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Judicial Oversight of Social Security Under the Due Process Clause

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INTRODUCTION

The Social Security Act provides for a two-stage review process to decide the eligibility of applicants for Social Security benefits. First, benefits are determined by an administrative process,[1] and second, claimants can obtain judicial review of an administrative decision in a civil action brought in federal district court.[2] These civil actions constitute a significant component of the federal trial court docket: between April 2004 and March 2005 federal district courts terminated 16111 cases brought under Social Security laws. Of the 13855 that required court action, only nine reached trial and 13703 were resolved before pretrial.[3]

This Briefing Paper discusses some of the constitutional issues that arise during Social Security adjudication and litigation. Part I briefly discusses the possibility that legislative curtailments of Social Security benefits might violate substantive due process or property rights. Part II discusses the equal protection consequences of Social Security legislation that implicates suspect classifications, with a focus on gender-based classifications. Part III addresses the current law of procedural due process and its implications for Social Security claims.

I. SUBSTANTIVE DUE PROCESS RIGHTS TO SOCIAL SECURITY

The Supreme Court has foreclosed nearly all arguments that there exists a vested property right to Social Security benefits. The Social Security Act expressly reserves to Congress "[t]he right to alter, amend, or repeal" any provision of the Act,[4] and the Court

[1] 42 U.S.C. § 405(b) (2000).

[2] *Id.* § 405(g).

[3] OFFICE OF JUDGES PROGRAMS, STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, MARCH 31, 2005 app. § C-4 (2005), http://www.uscourts.gov/caseload2005/tables/C04mar05.pdf.

[4] 42 U.S.C. § 1304.

has interpreted this provision, in conjunction with the statutory structure of Social Security, to indicate that the program is a "noncontractual interest" that "cannot be soundly analogized to that of the holder of an annuity."[5] Congress has the power to modify the structure of Social Security unless the modification "manifests a patently arbitrary classification, utterly lacking in rational justification."[6] Accordingly, the Court has adopted a highly deferential posture toward Congress's power to modify the structure of the entitlement.

II. EQUAL PROTECTION AND SUSPECT CLASSIFICATIONS

Although equal protection is textually a constraint on only the powers of the states,[7] the mandate of equal protection likewise applies to the federal government through the Fifth Amendment's Due Process Clause.[8] Social security benefits, which are determined by reference to family relationships,[9] have thus not surprisingly been challenged for treating different classes of parents, spouses, and children differently. In particular, these familial distinctions have been challenged for creating two types of classifications that the Supreme Court has determined to be quasi-suspect: classifications

[5] Flemming v. Nestor, 363 U.S. 603, 610 (1960).

[6] *Id.* at 611.

[7] U.S. CONST. amend XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[8] *See, e.g.*, Weinberger v. Wisenfield, 420 U.S. 636, 638 n.2 ("While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" (quoting Schneider v. Rusk, 377 U.S. 163, 168 (1964))); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("In view of our decision that [the Equal Protection Clause] prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."). Furthermore, the doctrinal principles applicable to the states are equally applicable to the federal government. *See* Buckley v. Valeo, 424 U.S. 1, 93–94 (1976) (per curiam) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995 (same).

[9] For example, 42 U.S.C. § 416, which defines numerous terms for purposes of Title II of the Social Security Act (governing federal old-age, survivors, and disability insurance benefits), provides definitions for terms such as "wife," "widow," "husband," "widower," and "child."

based on gender[10] and classifications based on illegitimacy.[11] This Part discusses the constitutionality of social security laws that implicate the former.

A. Representative Cases

1. Surviving Spouse Benefits: The First Round

The Court first had an opportunity to apply its intermediate scrutiny standard to social security legislation in *Califano v. Goldfarb*.[12] At issue in Goldfarb were the Social Security Act's widow's and widower's insurance benefits, which entitle a surviving spouse to his or her deceased spouse's primary old-age insurance amount.[13] At the time, section 202 of the Social Security Act[14] imposed requirements on widows who sought widow's insurance benefits that were different from the requirements imposed on widowers who sought widower's insurance benefits. Specifically, a widower was eligible only if he "was receiving at least one-half of his support . . . from [his wife] at the time of her death" or "was receiving at least one-half of his support . . . from [his wife] at the time she became entitled to old-age . . . insurance benefits."[15] A widow, however, was eligible without needing to meet an analogous requirement of one-half support.[16]

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[10] Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that "statutory classifications that distinguish between males and females" must, "[t]o withstand constitutional challenge, . . . serve important governmental objectives and . . . be substantially related to achievement of those objectives"); *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (holding that "the part seeking to uphold a statute that classifies individuals on the basis of their gender" must show "that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'" (quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980))).

[11] Clark v. Jeter, 486 U.S. 456, 461 (1988) (stating that "a level of intermediate scrutiny . . . generally has been applied to discriminatory classifications based on sex or illegitimacy").

[12] 430 U.S. 199 (1977).

[13] *See* 42 U.S.C. § 402(e) (widow's insurance benefits); id. § 402(f) (widower's insurance benefits).

[14] *Id.* § 402.

[15] *Goldfarb*, 430 U.S. at 201 n.1 (plurality opinion) (omissions in original) (quoting 42 U.S.C. § 402(f)(1) (1970)).

[16] *Id.* (citing 42 U.S.C. § 402(e)(1)).

Goldfarb, a widowed man who was denied widower's insurance benefits because he did not meet the requirement of one-half support, challenged the statute as a violation of equal protection. In affirming the ruling below that the statute did indeed discriminate in violation of the Due Process Clause, four Justices wrote not that the classification discriminated against men, but rather that it discriminated against women. Social security taxes were withheld from Mrs. Goldfarb's paychecks, yet she "failed to receive for her [spouse] the same protection which a similarly situated male worker would have received [for his spouse]."[17]

Their opinion offered an alternative explanation, too, stating that if the equal protection analysis were instead framed as discrimination against the widower, review under the intermediate scrutiny standard proclaimed the law unconstitutional because the gender-based discrimination was not intended to "redress[] our society's longstanding disparate treatment of women" and thus did not serve an important governmental objective.[18]

Justice Stevens, who concurred in the judgment and provided the fifth vote to declare the statute unconstitutional, found only the latter argument convincing. The argument that the deceased wage earner's rights were violated had no merit, he said, because "[s]he had no contractual right to receive benefits or to control their payment" and because the payments to her beneficiaries were "not a form of compensation for her

[17] *Id.* at 206 (alterations in original) (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975)).

[18] *Id.* at 209 n.8. Notably, the Supreme Court, shortly after issuing its decision in *Goldfarb*, summarily affirmed two lower court holdings that an analogous requirement of one-half support for husband's insurance benefits in 42 U.S.C. § 402(c) violated the equal protection component of the Due Process Clause. *See* Califano v. Silbowitz, 430 U.S. 924 (1977) (mem.), *aff'g* Silbowitz v. Sec'y of Health, Educ. & Welfare, 397 F. Supp. 862 (S.D. Fla. 1975); Califano v. Jablon, 430 U.S. 924 (1977) (mem.), *aff'g* Jablon v. Sec'y of Health, Educ. & Welfare, 399 F. Supp. 118 (D. Md. 1975).

services."[19] Even though the deceased wage earner paid the same taxes during her lifetime as a man earning the same salary would have, Justice Stevens noted that "[t]he benefits which may ultimately become payable . . . vary enormously" based on the wage earner's family situation, so the differential here did not "convert a uniform tax obligation into an unequal one."[20] Moreover, Justice Stevens did not view the favorable treatment of widows (vis-à-vis widowers) as constituting invidious gender discrimination: the classification did not, in his opinion, "imply that males are inferior to females" or "add to the burdens of an already disadvantaged discrete minority."[21]

But Justice Stevens still considered the statute unconstitutional, concluding that the discrimination against widowers was "merely the accidental byproduct of a traditional way of thinking about females" and thus was not actually intended to serve any governmental interest.[22] He observed that, in previous cases, discrimination in entitlement programs *did* survive intermediate scrutiny when the discrimination served the purpose of either "administrative convenience"[23] or a "policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."[24]

First, with respect to the administrative convenience rationale, Justice Stevens recognized that the presumption that widows are dependent did indeed serve a significant administrative convenience: because about 90% of married women in the relevant age group were in fact dependent spouses, the presumption expedited the processing of 90%

[19] *Goldfarb*, 430 U.S. at 217 (Stevens, J., concurring in the judgment).
[20] *Id.* at 218.
[21] *Id.*
[22] *Id.* at 222–23.
[23] *Id.* at 219 (quoting Mathews v. Lucas, 427 U.S. 495, 509 (1976)) (internal quotation marks omitted).
[24] *Id.* (quoting Kahn v. Shevin, 416 U.S. 351, 355 (1974)).

of the applications for surviving spouse benefits.[25] But the presumption's overinclusiveness came at a high price: the payment of surviving spouse benefits to the 10% of married women who were *not* dependent spouses — and were therefore entitled to benefits only as a matter of administrative convenience — cost the federal government an estimated $785 million per year.[26] Justice Stevens concluded that "[i]t is inconceivable that Congress would have authorized such large expenditures for an administrative purpose without the benefit of any cost analysis" and was accordingly "convinced that administrative convenience was not the actual reason for the discrimination."[27]

Second, Justice Stevens also refused to accept the reasoning that a disproportionate benefit for widows eased a disproportionate burden. As he framed the statute's disparate effect, the lack of a one-half support requirement for widows benefited only those women who were successful in the workplace. Those widows who were *not* successful on their own — that is, those who would receive surviving spouse benefits even if there *were* a one-half support requirement for women — received no benefit from the requirement's absence.[28] This result, he concluded, was irrational. To accept that this state of affairs flowed from a "conscious purpose to redress the 'legacy of economic discrimination' against females" would require the Court to "presume that Congress deliberately gave a special benefit to those females *least* likely to have been victims of the historic discrimination."[29]

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[25] *See id.*

[26] *See id.* at 219–220 & n.5.

[27] *Id.* at 220.

[28] *See id.*

[29] *Id.* (emphasis added) (quoting *Kahn*, 416 U.S. at 359 (Brennan, J., dissenting)).

Rejecting the two plausible justifications left Justice Stevens with no choice but to conclude that the history of the statute, which initially provided benefits for all widows and later provided benefits for dependent widowers, was "entirely consistent with the view that Congress simply assumed that all widows should be regarded as 'dependents' in some general sense."[30] Thus, in his interpretation of the legislative path that led to the classificatory scheme in *Goldfarb*:

> It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate the terms "widow" and "dependent surviving spouse." That kind of automatic reflex is far different from either a legislative decision to favor females in order to compensate for past wrongs, or a legislative decision that the administrative savings exceed the cost of extending benefits to nondependent widows.[31]

Supported by only this justification, the statute, in his opinion, could not stand.

2. The Legislative Reaction to *Goldfarb* and the Court's Rejoinder

Congress promptly amended the Social Security Act to correct the defect found in *Goldfarb*,[32] but in doing so, it feared that removing the one-half support requirement would create a serious financial burden on the social security trust fund.[33] Accordingly, the amendments included a pension offset, under which spousal benefits — for both men and women — would be reduced by the amount of other governmental pensions.[34] To

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[30] *Id.* at 221–22.

[31] *Id.* at 222.

[32] *See* Social Security Amendments of 1977, Pub. L. No. 95-216, tit. III, § 334(d)(1), 91 Stat. 1509, 1545 (amending 42 U.S.C. § 402(f)(1)). This paragraph of the amendment struck out the requirement one-half support in the subsection of the Social Security Act that provides widower's insurance benefits. This provision was one of many modifications to the Social Security Act as part of the 1977 amendments, which were enacted primarily to address the program's immediate financing problems. For a brief overview of the purposes of the 1977 amendments, see Social Security Online, Historical Background and Development of Social Security, http://www.ssa.gov/history/briefhistory3.html (last visited May 12, 2006), and for a more in-depth analysis, see John Snee & Mary Ross, *Social Security Amendments of 1977: Legislative History and Summary of Provisions*, SOC. SEC. BULL., Mar. 1978, at 3.

[33] Heckler v. Mathews, 465 U.S. 728, 731–32 (1984) (citing S. Rep. No. 95-572, at 27–28).

[34] § 334(d)(2), 91 Stat. at 1545 (codified as amended at 42 U.S.C. § 402(f)(2)(A)) ("The amount of a widower's insurance benefit . . . shall be reduced (but not below zero) by an amount equal to the amount of

protect the reliance interests of people who were about to retire, Congress included a five-year waiting period before the offset took affect that applied only to men who would have received spousal benefits under the pre-*Goldfarb* law;[35] that is, the amendments reenacted the pre-*Goldfarb* eligibility requirements for five years. The constitutionality of the pension offset provision and the associated five-year exception were challenged in *Heckler v. Mathews*.[36]

The Court again applied intermediate scrutiny but this time held that the government's purpose was legitimate. Writing for a unanimous Court, Justice Brennan stated:

> Although the offset exception temporarily revives the gender-based eligibility requirements invalidated in *Goldfarb*, Congress's purpose in adopting the exception bears no relationship to the concerns that animated the original enactment of those criteria. The Court concluded in *Goldfarb* that the original gender-based standards, which were premised on an assumption that females would normally be dependent on the earnings of their spouses but males would not, constituted an "accidental byproduct of a traditional way of thinking about females" . . . .[37]

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any monthly periodic benefit payable to such widower for such month which is based upon his earnings while in the service of the Federal Government of any State . . . .").

[35] § 334(g)(1), 91 Stat. at 1546–47. The precise wording of the grace period was, in relevant part, as follows:

> The amendments made by . . . this section shall not apply with respect to any monthly insurance benefit payable, under . . . section 202 of the Social Security Act, to an individual —
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> (A) to whom there is payable for any month within the 60-month period beginning with the month in which this Act is enacted (or who is eligible in any such month for) a monthly periodic benefit . . . based upon such individual's earnings while in the service of the Federal Government or any State . . . ; and
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> (B) who at time of application for or initial entitlement to such monthly insurance benefit . . . meets the requirements of [the relevant subsection of section 202] as it was in effect and being administered in January 1977.

Id.; *see also Heckler*, 465 U.S. at 742 (stating that language and history of the offset exception plainly demonstrate that Congress meant to resurrect, for a five-year grace period, the gender-based dependency test of pre-*Goldfarb* law").

[36] 465 U.S. 728.

[37] *Id.* at 745 (quoting Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring in the judgment)). In 1983, Professor Ann Freedman wrote that *Heckler* was one of only two cases in which Justices Brennan and Marshall voted to strike down a classification based on gender. *See* Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 918 (1983).

Instead, he wrote, "Congress adopted the offset exception in order to protect the expectations of persons, both men and women, who had planned their retirements based on pre-[*Goldfarb*] law, under which they could receive spousal benefits unreduced by the amount of any government pensions to which they were also entitled."[38] Justice Brennan held this interest in protecting reasonable reliance legitimate, even though it was "achieved through a temporary revival of an invalidated classification"[39]

Moreover, the Court held that the amendment's means were substantially related to the objective because the five-year exception was "narrowly tailored to protect only those individuals who made retirement plans prior to the changes in the law" and was imposed only after careful legislative deliberation and consideration of alternatives.[40] Of course, the five-year grace period was a somewhat arbitrary dividing line: it would be nearly impossible to conclude with certainty that people who planned to retire in five years had a worthy reliance interest on the pre-*Goldfarb* law but that people who planned to retire in six years did not. But the Court recognized that this sort of determination was not within the judiciary's competence to evaluate and instead seemed to evaluate this aspect of the statutory scheme under a rational basis standard. After reviewing the legislative history of the 1977 amendments, the Court remarked that "Congress considered carefully and at length both the financial problems that led to the offset provision and the reliance interests that might be frustrated by that requirement."[41] This determination led the Court to conclude that "the offset exception was plainly adopted 'through reasoned analysis rather than through the mechanical application of traditional,

[38] *Id.*

[39] *Id.* at 746.

[40] *Id.* at 749–50.

[41] *Id.* at 750.

often inaccurate, assumptions about the proper roles of men and women'"[42] and was therefore constitutionally sufficient.

B. Commentary

As juxtaposing *Goldfarb* and *Heckler* illustrates, the propriety of gender-based discriminations within the social security system is determined in light of the "*reason* (in the Court's view) that the legislature adopted the sex-specific classification."[43] The discrimination is constitutional when it is "based on the desire to compensate women for past discrimination or to protect (transitional) reliance on earlier sex-based social security provisions" and unconstitutional when "based on stereotypical impressions of traditional differences between the sexes."[44]

1. *Goldfarb* and *Heckler* Fail To Remedy Structural Biases in the Social Security System

Although both *Goldfarb* and *Heckler* reaffirmed the Court's commitment to a more searching standard of review for gender-based classifications, a feminist perspective put forth by Professor Mary Becker holds that the cases are "trivial"[45] and stray from the purpose of the Court's heightened scrutiny jurisprudence[46] — even if the statutory provisions at issue are viewed, as the plurality viewed them, as discriminatory against women. Even today, 99% of the recipients of surviving spouse benefits are

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[42] *Id.* (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 726 (1982)).

[43] Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's* Constitutional Law, 89 COLUM. L. REV. 264, 272 (1989) (emphasis added).

[44] *Id.* (footnote omitted).

[45] *See id.* at 271–76.

[46] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (calling for heightened scrutiny when statutes are directed "against discrete and insular minorities"); *see also* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1297 (1982) (arguing that *Carolene Products* calls for judicial protection of minorities because "a discrete and insular minority cannot expect majoritarian politics to protect its members as it protects others").

women,[47] illustrating that if the *Goldfarb* plurality's goal was to enable women to provide for their surviving husbands, the plurality has thus far failed. If one assumes that "[i]n achieving equality for women, . . . what matters (to a very large extent) is numbers — results — not abstract principles," then "*Goldfarb* does nothing significant about the problems women face."[48]

What Professor Becker would like to see changed instead, perhaps, is a feature of the social security system that, as a structural matter, provides women with an incentive not to enter the workforce. It is useful to consider several hypothetical examples that illustrate this disincentive.[49]

Suppose that a working spouse is to receive a monthly entitlement of $1000 in retirement. If the other spouse is nonworking, the nonworking spouse will receive a monthly benefit of $500 while the working spouse is alive[50] and a monthly benefit of $1000 after the working spouse dies.[51] If the other spouse is working, however, the second working spouse will receive no entitlement from his or her own work while the higher-earning spouse is alive *unless* the lower-earning spouse's own monthly benefit is at least $500. The reason for this result is that a lower-earning spouse is entitled to the

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[47] *See* SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2005, at 5.17–18 tbl.5.A1.6 (2006), *available at* http://www.ssa.gov/policy/docs/statcomps/supplement/2005/supplement05.pdf (reporting that, in December 2004, 4,386,430 million women received widow's benefits and that 44,590 men received widower's benefits).

[48] Becker, *supra* note 43, at 274.

[49] These examples assume that (i) in a single-wage-earner couple, the man is more likely than not to be the wage earner and (ii) in a dual-wage-earner couple, the man is more likely than not to be the higher-earning spouse.

[50] *See* 42 U.S.C. § 402(b)(2) ("[The] wife's insurance benefit for each month shall be equal to one-half of the primary insurance amount of her husband . . . for such month."); *id.* § 402(c)(3) ("[The] husband's insurance benefit for each month shall be equal to one-half of the primary insurance amount of his wife . . . for such month.").

[51] *See id.* § 402(e)(2)(A) ("[The] widow's insurance benefit for each month shall be equal to the primary insurance amount . . . of [her] deceased [husband]."); id. § 402(f)(3)(A) ("[The] widower's insurance benefit for each month shall be equal to the primary insurance amount . . . of [his] deceased [wife].").

greater of (i) his or her own monthly benefit and (ii) his or her monthly spouse's benefit.[52] After the higher-earning spouse dies, the situation is worse: the lower-earning spouse for the same reason receives no entitlement from his or her own work unless his or her own monthly benefit would be at least $1000. Thus, the social security system provides an incentive for would-be low-wage-earning spouses to stay out of the labor force altogether. If one assumes that would-be low-wage-earning spouses are predominantly women, the structural bias in the social security system is evident.

For precisely the same reason, the social security system creates a structural bias in favor of single-wage-earner couples. Suppose that a first couple has one wage earner who is entitled to a monthly benefit of $1000 in retirement and that a second couple has two wage earners, each entitled to a monthly benefit of $500 in retirement. The first couple will receive a total monthly benefit of $1500 while both spouses are alive: the working spouse's $1000 plus the nonworking spouse's $500 spousal benefit. The second couple, in contrast, will receive a total monthly benefit of $1000: each spouse's $500. This illustration shows a structural preference in favor of the single-wage-earner family. Professor Becker, undoubtedly, would have preferred that Justice Stevens recognized *these* features of the social security system, rather than the one-half support requirement, as reflecting an outmoded "traditional way of thinking about females."[53]

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[52] *See id.* § 402(k)(2)(B) ("Any individual . . . who, under the preceding provisions of this section . . . , is entitled . . . to more than one monthly insurance benefit . . . under this subchapter shall be entitled to only one such monthly benefit . . . , such benefit to be the largest of the monthly benefits to which he (but for this subparagraph) would otherwise be entitled . . . .").

[53] For a more detailed treatment of these aspects of the social security system, see Jane L. Ross & Melinda M. Upp, *Treatment of Women in the U.S. Social Security System, 1970–88*, SOC. SEC. BULL., Fall 1993, at 56.

2. The *Goldfarb* and *Heckler* Outcomes Might Be Explained as an Instance of Remedial Deterrence

The *Heckler* Court noted that a remedy to a discriminatory statute can be crafted in one of two ways. First, the Court can remedy the discrimination by "declare[ing] [the statute] a nullity and order[ing] that its benefit not extend to the class that the legislature intended to benefit,"[54] an approach termed "leveling down."[55] Alternatively, the remedy can "extend the coverage of the statute to include those who are aggrieved by the exclusion,"[56] an approach that is conversely termed "leveling up."[57] In *Heckler*, the Court took note of Congress's expressed intent that the Court consider only the leveling down approach.[58] And even though Justice Brennan noted that "ordinarily 'extension, rather than nullification, is the proper course'"[59] for a remedy, he remarked that the Court should not "use its remedial powers to circumvent the intent of the legislature."[60]

By heeding Congress's wishes in this regard, the Court reduced its inquiry to a decision between finding no constitutional violation, on the one hand, and finding a constitutional violation but offering an unpalatable remedy, on the other.[61] The Court, of course, chose the former, a judicial response that Professor Daryl Levinson terms

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[54] *Id.* at 101 (second alternation in original) (quoting Heckler v. Mathews, 465 U.S. 728, 738 (1984)).

[55] Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 515 (2004).

[56] Bruce K. Miller, *Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of* Heckler v. Mathews, 20 HARV. C.R.-C.L. L. REV. 79, 101–02 (1985) (quoting *Heckler*, 465 U.S. at 738) (internal quotation mark omitted).

[57] Brake, *supra* note 55, at 515.

[58] In the 1977 amendments, Congress stated that the pension offset exclusion provision were held unconstitutional, "the application of [the offset exclusion] to any other persons or circumstances shall also be considered invalid." Social Security Amendments of 1977, Pub. L. No. 95-216, tit. III, § 334(g)(3), 91 Stat. 1509, 1547, *quoted in Heckler*, 465 U.S. at 734.

[59] *Heckler*, 465 U.S. at 739 n.5 (quoting Califano v. Westcott, 443 U.S. 76, 89 (1979)).

[60] *Id.* (quoting *Westcott*, 443 U.S. at 94 (Powell, J., concurring in part and dissenting in part)).

[61] *See* Miller, *supra* note 56, at 101–04.

"remedial deterrence."[62] According to the theory of remedial deterrence, "[j]udges may be less willing or less likely to find rights violations . . . merely because no viable remedy seems apparent."[63] In Professor Levinson's words, "[t]he defining feature [of an instance of remedial deterrence] is the threat of undesirable remedial consequences motivating courts to construct the right in such a way as to avoid those consequences. At the extreme, where no viable remedy is at hand, courts may define the right as nonexistent."[64]

Depending on one's point of view, however, remedial deterrence may create a desirable outcome or an undesirable one. According to a simplified model of constitutional adjudication, courts can minimize the "cost" of constitutional violations in two ways: they can reduce the scope of a constitutional right, or they can reduce the remedies available. But in *Heckler*, the remedy was specified by Congress. Accordingly, the Court, if it wanted to minimize the cost of constitutional violations, had no choice but to reduce the scope of the equal protection right and find no violation. From Professor Levinson's decisional cost perspective, the remedial deterrence approach makes sense.

Another commentator, Professor Bruce Miller sees *Heckler* as a disconcerting example of judicial deference to legislative remedial choices.[65] He perceives that if the congressional preference of leveling down were in fact binding on the Court, it would lead to, among other problems, a constitutionally questionable instance of jurisdiction stripping.[66] Assuming leveling down were the only permissible remedy, there would

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[62] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884–85 (1999).

[63] *Developments in the Law—Voting and Democracy*, 119 HARV. L. REV. 1127, 1188 (2006).

[64] Levinson, *supra* note 62, at 885.

[65] *See* Miller, supra note 56.

[66] *Id.* at 103–04, 132–37.

seemingly be no litigant who could possibly receive any benefit from challenging the provision, which would mean that no litigant would ever have standing to sue.[67] Viewed from Professor Miller's perspective, the *Heckler* decision turned on a fictitious formality that creates a chilling effect on reform litigation: remedial deterrence necessarily "threaten[s] judicial review of unconstitutional classifications by removing the incentive" — and possibly the standing — "of persons harmed by such classifications to dispute them in court."[68] Such a chilling effect, Professor Miller argues, is not only normatively unsettling, but also potentially abridges the freedom of the people whom the law discriminates against to petition the government for a redress of their grievances as guaranteed by the First Amendment.[69]

3. The *Goldfarb* and *Heckler* Outcomes as Functional Constitutionalism

From another perspective, however, the *Goldfarb-Heckler* distinction is sound. Professor Levinson, for example, might applaud the distinction because the cases' reconciliation requires interpreting equal protection as "inevitably shaped by, and incorporat[ing], remedial concerns," representing a "[c]onstitutional adjudication [that is] functional not just at the level of remedies, but all the way up."[70] Professor Levinson derides what he terms the "rights essentialist" perspective, in which "courts begin with the pure, Platonic ideal of a constitutional right and only then pragmatically apply the

[67] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982) (holding that Article III "requires the party who invokes the court's authority" to show that the injury "is likely to be redressed by a favorable decision" (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)) (internal quotation marks omitted)).

[68] Miller, *supra* note 56, at 104; *see also id.* at 132–41 (arguing that using severability clauses to indicate legislative remedial preferences is an impermissible exception to Article III standing and violates the First Amendment right to petition the government to petition the courts for redress of grievances).

[69] *Id.* at 104, 137–141.

[70] Levinson, *supra* note 62, at 873.

right through the vehicles of implementation and remediation."[71] Because the *Heckler* Court's decision to uphold the gender-based classification — the same classification that it struck down in *Goldfarb* — was pervaded by (and indeed turned on) remedial concerns, it eschewed the rights essentialist mode of adjudication that views constitutional rights in the abstract.

Moreover, the Court's decision in *Heckler* to allow a reverse-discriminatory measure that is temporary and targeted to address a wrong other than past societal discrimination is also consonant, at least to some extent, with its more recent statements about the permissible scope of affirmative action. In the realm of race-based affirmative action, the Court has held that "past societal discrimination alone" cannot serve as the basis for rigid preferences[72]: the statutory classification in *Goldfarb* was, as the Court saw it, nothing more than an attempt to remedy past societal discrimination,[73] whereas the classification was reenacted in *Heckler* to serve a different goal. Moreover, the *Goldfarb*-*Heckler* distinction comports with the Court's recent statement, again in the race-based affirmative action context, that race-based policies "must be limited in

[71] *Id.*

[72] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989). Notably, at the time of *Goldfarb*, the Court did view general societal discrimination as a sufficient condition to permit affirmative action. *See, e.g.*, Orr v. Orr, 440 U.S. 268, 280 (1979) (holding that legislation giving preference to women with the purpose of "compensating women for past discrimination during marriage" is supported by a legitimate state interest); Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977) (plurality opinion) (remarking that "gender-based distinctions . . . [are] justified [when] the only discernable purpose . . .[is] the permissible one of redressing our society's longstanding disparate treatment of women"). However, the Court largely abandoned this position in the 1980s and 1990s, at least in the context of race-based affirmative action, in, for example, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Croson*; and a plurality opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

[73] *See* Heckler v. Mathews, 465 U.S. 728, 745 (1984) (characterizing *Goldfarb* as recognizing that "the original gender-based standards . . . constituted an 'accidental byproduct of a traditional way of thinking about females'" (quoting *Goldfarb*, 430 U.S. at 223 (Stevens, J., concurring in the judgment))).

time";[74] the gender-based classification was, of course, time-limited in *Heckler*, but not in *Goldfarb*.

III. PROCEDURAL DUE PROCESS

A. Is There a Protected Liberty or Property Interest?

An individual seeking to challenge a government decision to deny him benefits must first demonstrate that he has a liberty or property interest at stake that rises to the level of those protected by the Fifth and Fourteenth Amendments. Of course, in the context of government spending programs, the benefits are ones which the government was not required to provide in the first place. Our question, then, is to what extent a citizen is entitled to fair process before being denied a benefit available generally but to which no citizen is constitutionally entitled in the first instance. At one extreme Justice Holmes has argued, in the parallel context of government employment, that a police officer dismissed for engaging in political activities had no recourse for a citizen "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. . . . The servant cannot complain, as he takes the employment on the terms which are offered to him."[75] As we shall see, similar views have received fuller and more recent expression in the opinions of the late Chief Justice Rehnquist. Against this stands the proposition that "The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally."[76] That logic is enhanced by the idea that due process is not fixed to a particular content but rather expresses our commitment to "respect enforced by law for that feeling of just treatment

[74] Grutter v. Bollinger, 539 U.S. 306, 342 (2003) (emphasis omitted).

[75] McAuliffe v. New Bedford, 29 N.E. 517, 517–18 (Mass. 1892).

[76] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 185 (1951) (Jackson, J., concurring).

which has been evolved through centuries of Anglo-American constitutional history and civilization . . . . Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. . . . This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society."[77]

In 1961 the Supreme Court expressly repudiated the traditional distinction between rights and privileges that had under-girded previous due process jurisprudence.[78] Although the Court ruled against the plaintiff, it did so only after balancing the government's interest against the plaintiff's and finding that a hearing was not required where the adverse employment action was (purportedly) based on security concerns and had no effect other than to deny the plaintiff employment in only one cafeteria on one naval base. The Court explicitly rejected the proposition the case could be decided on the grounds that the plaintiff had no constitutional right to employment and emphasized that the government could not fire an employee for any announced reason.[79]

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[77] *Id*. at 162–63, 168–69 (Frankfurter, J., concurring).

[78] *But see* Sidney A. Shapiro & Richard E. Levy, *Government Benefits and the Rule of Law; Toward a Standards-Based Theory of Due Process*, 57 ADMIN L. REV. 107 (2005) (proposing to revise the conventional interpretation in favor of the view that the Supreme Court had long extended due process protections to government benefits and other forms of other non-traditional property).

[79] Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961). Progress had also been made on the intermediate issue of governments' conditioning the receipt of a privilege such as employment or welfare on waiver of constitutional rights. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (state cannot condition unemployment benefits on requirement that individual work on a Saturday despite their constitutionally protected religious beliefs); Slochower v. Bd. of Educ., 350 U.S. 551 (1956) (state college cannot dismiss an associate professor for invoking his right against self-incrimination); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961) (student cannot be expelled from state college for participating in a sit-in). Those cases, however, fell short of forbidding against deprivation without process in the absence of a burdened constitutional right.

In 1970 the Supreme Court decided *Goldberg v. Kelly*.[80] There, it squarely faced the question of whether a state could terminate public assistance payments to an individual recipient without providing a pre-deprivation hearing. The Court held that it was of no account that the relevant entitlement was statutory rather than constitutional. "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[81]

Cases subsequent to *Goldberg* shifted the test for finding a protected property interest away from the question of "grievous loss" and toward whether the plaintiff has a legitimate and non-subjective claim of entitlement to the benefit. In two companion cases decided in 1972, the Court required the recipient to have a legitimate claim of entitlement to a benefit to have a property interest therein. Rules or mutually explicit understandings could support the claim of entitlement but not a mere unilateral expectation. Emphasizing that the nature rather than the weight of the interest was at stake, the Court characterized *Goldberg* as grounding the welfare interest in the statute defining eligibility.[82]

The *Roth* approach remains the law of the land. In 1999 the Court ruled that a worker's compensation program that guarantees "reasonable" and "necessary" medical treatment limits the entitlement to those treatments alone.[83] Before a worker could arrive

[80] 397 U.S. 254 (1970).

[81] *Id.* at 262–63.

[82] Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

[83] Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

at the balancing test to determine what due process was required (see below), "he must establish that the particular medical treatment at issue is reasonable and necessary."[84] More recently, in *Town of Castle Rock v. Gonzales*,[85] the Court reiterated that entitlement to a government benefit is prerequisite to procedural due process protection for that benefit. It found no entitlement to police protection because the strongly-rooted tradition of law enforcement discretion meant that officers could provide or deny protection as they saw fit.[86]

As for Social Security, the Court has held that Social Security Disability Insurance benefits constitute an entitlement for purposes of due process.[87] As a practical matter, as long as Congress wants to establish mandatory eligibility criteria for Social Security, it will have a hard time writing the law so as to avoid creating a protected property interest. Unlike Social Security, Welfare was transformed from a federal entitlement into state block grants. Wisconsin has attempted to avoid due process protections by stating outright that its program does not create an entitlement, but

[84] *Id*. at 61.

[85] 125 S. Ct. 2796 (2005).

[86] *Dicta* in *Town of Castle Rock* suggest a willingness to introduce yet another limitation on the extension of procedural due process protection to "new" property. The majority, after deciding that there was no entitlement to enforcement of a restraining order, proposed that even if that were not the case "it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a 'property' interest for purposes of the Due Process Clause." *Id*. at 2810. They cited a law review article's reading of *Roth* and its progeny to "implicitly" require that property entitlements have "some ascertainable monetary value" and asserted that enforcement of restraining orders does not. *Id*. (quoting Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 964 (2000)). Additionally, "the alleged property interest here arises *incidentally*, not out of some new species of government benefit or service, but out of a function that government actors have always performed — to wit, arresting people who they have probable cause to believe have committed a criminal offense." *Id*. (emphasis in original).

[87] *Mathews v. Eldridge*, 424 U.S. 319 (1976). That holding is no danger of being revised. It has been regularly repeated and relied upon. *See, e.g., Am. Mfrs. Mut. Ins*. Co., 526 U.S. at 60.

whether that sort of legislative say-so is sufficient to overcome other features of the program that might point toward the creation of an entitlement has yet to be decided.[88]

My guess is that the Court would consider that statement of intent relevant but not dispositive. Otherwise it would be bound by state legislative fiat to decide a question of constitutional law, namely whether a benefit rose to the level of a protected property interest under the Due Process Clause. In *Town of Castle Rock* the Court, per Justice Scalia, refused to defer to a circuit court's interpretation of state law despite the usual "presumption of deference given the views of a federal court as to the law of a State within its jurisdiction."[89] The determination of whether a state statute creates a protected property interest, "despite its state-law underpinnings, is ultimately one of federal constitutional law. Although the underlying substantive interest is created by an independent source such as state law, *federal constitutional law* determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause. . . . [I]f we were simply to accept the Court of Appeals' conclusion, we would necessarily have to decide conclusively a federal constitutional question"[90] Where interpretation of a state law decides a federal constitutional question, the Supreme Court cannot defer to a state legislature's interpretation any more than it can to a federal appellate court. A state legislature's claim that its law creates no "entitlement" cannot dispose of the question of whether it constitutes an entitlement for the purposes of a federal constitutional rule. "Entitlement" as the benchmark for protected property interests under the Due Process Clause is a federal constitutional question, not a matter of

[88] *See* Shapiro & Levy, *supra* note 78, at 114.

[89] 125 S. Ct. at 2804 (internal citations and quotation marks omitted).

[90] *Id*. at 2803-04 (internal citations and quotation marks omitted) (emphasis in original).

statutory definition, and if the Supreme Court is to remain the final interpreter of the Constitution, state legislatures cannot decide such a question by using the word in their statutes any more than they can decide a First Amendment question by asserting in the text of the statute that their law does not "abridge the freedom of speech."[91]

The entitlement approach, if stretched to its full extent holds the possibility of eviscerating procedural due process.[92] If entitlement rests on the statute, the legislature can simply pass a statute that limits the scope of the entitlement so as to exclude the right to process or certain elements of process. That a legislature should be able to decline to create an entitlement to some benefit but unable, if they do choose to create an entitlement, to decline certain procedural protections rests upon an arbitrary distinction. The notion that due process protection exists only where the legislature chooses to provide protection seems disturbing, even offensive to the very idea of a constitutional guarantee of due process. Nevertheless, it was then-Justice Rehnquist's view. Writing for a plurality in *Arnett v. Kennedy*,[93] Rehnquist argued that when Congress provides a statutory entitlement, the individual is entitled only insofar as the statute provides. "Where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet."[94]

Moreover, the logic of the entitlement approach allows legislatures to deny due process even to traditional property. The Constitution nowhere defines what constitutes property. Rather, state law defines the extent and nature of property rights just as it

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[91] *See* U.S. CONST. amend. I.

[92] *See* Shapiro & Levy, *supra* note 78, at 118.

[93] 416 U.S. 134 (1974).

[94] *Id*. at 153–54 (plurality opinion).

defines the scope of government benefits. The legislature, then, should be equally able to establish the level or existence of entitlements to new or traditional property. Say a state legislature passes a statute saying that no one who buys a car *after the statute has passed* will have a right of continued ownership as against the state and leaves the decision as to whether to confiscate the car to the discretion of the governor.[95] All legal rights and relationships, from Social Security to traditional property, are a creation of law. The question is, in both cases, whether the state — which controls the law of property — can define away some dimensions of property interests.

Because this logic can apply both to the question of whether there is a protected property right and to the question of what process is protected, we shall consider the Court's current position on the subject only after introducing the latter question.

B. What Process Is Required?

In *Goldberg*, the challenged New York procedures provided the welfare recipient notice about a potential discontinuation of his welfare payments, the opportunity to make a written statement contesting the action, and the power the request that a higher-ranking welfare official review the case.[96] The welfare recipient was also entitled to a post-deprivation hearing at which point he could appear in person, offer oral evidence, and confront witnesses.[97] Nevertheless, the Court held that "when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process."[98] Because welfare provides the means to obtain essentials such as food, clothing, shelter, and medical care, "termination of aid pending resolution of a

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[95] *See* Henry Paul Monaghan, *Of "Liberty" and "Property*," 62 CORNELL L. REV. 405 (1977).

[96] *Goldberg*, 397 U.S. at 258.

[97] *Id.* at 259.

[98] *Id.* at 264.

controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits" — something that is not the case in other sorts of disputes.[99] Moreover, "the same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end."[100]

Nevertheless, the Court emphasized that "the pre-termination hearing need not take the form of a judicial or quasi-judicial trial."[101] Burdensome caseloads, the need for rapid determinations of eligibility, the limited nature of the controversies, and the informal nature of the relationship between case-workers and welfare recipients all militated toward a requirement of only "rudimentary due process" without the production of a complete record or comprehensive opinion.[102] What is required is primarily a meaningful opportunity to be heard: adequate notice of the reasons for termination and a chance to respond by confronting adverse witnesses and presenting arguments and evidence orally.[103] There must be an impartial decision-maker who did not participate in making the decision under review. He must rule based solely on materials adduced at the hearing and explain the basis for his decision.[104]

By the time *Goldberg* was decided, Earl Warren had already retired and been replaced by Warren Burger. Soon afterward, Justices Black, Douglas, and Harlan would all leave the Court, shifting it to the right. The rule of *Mathews v. Eldridge*[105] reflects

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[99] *Id.*
[100] *Id.* at 265.
[101] *Id.* at 266.
[102] *Id.* at 267.
[103] *Id.* at 269.
[104] *Id.* at 271.
[105] 424 U.S. 319 (1976).

this change. There the Court held that due process does not require an evidentiary hearing prior to the termination of Social Security disability payments. The Court weighed the recipient's interest in the benefit, the probability of erroneous deprivation under various procedural regimes, and the government's interest in efficiency and minimal administrative burden. Noting that a recipient is awarded retroactive relief if he ultimately prevails, the Court found that, as in *Goldberg*, his only interest in a pre-termination hearing is to avoid an interruption in benefits.[106] The Court distinguished the AFDC context on the grounds that the *Goldberg* logic — that welfare recipients rely on their payments for the very margin of subsistence — did not extend to the circumstance of disability benefits.[107] "The degree of potential deprivation that may be created by a particular decision is a factor to be considered . . . . The potential deprivation here is generally likely to be less than in *Goldberg* . . . ."[108] The majority also argued that disability insurance differed from AFDC in that the DI decision will turn on written medical reports rather than a broader range of circumstances for which witness testimony is central: questions of credibility and veracity are more salient in the latter instance.[109]

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[106] *Id.* at 340.

[107] *Id.* at 340–41 ("Eligibility for disability benefits, in contrast, is not based upon financial need. Indeed, it is wholly unrelated the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards, tort claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the 'many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force . . . .'" (omission in original) (footnotes omitted) (quoting Richardson v. Belcher, 404 U.S. 78, 85 (1971) (Douglas, J., dissenting))). Justice Brennan's dissent disputed the majority's view. *Id.* at 350 (Brennan, J., dissenting) ("[T]he Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument. It is speculative. Moreover, the very legislative determination to provide disability benefits, without any prerequisite determination of need in fact, presumes a need by the recipient which is not this Court's function to denigrate. Indeed, in the present case, it is indicated that because disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed.").

[108] *Id.* at 341.

[109] *Id.* at 343–44.

Mathews also characterized the proposition that "something less than an evidentiary hearing is sufficient prior to adverse administrative action" as the "ordinary principle" from which *Goldberg* constituted a departure based on reasons particular to its facts.[110] The bottom line is that the individual must be given notice of the action against him and an opportunity to present his case, but the procedures are to be tailored to the situation at hand. They are to be evaluated via a balancing test and will not necessarily, or even likely, involve a pre-deprivation, judicial-style hearing.

Mathews, rather than *Goldberg*, reflects the direction in which the Court has headed. In a subsequent decision, the Justice Rehnquist likened veterans' benefits to disability benefits rather than welfare benefits and ruled against the claim that statutory restrictions on attorneys' fees denied recipients due process by unconstitutionally limiting their access to lawyers to present their case.[111] Justices O'Connor and Blackmun provided Rehnquist with a majority. They joined the opinion but also wrote separately to express their view that while the provision was not unconstitutional generally, in particular circumstances an individual might be able to show that as to him the limitations on attorneys' fees created a particularly great risk of error and thus violated his right to due process.[112]

Two things are worth noting here. First, in distinguishing precedents guaranteeing the right to counsel Rehnquist explained, "where, as here, the only interest protected by the Due Process Clause is a property interest in the continued receipt of Government benefits, which interest is conferred and terminated in a nonadversary

[110] *Id.* at 343.

[111] Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985).

[112] *Id.* at 336 (O'Connor, J., concurring).

proceeding, these precedents are of only tangential relevance."[113] This has something of the logic of the view that a statutory entitlement, even where it creates a property interest, can include or not include elements of due process as the legislature sees fit. In that case, there would be little or no remaining role for constitutional due process. We shall explore this further below. Second, upholding restraints on the use of counsel has implications far beyond the narrow terms of the restriction itself. Discouraging counsel militates against an adversarial model of due process more generally. Indeed, as Rehnquist himself noted, "if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation."[114]

The Court has repeatedly reaffirmed that the *Mathews* three part balancing test is the proper way to evaluate the adequacy of procedures incident to the denial of protected liberty or property interests. In *United States v. James Daniel Good Real Property*,[115] the Court used it to determine what process is required before seizing a house forfeited for its use in a drug offense. *Wilkinson v. Austin*,[116] characterizing the touchstones of due

[113] *Id.* at 332 (majority opinion).

[114] *Id.* at 326.

[115] 510 U.S. 43 (1993). This case perfectly demonstrates the arbitrariness of the distinction between new and traditional property and of not allowing a state to limit the process attendant upon an "entitlement" whose existence it controls in the first place. The forfeiture makes clear that the state is allowed to condition rights to traditional property — as it turns out, the car example offered above is not merely a hypothetical. Yet, that property automatically constitutes a protected property interest for purposes of determining that procedural due process attaches, while new property does not and has to satisfy the "entitlement" test. The reason for this distinction is supposedly that government benefits are gifts of the state while traditional property is somehow more solid, but the no drug use condition makes clear that there is nothing to that logic. And although the state can restrict traditional property rights with conditions of its choosing and can turn new property into non-property as it wishes, it cannot condition either on the forfeiture of certain procedural protections. If a state can eliminate elements of the substantive protections of property, why can it not eliminate elements of the procedural protections?

[116] 545 U.S. 209 (2005).

process as notice of the factual basis for the deprivation and an opportunity to be heard in rebuttal, employed the *Mathews* balancing test to approve Ohio procedures for depriving inmates' liberty interests by assigning them to a Supermax prison. Similarly, *Hamdi v. Rumsfeld*[117] used the Mathews factors to determine what notice and opportunity for a hearing is required when detaining enemy combatants. Under the *Mathews* test, "the Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property."[118] However, a pre-action hearing is not required before suspending employees without pay.[119]

Because *Mathews* itself ruled against a challenge to the procedures for denying SSDI benefits, there are not many cases discussing the subject. In 1986, the Court again upheld the SSDI procedures against challenge, this time statutory.[120] No mention was made of due process concerns.

The Supreme Court has, however, ruled on less central procedural questions. Overpayments of Social Security benefits can be recouped only if recovery would not defeat the purposes of the program or cut against "equity or good conscience."[121] In 1979, the Court decided that recipients had a right to an oral hearing prior to recoupment to determine whether it was appropriate under that standard.[122] However, the Justices did not straightforwardly decide the issue under the Due Process Clause. Rather they found that a requirement of a pre-recoupment oral hearing was a reasonable interpretation of the underlying statute and that there was a substantial constitutional question as to whether

[117] 542 U.S. 507 (2004).

[118] Zinermon v. Burch, 520 U.S. 924 (1990) (emphasis in original).

[119] Gilbert v. Homar, 520 U.S. 924 (1997).

[120] Bowen v. Yuckert, 482 U.S. 137 (1987).

[121] 42 U.S.C. § 404(b).

[122] Califano v. Yamasaki, 442 U.S. 682 (1979).

due process required the hearings. The Court therefore relied on the canon of constitutional avoidance to read the statute to require an oral hearing.[123] It decided, however, that due process did not require oral hearings on the question of whether an overpayment had occurred.[124]

In *Heckler v. Campbell,*[125] the Court ruled that the use of medical-vocational guidelines to determine if claimants were unable to work was appropriate and that due process did not require the specific identification of available alternative jobs in every individual ruling. Three years later, the Court tolled the statute of limitations and excused exhaustion requirements on pursuing judicial review of claims where the Social Security Administration had engaged in secret and systematic procedural irregularity.[126] The decision emphasized concern about the fact that individuals already wrongfully denied benefits might suffer medical setbacks if required to go back and repeat the administrative appeals process. "We should be especially sensitive to this kind of harm where the Government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place."[127]

C. Can a Legislature Limit the Degree of Entitlement?

In 1985 the Court, over Justice Rehnquist's dissent, ruled that an Ohio statute requiring termination of public employees only for cause impermissibly denied a pre-

[123] *Id*. at 692-94.
[124] *Id*. at 696.
[125] 461 U.S. 458 (1983).
[126] Bowen v. New York, 476 U.S. 467 (1986).
[127] *Id*. at 484.

termination hearing.[128] Justice White found a protected property interest in employment where civil servants were entitled to retain their positions during good behavior and thus had an expectation of continued employment. The defendant Board, echoing Rehnquist's logic in *Arnett*, argued "that the property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation."[129] The majority explicitly rejected this logic, and denied that "because the entitlement arose from a state statute, the legislature had the prerogative to define the procedures to be followed to protect that entitlement."[130] Ruling that "the 'bitter with the sweet' approach misconceives the constitutional guarantee," White explained:

> The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."
>
> In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." The answer to that question is not to be found in the Ohio statute.[131]

The Court went on to hold that the employees' interests were strong enough to entitle them to a pre-termination hearing. However, it went on to distinguish *Goldberg* and hold that the hearings were not required to be elaborate because state law provided for a full hearing later.[132]

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[128] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

[129] *Id.* at 539.

[130] *Id.* at 541.

[131] *Id.* (alteration in original) (citations omitted) (quoting Arnett v. Kentucky, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in the result in part) (footnote omitted); Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[132] *Id.* at 545.

The Court's exercise of judicial fiat in *Loudermill* manages at once to avoid the intolerable results that the full logic of the entitlement approach would require while still preserving its core distinction. The result is to sacrifice both legal coherence and the rule of law in cases where government benefits do not rise to the level of an entitlement. Moreover, Court's approach rests on the assumption that there are clear distinctions between substance and procedure, which may itself be another example of arbitrary and logically indefensible line-drawing. In sum, the Court's jurisprudence asks judges to separate substance and procedure in statutory entitlement programs. They must determine whether the substantive provisions constitute an entitlement and then evaluate whether the procedural guarantees meet the standard required by the Fifth and Fourteenth Amendments. This last require a *Mathews*-type balancing analysis.

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