate some positivist elements. Thus, proponents of a constitutional definition of property accept the premise that property is not created by the Constitution, but advocate a constitutional standard for evaluating whether the interest created is property for purposes of due process. Justice Brennan, for example, argued in his *Bishop v. Wood* dissent³⁷² that there is a constitutional dimension to the definition of property and that the “relevant inquiry is whether it was objectively

³⁶⁸ 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.

³⁶⁹ 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 redistributive 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, the difference may well justify a greater level of substantive protection for the creation and retention of such wealth, but it does not follow that this difference matters for purposes of the rule of law, which does not concern the underlying substantive right to a given interest.

³⁷⁰ See *supra* notes ___ and accompanying text (discussing inadequacy of political process to ensure procedural due process).

³⁷¹ Such an approach was advocated by one of the authors in an earlier article. See Levy, *supra* note ___, at 419-21.

³⁷² 426 U.S. 341 (1976).

reasonable” to rely on a government benefit.³⁷³ Similarly, Professor Merrill proposes a constitutional standard under which government benefits are “property” if some nonconstitutional source of law confers on the claimant “an entitlement having a monetary value that can be terminated only upon a finding that some specific condition has been satisfied.”³⁷⁴

These definitions may prevent the legislature from avoiding due process through the simple expedient of declaring “no entitlement, but they do not completely eliminate the circularity of current doctrine. The legislature retains complete discretion over the form of benefits and is apparently free to structure them so as to avoid creating objectively reasonable reliance or a legal entitlement.”³⁷⁵ Under a rights-based approach, circularity can only be avoided by establishing some constitutional baseline of property, which cannot include government benefits without recognizing some affirmative constitutional rights.

Other 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, defines liberty to include freedom of contract and occupational liberty,³⁷⁶ which protects government benefits when the government has displaced the private market or forces a double payment for using the private market.³⁷⁷ A much broader proposal is offered by William Van Alstyne, who would treat “freedom from arbitrary adjudicative procedures as a substantive element of one’s liberty,”³⁷⁸ thus incorporating a general requirement of due process regardless of the underlying interest. Reliance on the liberty interest component of

³⁷³ *Id.* at 353. Justice Brennan rejected the majority’s reliance on the lack of a legal entitlement as according “‘unfettered discretion’ in defining property,” thus embracing the bitter-with-the-sweet analysis rejected by the majority in *Arnett v. Kennedy* and resurrecting the right-privilege distinction. *Id.* at 353 & n.4.

³⁷⁴ Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 961 (2000). Under Merrill’s proposal, a benefit is property if there is a current guarantee against discretionary denial, even if a legislature does not guarantee there will be no wholesale withdrawal or diminution in the future. Under the Court’s entitlement approach, there is no guarantee of due process if there is no entitlement to a benefit, which would be the case if the benefit could be eliminated at any time by Congress or a state legislature. Merrill, *supra*, at 963-64.

³⁷⁵ Justice Brennan’s use of “reliance” is circular because reliance is not justified if the lack of legal standards preclude it. Likewise, while Professor Merrill’s definition prevents the legislature from avoiding due process through a simple declaration of “no entitlement,” the application of discretion pursuant to standards may not rise to the level of an entitlement. Professor Merrill, moreover, would not extend due process safeguards to initial benefits decisions, as opposed to terminations because of the social costs of those procedures, Merrill, *supra* note ___, at 968 and because “individuals experience of loss of benefits more sharply than they do the failure to gain new benefits.” *Id.* at 967 n. 299.

³⁷⁶ Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. Legal Stud. 3 (1983). Judge Williams reasons that “the family of 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.” *Id.* at 20.

³⁷⁷ Williams, *supra* note ___, at 22. Similarly, Timothy Terrell’s “government as monopolist” theory would apply due process only when an individual has no choice to deal with the government. See Timothy P. Terrell, “Property,” “Due Process,” and the Distinction Between Definition and Theory in Legal Analysis, 70 Geo. L.J. 861, 902-03 (1982).

³⁷⁸ William Van Alstyne, *Cracks in “The New Property”*: *Adjudicative Due Process in the Administrative State*, 62 Cornell L. Rev. 445, 487 (1977) (emphasis omitted).

the Due Process Clause avoids the circularity of the entitlement construct of property because liberty interests are constitutionally determined, but it cannot avoid many of the problems of the rights-based approach.

Reliance on liberty interests only displaces the definitional question and, more fundamentally, is poorly suited to protecting government benefits. The scope of due process protections afforded government benefits depends on the definition of liberty interests adopted. A relatively narrow view of the liberty interests protected by due process, such as that proposed by Judge Williams, leaves important government benefits beyond the scope of due process.³⁷⁹ On the other hand, efforts to shoehorn broad protection for government benefits into some conception of liberty requires unnecessarily convoluted and ultimately unsuccessful reasoning. Thus, while we are sympathetic with Professor Van Alstyne's general position,³⁸⁰ 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 such procedures.³⁸¹

A final group of commentators would abandon the current two step methodology and 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. 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.³⁸² They propose that the Court interpret the phrase "life, liberty and property" to "embrace every interest valued by sensible persons,"³⁸³ which would ensure that the "government [cannot] seriously hurt you without due process of law."³⁸⁴ A variant of this balancing approach

³⁷⁹ There would be no due process protection for most government employment, for example, because there is no government monopoly and alternative employment is usually available in private markets. Williams, *supra* note ___, at 28. Indeed, Judge Williams approach does not differ markedly from the traditionalists, and has been cited with approval by Professor Pierce. See Pierce, *supra* note ___, at 1996-97. Likewise, the government as monopolist approach of Timothy Terrell, *see supra* note ___, permits the government to ignore the rule of law in any circumstance in which the government is not a monopolist. There is no reason to suppose, however, that the market will necessarily prevent the government from arbitrary action. See Patricia Smith, *Commentary on Terrell: Definition and Metaphor in Legal Analysis*, 39 U. Fla. L. Rev. 387, 393 (1987) (doubting that markets will protect government employees from being fired because of a vendetta by their supervisor).

³⁸⁰ In particular, we agree that "the protected essences of personal freedom include freedom from fundamentally unfair modes of government action, an immunity (if you will) from procedural arbitrariness." Van Alstyne, *supra* note ___, at 487.

³⁸¹ See Edward L. Rubin, *Due Process and the Administrative State*, 72 Cal. L. Rev. 1044, 1097 (1984) ("The idea of freedom from arbitrary action seems promising, but it is circuitous to relate that idea to the introductory phrase about life, liberty and property."). Indeed, 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." Van Alstyne, *supra* note ___, at 487.

³⁸² Henry Paul Monaghan, Of "Liberty" and "Property," 62 Cornell L. Rev. 405, 407 (1977).

³⁸³ Henry Paul Monaghan, The Burger Court and "Our Federalism," 43 Law & Contemp. Probs. 39, 49 (Summer 1980).

³⁸⁴ John Ely, Democracy and Distrust 19 (1980).

emphasizes a dignitary component of due process and would ask whether “the challenged process sustains or diminishes individual dignity.”³⁸⁵

This kind of open-ended balancing, however, is precisely what the Court sought to avoid when it moved toward the two step due process methodology and adopted the entitlement construct for defining property.³⁸⁶ Applying due process based on the importance of the interest at stake or human dignity requires the Court to engage in the unwelcome task of establishing a constitutional hierarchy of interests and values.³⁸⁷ The Court would also need to find a way to limit the implications of its due process analysis or be forced to recognize affirmative constitutional rights to important government benefits. This kind of analysis could just as easily signal a return to substantive economic due process as enhanced due process protection for government benefits.³⁸⁸ The 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 actors³⁸⁹ and involves an especially murky trigger for applying due process.³⁹⁰

³⁸⁵ Jerry Mashaw, *Administrative Due Process: The Quest for a Dignity Theory*, 61 B.U.L. Rev. 885, 894 (1981). 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.” Mashaw, *supra* note __, at 886; *see also* Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication— A Survey and Critique*, 66 Yale L.J. 319, 350 (1957) (arguing “various 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 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, *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 reflect 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*”].

³⁸⁶ *See supra* notes __ and accompanying text.

³⁸⁷ As 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. Farina, *supra* note __, at 204. Farina argues that any rights-based approach that avoids the positivist trap cannot avoid defining political rights, and she explores feminist legal theory as a promising beginning for such an effort. *Id.* at __. Any such effort, however, “inevitably leads to the . . . problem of imposing the entire debate regarding man, meaning, and the state on due process doctrine,” Rubin, *supra* note __, at 1091, a situation that the Court understandably wishes to avoid.

³⁸⁸ *See Farina, supra* note __, 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 outline of a straight-jacket on progressive social change.”).

³⁸⁹ *See Rubin, supra* note __, at 1098 (“Properly conceived, [dignity] theory is a theory about the stance that government should take toward the people it rules.”).

³⁹⁰ *See Mashaw, Three Factors, supra* note __, at 50-51 (conceding the difficulty with a dignity theory of “defining operational limits on the procedural claims it fosters”).

Among those who reject the two step methodology, Professor Ed Rubin’s analysis comes closest to our own. Professor Rubin rejects a rights-based due process trigger altogether³⁹¹ and emphasizes “the government’s interaction with the individual, rather than the nature of the nonprocedural right that triggers procedural protection.”³⁹² Based on the historical assumption that at the time of the Bill of Rights due process applied to all virtually all government adjudications, Professor Rubin argues for the universal application of due process to all government adjudications.³⁹³ 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 Framers’ “general sense of the fixed limits on state power” that is “in some sense ‘natural’ to this society.”³⁹⁴

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, which is hardly a model of coherence.³⁹⁵ 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,³⁹⁶ we think his approach is overly broad.³⁹⁷ More fundamentally, we believe that it is preferable to define the scope of due process by reference to underlying rule of law principles that can inform the analysis and provide a suitable framework for resolving difficult questions. Thus, while the duty-based approach starts from similar premises, it provides a superior vehicle for improving due process

³⁹¹ Rubin, *supra* note __, at 1100-01.

³⁹² Rubin, *supra* note __, 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.

³⁹³ 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 adjudication was carried out mostly by the courts at the time the Fifth and Fourteenth Amendments were adopted, 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.

³⁹⁴ Rubin, *supra* note __, at 1094.

³⁹⁵ 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. See *Granfinanciera*, 492 U.S. at _____. For criticism of this approach, see **CITES**

³⁹⁶ See *supra* notes ____ and accompanying text (discussing overlap between executive and judicial action in the context of *Murray’s Lessee*).

³⁹⁷ Not every government adjudication should be subject to due process because not every adjudication is subject to standards passed by Congress. As we previously developed, Congress should be able to assign certain functions to the discretion of the Executive Branch, assuming that these assignments meet applicable Constitutional standards concerning such delegations. In this circumstance, the rule of law is not implicated because administration action does not involve the application and interpretation of legal standards. See *supra* note __ and accompanying text.

doctrine.

2. Judicial Review

Like due process, judicial review of administrative action has drawn considerable scholarly attention. Commentators tend to focus on either the propriety of administrative adjudication in light of Article III (including the public rights doctrine) or on the jurisdiction stripping line of cases, with little attention paid to the overlap between the two.³⁹⁸ While our approach to judicial review draws on various components of the literature, it focuses on judicial review and extends the analysis by providing a comprehensive framework that relates judicial review to broader rule of law principles.

The administrative adjudication literature is for the most part highly critical of the public rights doctrine, challenging its historical foundations, its conceptual incoherence, and its fundamental inconsistency with the rule of law.³⁹⁹ Most of the commentary assumes that the public rights doctrine exempts administrative adjudication entirely from Article III,⁴⁰⁰ and therefore calls for the abolition of the public rights doctrine to ensure some judicial review.⁴⁰¹ Under this view, administrative adjudication of both public and private rights would be evaluated under the *Schor* test (or some variation of it), with particular attention paid to the availability and scope of judicial

³⁹⁸ See *supra* notes ___ and accompanying text.

³⁹⁹ See, e.g., Aman & Mayton, *supra* note ___, at 126 (“Because the public and private rights distinction . . . allows the courts’ important federal question jurisdiction to be allocated to agencies without reference to Article III or its purposes, the distinction is surely deficient.”); Fallon, *supra* note ___, at 953 (“to the extent that [the public rights doctrine] displaces checks against arbitrary and self-interested government action, the doctrine threatens the rule of law”). For additional commentary critical of the public rights doctrine, see Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts under Article III*, 65 *Ind. L.J.* 233, 250 (1990) (“For even if the ‘public rights’ category were an intelligible and manageable category (which it is plainly not), we still have not been told why the category is congruent with cases where the use of an article I court or administrative agency is valid.”); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 *Duke L.J.* 197, at 210 (discussing the constitutional flaws in the public-rights doctrine) Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 *U. Colo.L.Rev.* 581, 592-602 (1985) (arguing that the Article III safeguards are especially necessary in public rights cases); Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray’s Lessee Through Crowell to Schor*, 35 *Buff. L. Rev.* 765, 837 (1986) (criticizing the public-rights doctrine from a separation-of-powers perspective); see also Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 *Hastings Const. L.Q.* 1013 (1994) (arguing against the constitutional validity of the public-rights doctrine with respect to the Seventh Amendment); Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment* 21 *Hastings Const. L.Q.* 1013 (1994) (arguing that the history of the Seventh Amendment does not support the application of the public rights doctrine).

⁴⁰⁰ Craig A. Stern *What’s a Constitution among Friends?—Unbalancing Article III*, 146 *U. Pa. L. Rev.* 1043, 1062-63 (1998), is a notable exception. Professor Stern reviews *Murray’s Lessee* and notes, as we do, that the facts and reasoning of the case do not address the foreclosure of review, but he does not fully explain the public rights doctrine. See also Joshua I. Schwartz *Nonacquiescence, Crowell v. Benson, and Administrative Adjudication*, 77 *Geo. L.J.* 1815, 1883-85 (1989) (arguing that *Murray’s Lessee* and *Crowell* do not support foreclosure of judicial review of public rights cases).

⁴⁰¹ See, e.g. Glen O. Robinson, Ernest Gellhorn & Harold H. Bruff, *The Administrative Process* 163 (4th ed. 1993) (The Supreme Court has “approved foreclosure of review of nonconstitutional claims, and the prevailing assumption since *Crowell* has been that judicial review of public right claims is not required.) (citation omitted).

review. The leading proponent of this approach is Professor Richard Fallon, Jr., whose “appellate review theory” of judicial review posits that “when Congress chooses to employ a non-article III federal adjudicator, it must provide for judicial review of at least some issues in a constitutional court.”⁴⁰²

While our analysis leads us to much the same end result, our understanding of the public rights doctrine causes us to take a different route. As we discussed previously,⁴⁰³ the public rights doctrine is best understood as standing for the proposition that extrajudicial action to enforce rights belonging to the public is executive action. From this perspective, the doctrine permits executive action resembling adjudication in the first instance, but says nothing about the foreclosure of judicial review. Thus, we do not see the public rights doctrine as incompatible with a general constitutional requirement of judicial review of executive action.⁴⁰⁴ The doctrine may therefore continue to play an important role in assessing the constitutionality of first instance adjudication by agencies (or legislative courts).⁴⁰⁵ Whether the foreclosure of review is consistent with the rule of law, under either a due process or Article III approach, can and should be resolved by reference to *Marbury*’s understanding of the judicial role in enforcing the rule of law.⁴⁰⁶

There is also a “huge” body of scholarly comment on the power of Congress to restrict federal jurisdiction.⁴⁰⁷ The only consensus reflected in this scholarship is that the issues are unlikely to be resolved definitively in the foreseeable future.⁴⁰⁸ First, there is disagreement about whether the text and history of Article III require that the entire jurisdiction of the federal courts be vested in Article

⁴⁰² Fallon, *supra* note ___, at 949. See also Richard B. Saphire & Michael E. Solimine *Shoring up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U. L. Rev. 85 (1988) (arguing that judicial review should be required under the *Schor* test).

⁴⁰³ See *supra* notes ___ and accompanying text.

⁴⁰⁴ See *supra* notes ___ and accompanying text.

⁴⁰⁵ In light of the Court’s longstanding recognition of the doctrine and its role in preserving the constitutionality of first instance administrative adjudication (without juries), we doubt that the Court is prepared to directly repudiate it. In a similar vein, Professor Fallon concludes that the doctrine is too well-ensconced to be rejected, but seeks to narrow its scope to render it consistent with his appellate review theory of Article III. See Fallon, *supra* note ___, at 953-70. Although the rule of law does not speak to first instance administrative adjudication, provided that sufficient judicial review is retained, other Article III considerations, such as preserving the structural balance of the three branches, as well as the Seventh Amendment, are implicated by administrative adjudication in the first instance. Whether the public rights doctrine is an appropriate component of the analysis of these issues is beyond the scope of this article. For analysis of the Seventh Amendment issues, see Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment* 21 Hastings Const. L.Q. 1013 (1994); Ellen Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C.L. Rev. 1037 (1999).

⁴⁰⁶ The exception to the general requirement of review would be for matters that may be confided in the standardless discretion of executive officials. See *supra* notes ___ and accompanying text.

⁴⁰⁷ See Howard P. Fink, Linda S. Mullenix, Thomas D. Rowe, Jr. & Mark V. Tushnet, *Federal Courts in the 21st Century* 181 (1996) (referring to the “huge” literature and describing it). As noted earlier, this is one of the oldest and most famous debates regarding the federal courts. See *supra* notes ___ and accompanying text.

⁴⁰⁸ Thus, while we believe our approach is coherent and workable, and in many respects superior to other approaches, we harbor no illusions that it represents a definitive resolution of these issues.

III judges. Second, assuming that Article III affords Congress some authority to remove cases or controversies from the jurisdiction of federal courts, there is disagreement about the nature and scope of any inherent limits on that power. Third, while most commentators recognize that specific jurisdiction stripping statutes may violate specific constitutional rights, there is disagreement about the extent to which there is a general due process right of judicial review. Finally, even among those who argue that there is a general requirement of judicial review, there is disagreement about the scope of review required to preserve the judicial function.

Much of the traditional debate has focused on the meaning of Article III's jurisdictional provisions. The ambiguity of these provisions, however, has prevented any resolution of this question.⁴⁰⁹ A number of scholars, albeit a minority, join us in reading the mandatory language of these provisions as requiring that the entire judicial power must vest in Article III courts.⁴¹⁰ The majority of commentators, however, read the Exceptions Clause (in conjunction with congressional discretion over the creation of lower federal courts) as affording Congress substantial authority to remove cases or controversies from the jurisdiction of the federal courts.⁴¹¹ While we offer a textual analysis supporting mandatory jurisdiction, we harbor no illusions that this reading will end the debate. Our primary argument for the duty-based approach to judicial review is the rule of law and our textual analysis is intended to demonstrate that the duty-based approach is not inconsistent with Article III.

Although the majority of commentators rejects the mandatory view of Article III, most of them nonetheless recognize some constraints on congressional authority to limit the jurisdiction of federal courts.⁴¹² One influential view posits that Congress may not use its jurisdictional authority to interfere with the "essential functions" of the judiciary. The "essential" judicial functions analysis focuses on whether the preclusion of review "will destroy the essential role of the Supreme Court in the constitutional plan"⁴¹³ or undermine the distribution of authority between the judiciary and

⁴⁰⁹ Indeed, these provisions appear to be a constitutional Rorschach test into which readers read their own visions of the judicial role. Likewise, the history of Article III provides no definitive indications of the the meaning of the text.

⁴¹⁰ See authorities cited *supra* note _____. An interesting variant on this view is Professor Amar's two-tiered interpretation, which distinguishes between "cases" and "controversies, and concludes that jurisdiction is mandatory only as to "cases." See Amar, *supra* note _____.

⁴¹¹ See Clinton, Matasar and Collins, *supra* note ___, at 63 ("While contested by proponents of mandatory theories of federal jurisdiction, many scholars accept . . . that Congress has authority to curtail the appellate jurisdiction of the Supreme Court. . . . [M]ost scholars who accept the existence of such congressional authority base such legislative power in the so-called exceptions and regulations clause."). For a relatively recent textual analysis supporting congressional discretion, see John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. Chi. L. Rev. 203 (1997).

⁴¹² Some commentators, however, do argue that Congress has plenary authority to restrict federal jurisdiction. See Bator Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895 (1984).

⁴¹³ Henry Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953).

the other branches of government.⁴¹⁴ Because this approach focuses on broader structural concerns, it tends to submerge rule of law concerns and does not fully account for the individual interest in governmental regularity.⁴¹⁵ Many scholars, for example, assume that the essential functions approach does not require judicial review of statutory, as opposed to constitutional, claims.⁴¹⁶ It remains unclear, however, why there is any less need for judicial review when statutory rights are involved.⁴¹⁷ To the extent some commentators use essential functions analysis to argue for a broad requirement of judicial review in every case,⁴¹⁸ we think the rule of law approach provides a superior conceptual framework.⁴¹⁹

Others approach judicial review from a due process perspective,⁴²⁰ drawing on the Supreme Court's cases suggesting that preclusion of review may violate due process.⁴²¹ While we do not disagree with this premise, we consider it incomplete. There is little support in the cases for a general due process requirement of judicial review in the absence of a constitutional claim,⁴²² and it remains unclear how such a requirement would fit into current doctrine. It would appear to be a question of what process is due, but we do not believe that this is a question appropriate for *Matthews v. Eldridge's* utilitarian calculus.⁴²³ Simply shifting the analysis from Article III to due process, moreover, merely displaces the uncertainty of Article III analysis to the incoherence of current due process doctrine, particularly with respect to government benefits.⁴²⁴ Our duty-based approach explains both the requirement of judicial review and its relation to both separation of powers and due process in rule of law terms.

For those scholars who have concluded that Article III review of administrative adjudication in

⁴¹⁴ Peter Strauss, *The Place of Agencies in Government, Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, ___ (1984).

⁴¹⁵ Preclusion of review for a narrow category of administrative decisions, for example, would not necessarily interfere with the essential functions of the judiciary, but it would undermine rule of law protections as to those cases.

⁴¹⁶ Get cites.

⁴¹⁷ See Louise Weinberg, *The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts"*, 78 Tex. L. Rev. 1405, 1424 (2000) ("[T]here is no good reason why a claimant with a merely statutory claim against a federal official should have less access to an apolitical forum than a claimant with a constitutional claim.")

⁴¹⁸ The leading exponent of this "appellate review theory is Richard Fallon. See Fallon, *supra* note ___ and accompanying text.

⁴¹⁹ See *infra* notes ___ and accompanying text (discussing scope of review).

⁴²⁰ See Weinberg, *supra* note ___ (arguing that due process, not Article III, should be the primary referent for considering congressional authority to limit the jurisdiction of federal courts); see also Richard Fallon, *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 332-35 (1993) (analyzing due process right of review).

⁴²¹ See *supra* notes ___ and accompanying text.

⁴²² While cases such as *American School of Magnetic Healing v. McAnulty* arguably support a due process right to judicial review, see *supra* note ___ and accompanying text, current doctrine does not.

⁴²³ One might argue that judicial review is part of the "process due," but under *Matthews* this would be so only if it could be shown that the benefits of judicial review exceed its costs.

⁴²⁴ Problems with defining what interests are subject to a due process requirement of judicial review would remain.

ordinary cases is constitutionally compelled, there is the question of the “scope” of review.⁴²⁵ Among these scholars, there is general agreement that review of statutory interpretation and other legal issues is required, but there is a split of opinion concerning whether some judicial review of fact-finding is also necessary.⁴²⁶ This uncertainty tends to derive from the structural separation of powers perspective of those who advocate mandatory review. Limiting judicial review of fact-finding in a narrow group of statutory cases would not necessarily unbalance the three branches of government by interfering with the essential functions of the judiciary or unduly trammeling on the constitutional authority of the federal courts. Such a limitation, however, can have a direct and immediate impact on the rule of law.⁴²⁷ Thus, we think that the rule of law requires at least some judicial review of administrative factual determinations and of the application of law to facts. This conclusion is supported by our reading of the text of Article III, which specifically refers to the Supreme Court’s appellate jurisdiction as extending to “Law and Fact.”⁴²⁸

VI. Conclusion

We live in a welfare state. Government benefits are everywhere. If ours is to be a “government of laws and not of men,” the rule of law must apply to government benefits. *Marbury v. Madison*, a government benefits case, promises no less. The current rights-based approach provides at best a shaky foundation for the rule of law as applied to these benefits. It is doctrinally incoherent and leaves significant gaps in the application of both due process and judicial review. It does not have to be that way.

Ironically, while the scope of government benefits may be a relatively recent development, the rule of law issues presented by the administration of benefits are not. *Marbury’s* rule of law principles were articulated with respect to a government benefit and the Supreme Court applied rule of law principles to government benefits throughout the nineteenth and twentieth centuries, even if the precise doctrinal foundations remained uncertain and shifting. The historical precedents left the Supreme Court with a fundamental choice between two possible approaches to the rule of law, one based on rights and the other based on duties. As it turns out, the “rights” choice was not the right choice.

By focusing on the character of the right at issue to determine the extent to which constitutional requirements of due process and judicial review apply, the Court has created unnecessary difficulties. Calling government benefits rights for due process purposes raises the specter of substantive constitutional rights to benefits, an implication that the Court sought to avoid through

⁴²⁵ See *supra* notes ___ and accompanying text.

⁴²⁶ Compare *Saphire & Solimine*, *supra* note ___, at 139 (requiring judicial review of both factual and legal determinations) with Fallon, *supra* note ___, at 987 (requiring judicial review only of legal issues and establishing a presumption against judicial review of factual issues) and Paul M. Bator, *The Constitution As Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L. Rev. 233, 267-28 (1990) (requiring judicial review of legal issues, but not of factual issues as long as agency procedures comport with due process).

⁴²⁷ See *supra* note ___ and accompanying text.

⁴²⁸ See *supra* note ___ and accompanying text.

the entitlement construct of property for due process purposes. The results have been contingent due process and doctrinal incoherence that rights-based solutions have been unable to correct. Rights-based thinking has also needlessly complicated judicial review doctrine. The term “public rights” in *Murray’s Lessee* invited confusion about that concept. Rights-based thinking regarding judicial review has also led the Court and some commentators to minimize the need for review of statutory, as opposed to constitutional, claims.

The duty-based approach is a workable alternative that has its roots in *Marbury* itself. This approach resonates with core rule of law principles by emphasizing and preserving governmental regularity. Except in narrow areas where the Constitution permits standardless political discretion, governmental regularity requires legal standards that guide and control the execution of the law. Once legal standards are in place, it is the duty of all government officials to comply with them, regardless of the character of the right at issue. Due process and judicial review are the constitutional mechanisms for ensuring compliance with legal standards and therefore should apply whenever there are legal standards. The duty-based approach would therefore provide solid constitutional foundations for the rule of law. It would also solve many of the doctrinal conundrums presented by the rights-based approach. At the same time, the duty-based approach would not require 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 rule of law principles to government benefits need not be one of them.