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GIVING SUBSTANCE TO PROCESS: COUNTERING THE DUE PROCESS COUNTERREVOLUTION

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I. INTRODUCTION

The ability of members of a democratic society to participate in the system of government is essential to the maintenance of a strong and orderly community. To be a citizen is to be able to take part in the functioning of government, and in the process by which decisions are made. Yet, we are currently in the middle of an unheralded due process crisis, which threatens to exclude a large number of people—the poorest members of American society—from almost every aspect of participation in the processes by which decisions about them are made, and thus reduces their status to less than full citizenship. As a result of an ongoing due process counterrevolution, a large segment of the population is becoming increasingly disenfranchised and excluded from the body politic. The formalized manner in which the Supreme Court addresses procedural issues has failed to protect those who need protection most from arbitrary governmental action that threatens the very basis of their livelihood. It is time for the Court to re-think the nature of procedural rights, incorporating more effective notions of fairness and equality in order to put substance back into process.

Many scholars have criticized the Court's approach to due process as confusing, inconsistent and ineffective.[1] It has been called a doctrine which "subsists in confusion,"[2] "a pathological combination of ineffectualness and destructiveness."[3] Some scholars have recognized that the Court is undergoing a retreat from the due process revolution of the 1960s, and have called the retreat a counterrevolution.[4] However, they have not acknowledged the fact that the counterrevolution is most severely affecting the poor. The failure of the Court's due process jurisprudence is most evident in the Court's treatment of the people who most risk arbitrary action by the government because of their lack of economic resources and political power. An in-depth analysis of the Court's approach to the due process rights of poor people will help to elucidate the manner in which the Court's due process jurisprudence fails to meet the needs of society as a whole.

Dating back to the Magna Carta, the concept of due process has encompassed both procedural and substantive elements.[5] For example, the due process prohibition against arbitrariness stems from both the sub-

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1. *See, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 41 (1985); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309 (1993); Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J. L. & FEMINISM 189 (1991).

2. Fallon, *supra* note 1, at 309.

3. Farina, *supra* note 1, at 189.

4. *See* MASHAW, *supra* note 1, at 29-30. *See generally* Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996) (tracing the history of the due process revolution, which expanded the scope of interests protected by procedural due process).

5. *See* Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 9 (1992).

stantive notion that to be arbitrary is to be unprincipled, and the procedural notion that a decision is arbitrary by definition if it is made without allowing those affected to participate.[6] That is, due process has always encompassed substantive values of equality and fairness. Yet, there is a strong tension between the communitarian view of due process as a means to achieve a just society, and the individualist view of due process as a means to protect an individual's life, liberty, or property from outside interference.

The history of due process in our country reflects both views of due process. The drafters of the Constitution emphasized the importance of individual freedom to protect people from incursions by each other, and by the state.[7] To the extent that they were influenced by communitarian ideals, they believed that the community would be strengthened if individuals were protected from each other.[8] Hence, when drafting the Due Process Clause of the Fifth Amendment, "the Framers wanted to preserve their property from the vast unpropertied populace. . . . Protecting the rights of the elite from the incursion of the poor masses."[9] Similarly, the early capitalist economy relied on individual businessmen achieving economic success on an individual basis, without any communitarian notion of economic values. The Constitution does not purport to provide any basis for economic justice and does not provide for positive rights or protections. Rather, the Constitution is a negative document, based on the notion that people have some inalienable rights that cannot be taken away from them, and protecting those people from the usurpation of those rights. In particular, the property of the affluent members of society was protected from being arbitrarily taken away from them, by the government or anyone else, by the Due Process and Takings Clauses of the Constitution.

However, the neutral language of the Due Process Clause of the Fifth Amendment still held out a communitarian promise of participation to all citizens. Moreover, the Framers of the Fourteenth Amendment arguably had more of a communitarian and egalitarian view of due process when they included an identical clause in the Fourteenth Amendment to protect a weak minority (ex-slaves) from the power of the majority.[10] Sparked by the massive unemployment and poverty of the Depression,

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6. *Id.* at 6; *see also* Lawrence Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323, 324 (1987) (arguing that substantive values affect all procedural decisions).

7. Rutherford, *supra* note 5, at 10-11; *see also* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 163 (1989) ("The Constitution—the constituting document of this state society—with its interpretations assumes that society, absent government intervention, is free and equal; that its laws, in general reflect that; and that government need and should right only what government has previously wronged.").

8. MACKINNON, *supra* note 7.

9. Rutherford, *supra* note 5, at 10-11.

10. *Id.* at 11-12.

communitarian ideals were the impetus for the New Deal legislation, including the passage of the Social Security Act that established Social Security and Aid to Families with Dependent Children.[11] Similarly, the notion of due process began to be transformed by the Court from an individualist doctrine to a more communitarian one based on protecting the welfare of the larger community.[12] Three decades later, Charles Reich, the "father" of the due process revolution, argued that procedural protections should be extended to those who had not been protected by the individualist framework—that is, recipients of government benefits.[13] Reich argued that those benefits must be treated as property, with the concomitant procedural protections.[14] Extending the procedural protections enjoyed by the affluent owners of "old property" to the poorer owners of "new property" would result in a more equitable system of justice. As such, Reich's focus was not on individual protections, but on achieving a system that was fair to the entire community.

In the case of *Goldberg v. Kelly*,[15] the Court expressed a communitarian view of due process, influenced by the theories of Charles Reich, when it found procedural protections for the poor people who benefit from government programs in the same constitution that was written for the rich and powerful.[16] In his *Goldberg* opinion, Justice William Brennan spoke of the dignitary value of process in eloquent language that hinted at the promise of substantive justice and equality.[17] However, in the subsequent case of *Mathews v. Eldridge*,[18] the Court appeared to put aside the egalitarian, communitarian rationale of *Goldberg* and relied on more formalist, individualist reasoning.[19] The individualist approach of the Court in *Mathews* limited the ability of the due process revolution to better the lives of the poor.

The other significant limitation on the due process revolution was the fact that the Court confined its communitarian approach to the procedural realm and refused to extend it to the substantive realm. In the case of *Dandridge v. Williams*,[20] the Court refused to recognize the substantive right to welfare benefits in the Constitution. An examination of the

11. 42 U.S.C. § 602 (1994).

12. Rutherford, *supra* note 5, at 13.

13. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 758-60 (1964) [hereinafter Reich, *The New Property*]; *see also* Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1256 (1965) [hereinafter Reich, *Individual Rights*].

14. Reich, *The New Property*, *supra* note 13, at 785-86.

15. 397 U.S. 254 (1970).

16. *Goldberg*, 397 U.S. at 270.

17. *Id.* at 264-65. In a later speech, Justice Brennan described his opinion in *Goldberg* as "injecting passion into a system whose abstract rationality has led it astray." *See* William J. Brennan, Jr., *Reason, Passion and "The Progress of Law," The Forty-Second Annual Benjamin N. Cardozo Lecture*, 10 CARDOZO L. REV. 3, 20 (1988).

18. 424 U.S. 319 (1976).

19. *Mathews*, 424 U.S. at 340-45.

20. 397 U.S. 471 (1970).

Court's contrasting rulings in *Goldberg* and *Dandridge* reveals a connection between substantive rights and procedural rights that underlies all of the Court's due process jurisprudence.[21] The more economic resources a person possesses, the more likely that person will benefit from an individualist approach to process which merely incorporates formalist procedural protections. On the other hand, a person with fewer economic resources would undoubtedly benefit from a more communitarian approach which also incorporates substantive protections. Ironically, however, the Court has historically refused to formally recognize substantive protections for poor people, but has been considerably more willing to provide substantive protections to people with more economic resources. For example, in the *Lochner* era, the Court applied notions of substantive due process to strike down state statutes that restricted business in order to benefit working people.[22] Recently, the Court has returned to such a substantive due process approach to defining rights of the more affluent in cases involving compensation for regulatory takings.[23] As a result, the Court has been inconsistent in its approach to process depending on the financial resources of the parties involved.

The Court's formalist individualist approach to process in the years since its *Goldberg* ruling, and its refusal to recognize substantive economic rights, has opened the door for the ongoing counterrevolution, which is significantly eroding the due process rights of poor people.[24] Shortly after its ruling in *Goldberg*, the Court began restricting the framework of rights that are protected by the Due Process Clause of the Fourteenth Amendment.[25] In addition, the Court has recently added to the restrictions on the amount of process to which an individual is entitled when she has established that the interest in question falls within the framework of rights protected by the Due Process Clause.[26] Congress also has participated in the due process counterrevolution. Significantly, Congress recently passed a welfare reform bill that ends the entitlement status of welfare benefits, placing *Goldberg* itself in jeopardy.[27] Congress also recently enacted restrictions on the ability of poor people to obtain meaningful representation by an attorney, to bring civil actions, and to lobby effectively.[28] In contrast, procedural protections for more affluent members of our society remain in good standing. While the Court has narrowed the definition of "new property," procedural protections for

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21. *See infra* notes 312-14 and accompanying text.
22. Lochner v. New York, 198 U.S. 45, 64 (1905).
23. *See infra* notes 260-78 and accompanying text.
24. *See* Pierce, *supra* note 4.
25. *See id.* at 1977-78.
26. *See* Sandin v. Conner, 515 U.S. 472, 483-84 (1995); Pierce, *supra* note 4, at 1988-89.
27. *See* Pierce, *supra* note 4, at 1990-91; *infra* notes 184-91 and accompanying text. *See generally* Rebecca E. Zietlow, *Two Wrongs Don't Add Up To Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures*, 45 AM. U. L. REV. 1111 (1996) (reviewing recent congressional welfare reform measures).
28. *See infra* notes 203-28 and accompanying text.

owners of "old property," who tend to be more affluent, have not been challenged.[29] Moreover, the Court has taken an activist stance in expanding the rights of owners of "old property" in the doctrine of compensation for regulatory takings.[30]

The widening gap between the rich and the poor in this country has been well documented.[31] Equally serious, but less widely acknowledged is the burgeoning gap between the procedural rights of the rich and poor. Increasingly, due process is returning to its individualist roots—protecting those who have property from losing it, but failing to protect those who do not have property as it is traditionally defined. A communitarian view of due process, with its promises of fairness and equality, has often been lost in the Court's formalism. However, in some cases involving the substantive and procedural rights of poor people, the Court still has taken more of a communitarian approach.[32] It is the central thesis of this article that the Court should return to a communitarian view of process, in which process is viewed as a means to establish a just society, to enable all people to participate fully in our democracy without limitations imposed by a lack of economic resources or political power.

The problem that this article addresses is not one that affects only the poor. When large numbers of citizens are disenfranchised, lacking an investment in the functioning of our political system, they may become a dangerous destabilizing element in our society. The chant of "no justice, no peace" reflects the frustration of people who feel that they are being treated unfairly, and that they lack control over important issues in their lives. The frustration of disenfranchisement can also cause social instability. The essence of due process is that the government should not act arbitrarily towards its citizens.[33] The community as a whole is harmed when a substantial number of its citizens are subject to arbitrary treatment by the government without effective redress.

In Part I of this article, I summarize the developments of the due process revolution and analyze the effect of the substantive and procedural arguments on the Court's due process jurisprudence. In Part II, I examine the practical and theoretical limits of the ability of the due process revolution to better the lives of the poor and the disenfranchised. The roots of the failings of the due process revolution, which has not brought about the fairness that it promised and arguably has created a sterile bureaucratic state, can be found in the Court's theoretical approach to due process, which by its very nature is biased against the needs of the poor

29. *See* Pierce, *supra* note 4, at 1996.

30. *See infra* notes 260-78 and accompanying text.

31. *See, e.g.*, KEVIN PHILLIPS, THE POLITICS OF RICH AND POOR (1990); ROBERT B. REICH, THE WORK OF NATIONS (1991).

32. *See infra* notes 288-311 and accompanying text.

33. *See* Alexander, *supra* note 6, at 327 n.12; Fallon, *supra* note 1, at 310, 322-23; Rutherford, *supra* note 5, at 6.

and the disenfranchised. Despite the shortcomings of its approach, however, the due process hearings for recipients of government benefits, which resulted from the Court's *Goldberg* ruling, remain a significant avenue of participation for poor people. In Part III of the article, I describe how the due process counterrevolution has limited the rights of poor people to participate in all processes which affect their lives, from the administrative realm to the legislative process, from the ability to bring class actions to the ability to obtain effective representation by counsel. In Part IV, I describe how the gap between the procedural rights of the rich and poor has been widening as a result of the due process counterrevolution, undermining the egalitarian underpinnings of the Court's ruling in *Goldberg*. Even as the Court has restricted the procedural rights of poor people on all levels, it has greatly expanded the property rights of the affluent through the doctrine of compensation for regulatory takings. Finally, in Part V of the article, I suggest that the Court return to a communitarian approach to due process which would be more responsive to the needs of the poor. I suggest that the Court build on the "organic" approach of some of its earlier due process rulings, and incorporate substantive notions of economic justice to enhance the fairness of its rulings. It is essential that the Court adopt such an approach to reverse the disenfranchisement of the poor and foster a more just and stable society.

II. THE DUE PROCESS REVOLUTION

In the late 1960s and early 1970s, the Court expanded the notion of due process in a series of cases involving governmental benefits, contracts and other programs. Those Court rulings, foremost of which is *Goldberg v. Kelly*,[34] are generally known as the due process revolution.[35] In *Goldberg*, the Court found welfare recipients constitutionally entitled to trial-type hearings before the termination of their benefits.[36] In other rulings, the Court expanded the notion of due process to encompass prisoners' rights,[37] the rights of government employees,[38] and the right to

34. 397 U.S. 254 (1970).

35. *See* Pierce, *supra* note 4, at 1973. Prior to *Goldberg*, the Court decided the case of *King v. Smith*, 392 U.S. 309 (1968), in which the Court struck down an Alabama statute that deemed the income of any man with whom a woman was cohabiting to the household of that woman, as violative of the Federal Social Security Act. *Smith*, 392 U.S. at 333. The Court's ruling that states must follow uniform federal regulations governing the administration of welfare benefits was based on the view that uniform treatment was more fair, and thus had procedural overtones. However, the Court did not expressly cite the Due Process Clause as support for its opinion, and *Smith* is not generally considered to be a procedural case.

36. *Goldberg*, 397 U.S. at 264.

37. *See* Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1 (1979); Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

38. *See* Perry v. Sindermann, 408 U.S. 593, 603 (1974) (holding that opportunity must be given to justify a claim of entitlement to continue employment); Board of Regents v. Roth, 408 U.S. 564 (1974) (finding that, though not implicated in the case at hand, when one's reputation is at stake,

avoid a state-imposed stigma to one's reputation.[39] Through these rulings, people of all classes benefitted from the due process revolution. However, the *Goldberg* decision heralded an increase in the procedural rights of the poor, based in part on Charles Reich's expansive notions of the property rights of the poor.

Charles Reich's theories were embraced by the Court in part because of the political mood of the times, characterized by a belief in the power of government to transform society.[40] Reich had argued, in effect, that constitutional law discriminated against the poor by protecting only the property of the rich.[41] However, due process alone, even the expansive, communitarian notion of process expressed by the Court in *Goldberg*, did not serve the function of redistributing economic resources. To the extent that fairness is a component of the procedural rights established by the Court in the due process revolution, it was limited to procedural, not substantive fairness. As such, due process may be criticized for attempting to mask the injustice in a capitalist society, especially since the Court has been extremely reluctant to find substantive economic rights in the Constitution. The benefits of the due process revolution for poor people were limited by the individualist formalism of the Court's rulings subsequent to *Goldberg*, and by the Court's unwillingness to find substantive economic rights in other cases regarding welfare benefits.

A. *Supreme Court Jurisprudence*

The Court's ruling in *Goldberg* is arguably the closest that it came to establishing a communitarian notion of process, which would be particularly beneficial to poor people. The ruling had two significant theoretical bases, which expanded the concept of process to benefit the poorest members of society. First, the Court expanded the definition of property protected by the Due Process Clause to include the entitlement to government benefits.[42] By expanding the definition of protected property and liberty interests, the Court extended individualist protections, previously enjoyed primarily by affluent and middle class owners of traditional property, to the meager and previously unprotected property interests of poor people. Second, the Court extended the notion of due process to include pre-deprivation hearings.[43] That is, the property or liberty interest could not be taken away without the owner first enjoying the right

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procedural due process protections are required); *see also* Pierce, *supra* note 4, at 1978-79 (arguing that *Sindermann* and *Roth* made it very difficult to fire government employees).

39. *See* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

40. Pierce, *supra* note 4, at 1975-76.

41. *Id.* at 1975.

42. Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

43. *Goldberg*, 397 U.S. at 264-65.

to defend his interest in the property at a hearing.[44] Because the public benefits at issue were often the only significant property owned by the claimants in these cases, pre-deprivation hearings were especially significant.

The key to the due process revolution was the Court's expanded definition of liberty and property rights that triggered protections. In *Goldberg*, the Court recognized a property right in welfare benefits, which had not previously been considered to be property.[45] Charles Reich, whose work was cited by the Court in *Goldberg*, argued that those benefits must be treated in the same way as traditional "old property," with the concomitant procedural protections.[46] Reich had argued that constitutional law discriminated against the poor by protecting only the property of the rich.[47] Extending procedural protections to "new property"[48] would result in a more equitable system of justice, in which property rights would be treated the same regardless of the property involved, or the income of the owner of the property.[49] Reich's goal was to create a governmental system that was fair to everyone.

The due process revolution also reached the more affluent members of society as well as poorer recipients of government benefits. For example, in *Schware v. Board of Examiners*, a precursor to *Goldberg*, the Court held that an attorney could not be deprived of his license to practice law without a prior hearing.[50] In addition, all government employees benefitted from the Court's rulings that the interest in a government job was a property interest protected by the Due Process Clause,[51] and people of all classes benefitted from the protection of their reputation.

The due process revolution was confined primarily to the administrative realm. However, the Court also expanded the constitutional right to an opportunity to be heard in some civil cases. In *Sniadach v. Family Finance Corp. of Bay View*, the Court struck down a Wisconsin prejudgment wage garnishment procedure as violative of due process because it did not allow for any type of notice or hearing prior to an adverse judgment.[52] Similarly, in *Fuentes v. Shevin*, the Court struck down

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44. *See id.* at 264 (finding a due process right to pre-termination hearings for welfare recipients); Sniadach v. Family Fin. Corp., 395 U.S. 337, 341-42 (1969) (striking down a Wisconsin prejudgment garnishment procedure as violative of due process).

45. *Goldberg*, 397 U.S. at 262 n.8.

46. Reich, *The New Property*, *supra* note 13, at 780-83.

47. Reich, *Individual Rights*, *supra* note 13, at 1255-56.

48. Reich defined the "new property" as the property rights created by the state in the form of benefits and licenses. Reich, *The New Property*, *supra* note 13, at 739.

49. Reich, *Individual Rights*, *supra* note 13, at 1252-53.

50. 353 U.S. 232, 238-39 (1957); *see also* Willner v. Committee on Character and Fitness, 373 U.S. 96, 106 (1963) (finding applicant to Bar entitled to prior notice of grounds of his rejection).

51. *See* Pierce, *supra* note 4, at 1978-79 (arguing that *Roth* and *Sindermann* made it very difficult to fire government employees).

52. 395 U.S. 337, 340-42 (1969).

a Florida statute that allowed owners of leased property to obtain an order of replevin, authorizing the sheriff to seize the property, without prior notice and a hearing for the person who possessed the property.[53] As a practical matter, *Sniadach* and *Fuentes* affected the procedural rights of poor people because it was they who most often suffered from abuse of the state procedures in question.[54] Moreover, poor people with less property had more to lose than the more affluent people who had other property interests to fall back on if they were deprived without a prior hearing.

Finally, the fundamental right to be heard also was the basis for the Court's ruling in *Boddie v. Connecticut*, where it found that indigent plaintiffs in divorce suits had a constitutional right to a state procedure for waiver of filing fees.[55] In that case, the Court relied on both due process and equal protection principles, pointing out that to deny plaintiffs an in forma pauperis procedure would effectively deny them access to the only process for terminating their marriage on the basis of their income alone.[56] Subsequently, however, the Court found no due process violation in the federal government's refusal to waive fees in bankruptcy cases in the case of *United States v. Kras*,[57] and the State of Oregon's refusal to waive filing fees for administrative review appeals of welfare benefit hearings in *Ortwein v. Schwab*.[58] In both of those cases, the Court distinguished its ruling from *Boddie* on the basis that *Boddie* implicated the fundamental interest in a familial relationship, while *Ortwein* implicated only the economic interests of the plaintiffs.[59] Thus, the Court's willingness to find civil due process rights outside the administrative realm was limited by its reluctance to find economic rights in the Constitution. This reluctance paralleled the Court's reluctance to find substantive economic rights in other realms that might have impacted on procedural rights.

B. *Substance and Procedure in the Due Process Revolution*

The Court's ruling in *Goldberg* was a victory in a campaign by welfare rights activists and their lawyers to reform the system by which welfare benefits were allocated.[60] The primary goal of the welfare rights activists was to achieve substantive economic gains by establishing a con-

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53. 407 U.S. 67, 96 (1972).

54. *See Sniadach*, 395 U.S. at 340 ("A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support.").

55. 401 U.S. 371, 382-83 (1971).

56. *Boddie*, at 375-76.

57. 409 U.S. 434, 450 (1973).

58. 410 U.S. 656, 659-60 (1973) (per curiam).

59. *Ortwein*, 410 U.S. at 659; *Kras*, 409 U.S. at 450.

60. *See generally* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-1973 (1993) (discussing *Goldberg*'s impact on the welfare rights movement); FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 264-359 (1977) (discussing the welfare rights movement).

stitutional right to a minimum income.[61] The legal strategy of advocating for pre-termination fair hearings was seen as a means to achieve that goal.[62] In *Goldberg*, the Court indicated that it might be receptive to arguments for substantive economic rights with its broad based language of equality.[63] However, in the subsequent case of *Dandridge v. Williams*, the Court directly rejected a constitutional claim for economic rights.[64] In retrospect, procedural rights without substantive economic rights achieved limited progress for poor people.

In *Goldberg*, the Court expressed an egalitarian view of process that would encompass protections for all members of society, including welfare recipients.[65] In his opinion, Justice Brennan stated that procedural protections such as pre-termination hearings were essential both to substantive equality and to "foster the dignity and well-being of all persons within [this nation's] borders."[66] Thus, the Court in *Goldberg* saw procedural justice as "a normative horizon rather than a technical problem[,]"[67] and expressed a view of due process that recognized its potential to foster substantive equality in the procedural realm. This communitarian, egalitarian vision held out much promise to poor people, who had never benefitted from procedural protections and were generally disenfranchised. The Court's language indicated that the Court might also be willing to find substantive economic rights in the Constitution, including the right to a guaranteed minimum income or the constitutional right to welfare benefits.[68] However, the Court rejected that concept directly in the case of *Dandridge v. Williams*,[69] belying the promise of substantive justice in Justice Brennan's *Goldberg* opinion.

From the beginning of the welfare rights movement, substantive and procedural concerns were intertwined. The first goal of the welfare rights activists was a substantive economic goal—to achieve the right to a minimum income.[70] At the same time, however, advocates for the poor recognized that the poor were being treated with less dignity because of their lack of economic resources. As Charles Reich said, recalling the

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61. DAVIS, *supra* note 60, at 37.

62. *Id.* at 47.

63. *See* Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970) ("From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders.").

64. 397 U.S. 397, 487 (1970).

65. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 3 (1990).

66. *Goldberg*, 397 U.S. at 264-65.

67. White, *supra* note 65, at 3.

68. *See Goldberg*, 397 U.S. at 265 ("Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'").

69. *Dandridge*, 397 U.S. at 486-87.

70. DAVIS, *supra* note 60, at 45. The first goal of the National Welfare Rights Organization was "1. Adequate Income: A system that guarantees enough money for all Americans to live dignified lives above the level of poverty." *Id.*

insights that his research on caseworkers' investigative raids of the houses of welfare recipients gave him for his writings on the nature of property:

> I began to see that [the functional view of property] had much more profound implications than I'd first realized.... It was linked to class; the lower on the totem pole you are, the fewer rights you have. To have one rule for television licenses, for example, and another for welfare violates principles of equality.[71]

Similarly, the lawyers for the plaintiffs in *Goldberg* brought the case in part to protect the substantive First Amendment rights of welfare rights activists, who feared having their benefits terminated if they complained to their case workers about their benefit levels or governing regulations.[72]

Substantive economic gains would be meaningless if the state had complete discretion to administer those gains. But process was also valued in and of itself. After their experiences dealing with arbitrary welfare case workers, welfare rights activists wanted formal protections from governmental arbitrariness. Moreover, they wanted to be treated with dignity and have the ability to participate in decisions affecting their lives like other citizens.[73] It soon became apparent that these formal procedural goals would be more easily obtained than substantive economic changes. Indeed, gains in the procedural realm sometimes backfired, resulting in substantive inequity, as in the case of the "special grants" campaign by New York welfare activists. The "special grants" campaign, which combined efforts at both substantive and procedural reforms, was the chief organizational tool of the National Welfare Rights Organization (NWRO). Under the New York state "special grants" program, welfare recipients could apply for one time grants to pay for basic necessities such as furniture and clothing. In the summer of 1967, NWRO organizers assisted welfare recipients in applying for those grants in an organized campaign. Denials were followed up by requests for fair hearings.[74] The goal of this campaign was both to obtain more benefits for those who needed them, and to use the fair hearings system, which had almost never been used before, to pressure state officials for reform.[75] Ironically,

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71. *Id.* at 85 (citing author interview with Charles Reich, Jan. 21, 1989).

72. *See* Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 562-63 (1984). *But see* White, *supra* note 65, at 18 ("Socially powerless speakers do not have the luxury of confrontation....").

73. For example, three of the four goals of the National Welfare Rights Organization in 1967 were process-oriented goals: "2. Dignity: A system that guarantees recipients the full freedoms, rights and respect of all American citizens. 3. Justice: A fair and open system that guarantees recipients the full protection of the Constitution. 4. Democracy: A system that guarantees recipients direct participation in the decisions under which they must live." DAVIS, *supra* note 60, at 45.

74. *Id.* at 48.

75. *Id.* at 47; PIVEN & CLOWARD, *supra* note 60, at 301-05.

the State of New York responded to this "special needs" campaign by creating a new system of smaller, flat grants which would be available to all recipients.[76] Although the new system reduced the benefit levels, it was hard to oppose because it gave the appearance of fairness by concurrently reducing the discretion of welfare caseworkers.[77] In this manner, the state instituted procedural changes that appeared on their surface to be more fair, but actually masked substantive injustice, turning the reformers' strategy on its head. The State of New York's response to the "special needs" campaign illustrates how procedure without substance can become meaningless formalism, harming rather than helping the beneficiaries of that procedure. The state's action foreshadowed later developments, as courts saw procedure in increasingly formalistic terms that rendered it sterile and meaningless.

In *Goldberg* itself, the plaintiffs argued in favor of a substantive right to welfare benefits along with procedural protections, noting in their brief that without "the bare minimums essential for existence . . . our expressed constitutional liberties become meaningless."[78] The plaintiffs also raised substantive economic issues by telling stories of the hardships that they suffered when they had their only means of livelihood cut off for months while they waited for the appeals process.[79] These stories of "brutal need" may have significantly moved the Court toward its ultimate ruling in *Goldberg*.[80] Moreover, the language of the Court's ruling in *Goldberg* indicated that the Court may have been moved by more substantive economic arguments. In particular, Justice Brennan referred to welfare benefits as "not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'"[81] However, the hope that the Court might find economic rights, as it had procedural ones, in the Constitution, was short lived.

In the case of *Dandridge v. Williams*, the Court specifically rejected the plaintiffs' attempt to establish a fundamental right to a minimum

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76. DAVIS, *supra* note 60, at 53.

77. *Id.* at 53-54.

78. Brief for Appellees at 39, Goldberg v. Kelly, 397 U.S. 254 (1970) (No. 62), *cited in* DAVIS, *supra* note 60, at 104. One attorney for the plaintiffs, Ed Sparer, had argued that it was imperative that *Goldberg* be used as a vehicle to establish a constitutional "right to live." DAVIS, *supra* note 60, at 103-04. Sparer's insistence was based in part on a New York federal court decision issued in another case handled by the Center on Social Welfare Policy and Law, *Rothstein v. Wyman*, 303 F. Supp. 339 (S.D.N.Y. 1969). In *Rothstein*, the court came close to recognizing welfare as a "fundamental right." *Rothstein*, 303 F. Supp. at 346-47; DAVIS, *supra* note 60, at 104. The language in the plaintiff's brief was the result of a compromise between Sparer and his more moderate colleague, Lee Albert, the director of the Center on Social Welfare Policy and Law. DAVIS, *supra* note 60, at 104.

79. *See* DAVIS, *supra* note 60, at 91-92 (emphasizing plaintiffs' plight in trial briefs); *Id.* at 109 (emphasizing plight of welfare recipients in oral argument before the Supreme Court).

80. *See* Brennan, *supra* note 17.

81. *Goldberg*, 397 U.S. at 264-65.

income.[82] The Court upheld a "family cap," imposed by the State of Maryland, which capped the level of benefits for recipients so that the level would not be increased if the recipient had more children.[83] Significantly, the Court treated welfare legislation as an economic regulation which triggered only minimal rational basis scrutiny, like a state's regulation of business interests.[84] The Court rejected arguments that welfare regulations should be treated differently than other economic classifications because of the "brutal need" of the recipients, over Justice Marshall's strident objections.[85] Any remaining expectation that the Court might recognize economic rights was dashed in the Court's opinion in *Wyman v. James*.[86] In that case, the Court analogized welfare benefits to private charity when it held that welfare recipients had no right to refuse access to caseworkers investigating their homes.[87]

Thus, the Court rejected the concept of substantive economic rights which might have accompanied the procedural rights that it found in *Goldberg*. More significantly, by applying a limited rational basis review in *Dandridge*,[88] the Court relegated the fate of poor people to the whims of state legislatures where they have little impact, and which are inherently conservative because of the impact of money on the legislative process.[89] In *Dandridge*, the Court ignored its admonishment in *United States v. Carolene Products Co.*, that discrete and insular minorities require more protection from courts because of their lack of clout in the legislative process, or it at least refused to recognize the poor as a discrete and insular minority.[90] The Court's reasoning stems in large part from its reluctance to apply notions of substantive due process to economic regulations. In the previous three decades, the Court had shied away from involving itself in the economy and disturbing the legislative process.[91] In *Dandridge*, the Court blindly applied the same rationale that it applies to antitrust and commerce clause concepts to the concerns of the poorest of the poor, unwilling to see the difference between regulating industry and allowing people meaningful control over their lives.

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82. Dandridge v. Williams, 397 U.S. 471, 487 (1970).

83. *Dandridge*, 397 U.S. at 481.

84. *Id.* at 485.

85. *See id.* at 520, 522 (Marshall, J., dissenting) (pointing out that the case involved "the literally vital interests of a powerless minority—poor families without breadwinners. . . . It is the individual interests here at stake that . . . most clearly distinguish this case from the 'business regulation' equal protection cases.").

86. 400 U.S. 309 (1971).

87. *Wyman*, 400 U.S. at 326.

88. *Dandridge*, 397 U.S. at 385-86.

89. *See infra* Part IV.E.

90. 304 U.S. 144, 152 n.4 (1938).

91. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955) (upholding an Oklahoma statute, under rational basis review, that made it unlawful for any person not a licensed optometrist or opthamologist to fit lenses, or replace or duplicate lenses).

Dandridge was a significant blow to the gains achieved by poor people in *Goldberg* and the other key cases of the due process revolution, and signaled a halt to the progress of the poor in both the procedural and substantive realms.[92] An undercurrent to all of the Court's rulings in cases involving the procedural rights of the poor since *Dandridge* is its refusal to find that class or income level is a suspect classification for the purposes of equal protection analysis. The Court's failure to classify economic interests as fundamental also precludes the Court from analyzing the impact of procedural mechanisms with strict scrutiny.[93] Because the Court has refused to find poverty to be a suspect classification, and because of its reluctance to apply the principles of substantive due process, many of the Court's rulings in favor of indigent petitioners in procedural cases are based on a hybrid reasoning that informally combines due process and equal protection principles to reach a result that comports with the Court's view of fairness.[94] However, these cases are few and far between, and have gotten lost in the Court's overall formalist approach to process.

III. THE LIMITS OF THE DUE PROCESS REVOLUTION

As a practical matter, the due process revolution did not bring about the justice that it promised. Instead, a bureaucratic state developed with an elaborate appellate process that is alienating for many welfare recipients. The failures of the due process revolution can be traced back to the Court's due process jurisprudence since *Goldberg*. The Court's formalist approach is not responsive to the needs of the poor, and is arguably biased against them.

A. *The Bureaucratic Welfare State*

Ever since the Court's ruling in *Goldberg*, scholars have critically analyzed the effect of the administrative state that grew out of the due process revolution.[95] The critiques fall into three general categories. First,

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92. As such, *Dandridge* parallels the impact of *Milliken v. Bradley*, 418 U.S. 717 (1974), on its efforts to desegregate public schools. In *Milliken*, the Court struck down a Detroit area desegregation plan that would have required busing of students between urban and suburban school districts to achieve racial parity. *Milliken*, 418 U.S. at 752-53. After *Milliken*, parents of white children could avoid sending their children to integrated schools by moving to the suburbs. Thus, it signaled the end of meaningful desegregation (as well as the end of decent urban public schools and the decline of urban areas in general). *See also* Denise C. Morgan, *What is Left to Argue in Desegregation Law? The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99, 108 (1991) ("The Court's experimentation with integration, however, ended with *Milliken v. Bradley*.") In *Milliken*, like *Dandridge*, the plaintiffs asked the Court to cross a line which it refused to cross. The result of both cases was the halt of meaningful reform.

93. *See* Fallon, *supra* note 1, at 314-15 (stating that, in the due process analysis, fundamental rights are subject to strict scrutiny, while non-fundamental rights merit only rational basis review).

94. *See infra* notes 321-24 and accompanying text.

95. *See, e.g.*, Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of*

many have criticized the cost of procedures, and advocated for limitations on procedural protections for the sake of reducing those costs.[96] This criticism has been accepted by the Court, and incorporated into its due process jurisprudence.[97] Second, others have critiqued the bureaucratic state that has resulted from implementing *Goldberg*'s requirement of pre-termination hearings.[98] A third area of criticism is the argument that the bureaucratic system seems to value process in and of itself, losing sight of the importance of fairness and justice in our society.[99] All of these criticisms are related, and are a natural result of a system based on process without substance.

Shortly after *Goldberg*, analysts voiced concern about the cost of the procedural protections that the Court had mandated.[100] The cost of process has always been a factor that weighs against the procedural rights of the poor, who cannot afford to pay for their own procedural protections. Since the state must always bear the cost of procedural protections for the poor, they will always be vulnerable to cost related critiques. Moreover, critics charge that money spent on procedural measures administering benefits reduces the amount of money available to recipients of those benefits.[101] According to this zero sum critique, procedure and substance are in direct competition with each other. The Court specifically rejected this argument in its ruling in *Goldberg*.[102] However, the Court tacitly accepted the argument that procedure was too costly in its subsequent ruling in *Mathews v. Eldridge*, and incorporated this criticism into the due process calculation.[103]

Social Welfare Claims, 59 CORNELL L. REV. 772 (1974) [hereinafter Mashaw, *Management Side*]; Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731 (1990) [hereinafter Reich, *Beyond the New Property*]; William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 BROOK. L. REV. 777 (1990) [hereinafter Simon, *Rule of Law*]; William H. Simon, *Legality, Bureaucracy and Class in the Welfare System*, 92 YALE L.J. 1198 (1983) [hereinafter Simon, *Legality*]. The Court's ruling in *Goldberg* was codified in the regulations governing Aid to Families with Dependent Children (AFDC), 42 U.S.C. § 602 (1994), and other government benefit programs. The fair hearing requirement as codified at 42 U.S.C § 602(a)(4). However, the AFDC program and all of its governing regulations were abolished by Congress in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

96. *See* Mashaw, *Management Side*, *supra* note 95.

97. *See* Mathews v. Elderidge, 424 U.S. 319 (1976).

98. *See* Simon, *Rule of Law*, *supra* note 95, at 785; Simon, *Legality*, *supra* note 95, at 1215-16.

99. *See infra* notes 114-16 and accompanying text.

100. Mashaw, *Management Side*, supra note 95, 804-24 (analyzing, among other things, the cost of procedures).

101. *See* Wheeler v. Montgomery, 397 U.S. 280, 284 (1970) (Burger, C.J., dissenting) ("[N]ew layers of procedural protection may become an intolerable drain on the very funds earmarked for food, clothing and other living essentials.").

102. *See* Goldberg v. Kelly, 397 U.S. 254, 266 (1970).

103. 424 U.S. 319, 347-48 (1976). *See* Pierce, *supra* note 4, at 1981 (stating that the *Mathews* balancing test was a response to the cost of process).

In *Mathews*, the plaintiff was a recipient of Social Security benefits who suffered from back pain and chronic anxiety.[104] His benefits were terminated by the state agency without a prior hearing, and he sued, claiming that the state action violated his due process rights.[105] In order to determine the extent to which he was entitled to pre-termination hearings, the Court established a three part balancing test to determine how much process is due to recipients of government benefits. According to the *Mathews* test, the state must balance the private interest which will be affected by the government action and the risk of erroneous deprivation of such interests through the procedures used, and the government's interest, including the fiscal and administrative burdens which would result from additional procedural protections.[106] The Court rejected the egalitarian nature of *Goldberg* and focused instead on an individualistic, utilitarian approach to process.[107] In *Mathews*, the Court pitted process against substance, setting up a contest that the poor were likely to lose.

A second area of criticism of the *Goldberg* approach to process focuses on its effect on the day to day administration of public benefits. As a result of the due process revolution, the administration of government benefits became more uniform and less discretionary. The resulting bureaucracy has been criticized by many as being both sterile and ineffective.[108] Charles Reich has argued that once attention was focused on procedure, reformers became preoccupied with the cost of procedure and overlooked the substantive question of individual need.[109] For example, many of the intrusive social workers who worked for welfare administrations prior to *Goldberg* were replaced by bureaucratic functionaries who had little training in meeting the needs of the poor and would simply follow administrative regulations.[110] The individual caseworker still makes most decisions on each welfare recipient's case and the system of appeals plays only a limited role in assuring that he or she makes correct decisions.[111] Moreover, the appeals system is too daunting for many re-

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104. *Mathews*, 424 U.S. at 324 n.2.

105. *Id.*

106. *Id.* at 335.

107. *See* Rutherford, *supra* note 5, at 48-49 (maintaining that a focus on the cost of process "subtly shift(s) the focus of due process from protecting the powerless to serving social utility as defined by the powerful").

108. *See* Simon, *Rule of Law*, *supra* note 95; Simon, *Legality*, *supra* note 95.

109. *See* Reich, *Beyond the New Property*, *supra* note 95, at 737 (arguing in favor of finding substantive economic rights in the Constitution).

110. *See* Simon, *Rule of Law*, *supra* note 95, at 785; Simon, *Legality*, *supra* note 95, at 1215-16 ("Educational requirements were reduced and efforts were made to recruit people who did not aspire to status or responsibility beyond clerical work.").

111. *See* Simon, *Rule of Law*, *supra* note 95, at 785. Although the system of appeals may serve as an incentive for caseworkers to make correct decisions so that they will not be overturned on appeal, they may also serve as a disincentive for some caseworkers, who know that any mistake they make can be corrected through an appeal.

cipients of governmental benefits who lack representation to utilize it.[112] "The fair procedures articulated by the Courts have become a labyrinth"[113] with devastating effects on those who are dependent upon it, and must navigate it for their livelihood.

Finally, others criticize the notion of process itself as empty formalism, bereft of the moral guidance needed to bring about justice in our society. In the bureaucratic welfare state, the humanist vision of *Goldberg* seems to be lost in the way "in which procedural rituals are actually played out."[114] Under this view, process serves to alienate, rather than empower, poor people. For example, formalized rules may intimidate recipients of benefits because they are both complex and constantly in flux, increasing the possibility that their benefits may be terminated by mistake for reasons that are not readily apparent to them.[115] Moreover, the alienating nature of the government bureaucracy may cause it to become a vehicle for gender and class subordination of people who are historically disenfranchised and subordinated because the bureaucracy reflects the stratification of society at large.[116] From this perspective, process has completely lost its substantive underpinnings and has become disengaged from any mechanism that might serve to create the fair society that it once promised.

Ironically, formal procedural rights may hurt rather than help poor people because they serve to mask substantive injustice. For example, the elaborate system of "fair hearings" implies that justice can be achieved through the use of those hearings.[117] However, this is not necessarily the case, especially for unrepresented recipients. Thus, process has become part of the problem to the extent that it has become a means to legitimate a system that is fundamentally unfair.[118] Recent welfare reforms have drastically decreased benefit levels by creating, among other things, five

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112. *See* Susan D. Bennett, *"No Relief But Upon the Terms of Coming Into the House"—Controlled Spaces, Invisible Disentitlements and Homelessness in an Urban Shelter System*, 104 YALE L.J. 2157, 2157-82 (1995) (describing in detail the discouraging process of homeless people in Washington D.C. applying and waiting for government assistance).

113. *See* Sparer, *supra* note 72, at 561.

114. White, *supra* note 65, at 4.

115. *Id.* at 35.

116. *Id.* at 41. *See generally* Gerald F. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) (criticizing the varying definitions of bureaucracy as a mechanism of deception).

117. *See* Mark V. Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694, 708-09 (1980) (reviewing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978)) (maintaining that *Goldberg* diminished the forces of equality "by deflecting them into a fruitless struggle against a bureaucracy that readily swallowed the Court-prescribed dose of due process without any change in symptoms, and second by bolstering the idea that fairness was not far away in the American welfare state").

118. For example, the bias of the decision maker remains a factor that may be masked by formal process. *See generally* Elaine Golin, Note, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532 (1995) (detailing bias in administrative adjudications).

year lifetime caps on the receipt of benefits, and imposing work requirements and other restrictions on all welfare recipients.[119] It has been argued that due process is necessary to enforce those restrictions "fairly."[120] However, an equally persuasive argument can be made that those provisions are so substantively unfair that no amount of process can make them so.[121]

Reliance on sterile process rather than moral reasoning may result in a system that is even more unjust, rather than furthering the interests of justice. In modern society, the reliance on formalism allows decision makers to sidestep moral dilemmas and avoid issues of substantive injustice.[122] Because they rely on formal doctrines such as precedent, "judges do not sufficiently focus on the values needed for a meaningful dispensation of justice."[123] Similarly, decision makers may follow formal procedural doctrines rather than being forced to make decisions that are morally correct. Of course, the goal of process is to enable decision makers to make decisions that are morally correct. However, rights may become rarified and abstracted to the point where they lose all meaning.[124] If so, process may become an impediment to achieving a just society, rather than a means to achieve it.

The foregoing discussion indicates that, at the very least, procedure without substance cannot be a goal in and of itself.[125] Yet, the bureaucratic welfare state is based on a cost conscious approach which pits substantive values against procedure. The resulting bureaucracy fails to meet the needs of poor people and may serve to further alienate them instead. The current system of due process rights has not established, indeed cannot establish, the just society envisioned by those who brought *Goldberg*.

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119. *See* Welfare Reform Act of 1996, Pub. L. No. 104-193 § 103(7)(a), 110 Stat. 2105, 2137 (5 year cap); § 824, 110 Stat. at 2323 (work requirements).

120. *See* Alan W. Houseman, *The Vitality of* Goldberg v. Kelly *to Welfare Advocacy in the 1990s*, 56 BROOK. L. REV. 831, 846-47, 853 (1990); Zietlow, *supra* note 27, at 1129-30.

121. *See* White, *supra* note 65, at 42 (arguing that welfare has reflected and sustained women's subordination). *See generally* Martha Albertson Fineman, *The Nature of Dependencies and Welfare "Reform,"* 36 SANTA CLARA L. REV. 287 (1996) (arguing that welfare reform has furthered, rather than reduced, women's subordination).

122. Phillip J. Closius, *Rejecting the Fruits of Action: The Regeneration of the Wasteland's Legal System*, 71 NOTRE DAME L. REV. 127, 131 (1995).

123. *Id.* at 131.

124. *See* Sparer, *supra* note 72, at 562.

125. For example, even advocates for due process would not want the full panoply of procedural protections, including a right to appear in civil court for judicial review on the first review of any administrative decision terminating welfare benefits. That process would be too time consuming and complicated. Aside from the court congestion that it would cause, the process would also be a burden for welfare recipients. They would have to wait too long to get a decision, and might feel overwhelmed by the procedural trappings of a civil court case.

B. *The Limits of Formalism*

Many of the effects of the due process revolution that have been criticized above flow naturally from the limits of the formalism with which the Court has approach procedural due process issues since *Goldberg*. The Court uses a two-pronged approach to procedural due process issues. First, the Court determines whether the plaintiff has any liberty or property right at stake. If so, the Court then determines how much process is warranted, applying the three part test of *Mathews v. Eldridge*.[126] The approach that the Court has adopted, which requires a state or federal statute to recognize a positive liberty or property right before any protections are triggered in the first prong of its analysis, is fundamentally biased against the less privileged because it requires someone to have a right to something before they are entitled to any process, and because the courts are more willing to recognize the substantive rights of the rich than those of the poor. In addition, the Court's approach to determining how much process is due, the second step, does not adequately account for the principles of fairness and equality, which are essential for a meaningful due process jurisprudence.

In *Roth v. Board of Regents*, the Court laid out the guidelines for determining whether a property or liberty interest is at stake.[127] A property or liberty interest does not stem from a person's "unilateral expectation" of that benefit.[128] Rather, that person has an identifiable interest only if she can establish that she has "a legitimate claim or entitlement" to it.[129] In order to determine whether an individual has a claim to entitlement, courts should look to "outside sources such as state law."[130] If there is no entitlement, then there is no constitutional requirement to procedural protections.

As a result of the Court's ruling in *Roth*, all individuals who seek due process protections must peruse state law and other sources to prove that they are entitled to some property or liberty interest as a preliminary step to make their case.[131] Courts become mired in the formal questions interpreting state statutes to determine whether they have created a liberty or property interest. Along the way, courts lose sight of what is

126. *See supra* notes 104-07 and accompanying text.

127. 408 U.S. 564 (1972).

128. *Roth*, 408 U.S. at 577.

129. *Id.*

130. *Id.*

131. For examples of innovative approaches to proving a property interest in order to convince courts that process is still due in a block grant era, see John Bouman, *Due Process For Welfare Recipients Subject to Changing Program Rules: An Illinois Case Study*, CLEARINGHOUSE REV., June 1996, at 112-13; and Nancy Morawetz, *A Due Process Primer: Litigating Government Benefit Cases in the Block Grant Era*, CLEARINGHOUSE REV., June 1996, at 98-100.

really at issue—the fairness of the state's treatment of the individual.[132] Moreover, the process generates anomalous results. As Jerry Mashaw has noted, "[i]t is a 'strange constitution' that protects hobby kits and the right to dispute one's water bill," but not nursing home residents who object to being moved from one nursing home to another.[133] The Court's positivist approach has been criticized by scholars both because it is relativistic, and because it leaves people subject to the whims of state legislatures.[134] In fact, some judges and scholars have argued that state legislatures are free to limit procedural protections in substantive legislation without any constitutional restrictions.[135] Other scholars have argued that notions of property and contract must have a core of federal constitutional meaning.[136]

The Court's positivist approach is positivist because it depends on the state to create a positive liberty or property interest. It is arguably biased by nature against the poor and the disempowered. The relegation of procedural rights to state legislatures would harm the interests of poor people because of the importance of money in the legislative process. Even more significant, as Mashaw has pointed out, positive law grants no substantive rights when no standards exist for exercising administrative discretion.[137] That is because, after the language of *Roth*, courts must carefully analyze the language of a statute to determine whether a beneficiary had a reasonable expectation of entitlement. When a system of government benefits allows the state complete discretion in its administration, a reasonable person has no expectation of an entitlement.[138] Thus, people with less political power are less likely to have their interests determined to be entitlements by courts.

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132. *See* Jerry L. Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433, 434 (1987) [hereinafter Mashaw, *Dignitary Process*].

133. *Id.* at 437.

134. *See* Farina, *supra* note 1, at 197-201; Sylvia A. Law, *Some Reflections on* Goldberg v. Kelly *at Twenty Years*, 56 BROOK. L. REV. 805, 813-14 (1990); Mashaw, *Dignitary Process*, *supra* note 132, at 437-38; Reich, *Beyond the New Property*, *supra* note 95, at 732.

135. This "bitter with the sweet" theory, put forth by Justice Rehnquist and Judge Easterbrook takes the positivist approach to its logical conclusion. *See* Alexander, *supra* note 6, at 335; Pierce, *supra* note 4, at 1986-87. Under that theory, state legislatures may link substantive benefits with limits on procedural protections. That is, beneficiaries of state benefits must take the "bitter" (lack of process) with the "sweet" (government benefit). Pierce, *supra* note 4, at 1986-87. Such an approach would be completely antithetical to the notion of process and participation as a dignitary value, with fairness as a goal in and of itself. *Id.* ("Acceptance of the 'bitter with the sweet' theory would have constituted clear, if implicit, repudiation of the entire due process revolution."). The theory was rejected by the Court in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1985). However, it retains the support of some justices and member of the academy. *See generally* Pierce, *supra* note 4, at 1986-95.

136. *See* Fallon, *supra* note 1, at 329.

137. Mashaw, *Dignitary Process*, *supra* note 132, at 438.

138. *See* Colson v. Sillman, 35 F.3d 106, 109 (2d Cir. 1994) (finding that applicants for children's health benefits provided by the state had no due process rights because the state statute provided for benefits only within the limitations of funds appropriated for the program, and thus the benefits were not entitlements).

Moreover, the entitlement approach is fundamentally biased against the poor because it requires the existence of a property or liberty right before an entitlement to process can be found. "In short, the Court's entitlement analysis, grounded in positive law prescriptions, causes due process protection to drop out of the Constitution when needed most."[139] Therefore, the first step of the Court's due process jurisprudence is fundamentally flawed in its ability to provide process for the poor and the disenfranchised.

The second step of the Court's due process reasoning, the balancing test of *Mathews v. Eldridge*,[140] is also weighted against the interests of the poor and the disenfranchised. In the *Mathews* test, courts pit the state's interests against those of the individual seeking procedural protections. The test is weighted in the state's favor because providing due process will always be costly to the state, so the state will have an interest in not providing procedural protections, and because the property interest of any individual poor person will be small. It also harms poor people in particular because they cannot afford to buy procedural protections. For example, they cannot afford to hire a lawyer to help them enforce their rights.

Moreover, equality is not taken into account in determining the procedural protections required by constitutional provisions of due process. Thus, the Court could find that welfare recipients were entitled to pre-termination hearings in *Goldberg*, and later find that recipients of Social Security benefits, many of whom also depend on their benefits for survival, were not entitled to pre-termination hearings in *Mathews*.[141] Moreover, the *Mathews* approach pits beneficiaries against each other because it is premised on the notion that the state will pay for procedural protections with money that would otherwise have been allocated for benefits.[142] Finally, the *Mathews* balancing test leads naturally to a sterile bureaucracy. State agencies are allowed to mathematically compute how much process they will provide rather than determining what procedures would be the most fair, or the most likely to reach the correct result, and have no incentive to design procedures leading to such results. Therefore, those who are most dependent on those processes—the recipients of governmental benefits—have the most to lose under the balancing test.

C. *The Resonance of* Goldberg

Despite all of its limitations, on both the practical and theoretical level, *Goldberg* and its progeny are still meaningful for the poor and

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139. Mashaw, *Dignitary Process*, *supra* note 132, at 438.

140. 424 U.S. 319 (1976).

141. The Court has been criticized for relying on speculative factual reasoning in *Mathews* because, in fact, many Social Security recipients do rely on their benefits as the sole source of income. *See* Reich, *Beyond the New Property*, *supra* note 95, at 732.

142. Rutherford, *supra* note 5, at 50.

their advocates. Because courts, legislatures and administrators are often not receptive to the substantive claims of the poor, individual hearings are an important arena for advocacy.[143] The right to be treated with dignity is still a value in and of itself, and it remains one of the few rights that poor people can enforce, usually with the help of representatives, in administrative hearings. The value of procedure in and of itself is of particular concern when those affected belong to a historically disadvantaged and disempowered group, especially women and members of racial and ethnic minority groups.

Of all the reforms achieved by welfare rights activists in the 1960s, the right to due process hearings from *Goldberg* may be the only one to remain active and vital.[144] Because courts recently have not been as receptive to impact litigation as they were in the past, advocates have resorted to individual hearings to vindicate their clients' rights.[145] Administrative process provides one of the few avenues of redress for advocates for the poor.[146] Of course, procedural protections are no substitute for substantive economic rights. However, when poor people bring substantive claims, they nearly always threaten the power structure since economic issues are implicated by necessity. As the Supreme Court has failed to find economic rights in the Constitution, poor people must use their procedural rights to glean what they can from the system, even if the system is fundamentally unjust.

Moreover, the notion of formal rights continues to resonate for the poor and the disenfranchised.[147] For example, in the civil rights movement, people risked their lives (and sometimes lost them) in the fight for the formal right to vote. Prior to *Goldberg*, poor people had virtually no rights, procedural or otherwise.[148] One of the highest priorities of the National Welfare Rights Organization was for all people to be treated with

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143. *See* Houseman, *supra* note 120, at 835; Zietlow, *supra* note 27, at 1129-39.

144. *See* Houseman, *supra* note 120, at 832-33 (stating that the substantive reform cases such as *King v. Smith*, 392 U.S. 309 (1968), no longer provide a framework for advocates for the poor). However, *Goldberg* itself is now in jeopardy after the enactment of the recent welfare reform bill. *See infra* notes 184-91 and accompanying text.

145. Houseman, *supra* note 120, at 835; *see* Zietlow, *supra* note 27, at 1115-16 (discussing that legal services attorneys spend much of their time representing clients at individual hearings). In particular, impact litigation advocating for welfare reform has been a target of recent Congressional action as members of Congress were annoyed by the attempts of advocates for the poor to influence welfare reform policy.

146. Houseman, *supra* note 120, at 836.

147. *See, e.g.*, Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 314-15 (1987) (finding informal process to have negative impact on minorities); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studues and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 390-91 (1987) (identifying need for structure in identifying and eliminating racism); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Reconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 408 (1987) (commenting on need for formal legal processes to assure rights).

148. Law, *supra* note 134, at 806.

dignity, rather than contempt and patronization, by the state workers with which they came into contact.[149]

Studies show that people who are disenfranchised are correct in valuing formal procedures.[150] Decision makers are less likely to act on prejudice if they are constrained by formal procedures.[151] Therefore, people who have faced historical discrimination, including women, people of color and poor people, have more to gain from formal procedures. Process also may serve as a means of empowerment for the disempowered. A formal hearing allows a person an arena in which to voice her concerns and air her grievances.[152] Moreover, process can serve as a means to balance power.[153] Procedural protections are designed to limit power imbalances by allowing people to participate in decisions that affect their lives.[154] Finally, as the opportunity to participate is essential to one's identity as a citizen, we must not overlook the importance of that opportunity to preserve the dignity of all of our citizens, regardless of their race, gender, ethnicity or income level.

IV. THE DUE PROCESS COUNTERREVOLUTION

In recent years, this country has undergone a due process counterrevolution, in which courts and legislatures have restricted the due process rights that they once had expanded thirty years ago.[155] Just as the due process revolution was most beneficial to the economically underprivileged, it is the poor and the disenfranchised who are losing their rights in

149. *See supra* note 73. Similarly, feminists seem drawn to procedural issues and protections as a means of empowerment for women, who have historically been disempowered. *See* Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 U. CIN. L. REV. 1223 (1993).

150. I have addressed this issue at length in my earlier work, Zietlow, *supra* note 27, at 1114-21.

151. *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387-89 (stating that without procedural formalities, decision makers are more likely to be swayed by prejudice); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) (stating that poorer parties are disadvantaged in the bargaining process because of their limited resources to finance litigation).

152. In her *Sunday Shoes* article, Lucie White tells the story of her representation of a client in a welfare hearing who appears to be overwhelmed and confused by the formal process of the hearing. White, *supra* note 65. White is effective in pointing out the limits of the effectiveness of procedure as an empowering structure. *Id.* However, White's story, rather than proving the disempowering nature of procedure, shows how it can be effective as a means of empowerment. By White's own account, her client was happy with the hearing and felt that she was able to tell her story. *Id.* at 31. Moreover, although she lost the formal appeal, she won her case when the county welfare department dropped the overpayment charge against her. *Id.* at 32.

153. Rutherford, *supra* note 5, at 5.

154. *See* Fiss, *supra* note 151, at 1077-78 (pointing out that one goal of the Federal Rules of Civil Procedure is to lessen the impact of distributional inequalities through the use of formal procedures).

155. *See generally* MASHAW, *supra* note 1, at 29-41 (suggesting the costs of increased citizen access to administrative hearings has driven courts to rethink participation rights granted in the early 1970s); Pierce, *supra* note 4 (stating that after a relatively stable post-revolution period from 1978-1994, recent developments foreshadow a due process counterrevolution).

the counterrevolution. In the administrative realm, the counterrevolution manifests itself in the Court's cutting back on what constitutes a liberty or property interest that triggers due process,[156] and in reducing the procedural protections that are constitutionally required.[157] Moreover, federal and state legislatures are reducing the procedural rights of recipients of government benefits by redefining some governmental benefits as lacking entitlement status, and therefore as "non-property."[158]

The due process counterrevolution in the administrative sphere will severely affect the ability of the poor to participate in decisions which will affect their lives. In addition, recent developments which encompass a broader notion of process will also serve to further disenfranchise the poor. For example, other related developments in the procedural realm of civil procedure, including amendments to Federal Rule of Civil Procedure 23, will restrict the ability of the poor to bring class actions to vindicate their rights. Restrictions on Legal Services Corporation (LSC) activities signal a significant decline in the procedural rights of the economically disadvantaged, and cuts in funding for the LSC threaten to deprive poor people of the primary access that they have to an attorney, further limiting their ability to participate effectively in decisions that affect their lives. Finally, the Court's interpretation of the First Amendment in election finance cases virtually insures that poor people will have little or no say in the political process. All of these developments have an impact on the ability of the poor to exert control over their own destinies, and implicate the right to participate in a broader sense than that traditionally referred to as procedural.[159] Moreover, they illustrate the increasing disenfranchisement of the poor in almost every aspect of their lives. Therefore, the author considers them to be essential aspects of the due process counterrevolution.

A. *The Administrative Counterrevolution*

The Supreme Court began its retreat from the due process revolution before it was even complete.[160] By 1978, the Court had issued nine opinions that reduced the scope of due process protections required by the Constitution.[161] Moreover, the Court limited the scope of interests triggering due process protections in cases involving harm to one's

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156. *See* Sandin v. Conner, 515 U.S. 472 (1995).

157. *See* Parratt v. Taylor, 451 U.S. 527, 541 (1981), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986).

158. The most significant development in this realm is the new Transitional Aid to Needy Families program of the Welfare Reform Act, which specifically defines welfare benefits as lacking entitlement status. 42 U.S.C. § 601 (1994).

159. For example, neither Mashaw nor Pierce refer to these developments in their discussion of a due process counterrevolution. *See generally* Pierce, *supra* note 4; MASHAW, *supra* note 1, at 29-41.

160. Pierce, *supra* note 4, at 1973.

161. *Id.* at 1973 & n.2.

reputation,[162] and in the context of regulatory proceedings.[163] In several other opinions, the Court held that the Constitution did not require a full *Goldberg*-style hearing before benefits could be terminated, but could be satisfied by an informal paper review prior to governmental action.[164] The most significant of these cases, however, is *Mathews v. Eldridge*,[165] in which the Court rejected the broad-based ideological vision of its *Goldberg* opinion in favor of a utilitarian approach, which principally reflected a concern about the cost of procedural protections.[166] As noted above, *Mathews* set the stage for a due process regime in which poor people are by nature likely to be under served. In a series of cases, the Court has also cut back on what procedural protections are required in the context of claims brought under the primary civil rights statute, 42 U.S.C. § 1983, for compensation sought as redress for denials of process.

Recent Supreme Court rulings have limited the ability of plaintiffs to bring procedural due process claims under section 1983. These rulings reflect the Court's impatience with the number of such claims that resulted from the due process revolution. For example, in *Parratt v. Taylor*, the Court limited the ability of plaintiffs to recover under section 1983 from the lack of pre-deprivation process to protect from the "random and unauthorized acts" of government officials.[167] In *Sandin v. Conner*, the Court limited the ability of a prisoner to recover under section 1983 for actions of prison officials which arguably violated his procedural rights.[168] Both cases can be seen as nothing more than the Court's attempt to curb section 1983 actions when other procedural remedies were available. However, the cases also may have repercussions that further undermine the constitutionally required procedural rights in the administrative context.

In *Parratt*, the plaintiff was a prisoner whose hobby kit was lost by the prison employees in the mail room.[169] Although he could have brought a post-deprivation state court action in tort, he decided instead to file a section 1983 action in federal court, alleging violation of his due process rights by prison officials because he was denied a pre-

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162. *See* Paul v. Davis, 424 U.S. 693, 708-09 (1976) (holding that government action which stigmatizes triggers a property interest only if that stigma denies a state-protected right, and loss of reputation is not such a right).

163. *See* Pierce, *supra* note 4, at 1984.

164. *See id.* at 1983.

165. 424 U.S. 319 (1976).

166. *See* Pierce, *supra* note 4, at 1982 ("The dramatically different tone of the opinion in *Eldridge*, however, seemed to send a message that *Goldberg*, and its welfare context, represented the high water mark for the procedures the Court would require before the government could deprive an individual of an interest protected by due process.").

167. 451 U.S. 527 (1981).

168. 515 U.S. 472 (1995).

169. *Parratt*, 451 U.S. at 529-30.

deprivation remedy.[170] The Court found that pre-deprivation process is not constitutionally required when it is not feasible, and when the person affected has sufficient post-deprivation remedies.[171] The Court held that a state need not provide pre-deprivation procedures to guard against "random and unauthorized acts" by the state.[172]

The Court's ruling in *Parratt* may be nothing more than simply creating an abstention doctrine encouraging plaintiffs to use state tort remedies.[173] However, at the very least, *Parratt* places the burden on plaintiffs to prove the constitutional inadequacy of a state's remedies.[174] The *Parratt* Court appeared to condone random and unauthorized government acts by holding that it would be too difficult to provide pre-deprivation remedies for those acts. If so, *Parratt* represents a significant barrier to establishing due process protections when they are arguably needed the most.[175] For example, in the case of *Clifton v. Shaffer*, the Court of Appeals for the Seventh Circuit relied on *Parratt* when it found that a plaintiff who suffered a two month deprivation of his welfare benefits because of a mistake made by his caseworker did not state a due process claim under section 1983 because the caseworker's act was random and unauthorized.[176] When interpreted in this manner, the *Parratt* doctrine means that due process does not protect against the most arbitrary and unfair state action.

The Court's recent decision in *Sandin v. Conner* also may be a significant development in the due process counterrevolution.[177] In that case, the Court put severe limits on what could be considered to be the definition of a liberty interest, finding that a prisoner is deprived of a liberty interest only when the state's action imposes an "atypical or significant hardship on the inmate in relation to the normal incidents of prison life."[178] The Court found that the plaintiff's thirty days in solitary confinement was not "atypical" or "significant" enough to implicate a liberty interest.[179] Thus, the Court severely limited the scope of what a prisoner could claim as a "liberty" interest.

Most importantly, in *Sandin* the Court appears to have created a third hurdle for persons attempting to bring due process claims—a hurdle

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170. *Id.* at 543-44.

171. *Id.* at 538.

172. *Id.* at 541.

173. *See* Fallon, *supra* note 1, at 345-51.

174. *Id.* at 356.

175. *See* Morawetz, *supra* note 131, at 103.

176. 969 F.2d 278 (7th Cir. 1992). The plaintiff in *Clifton* had also filed an administrative appeal, which eventually resulted in the restoration of his benefits. *Clifton*, 969 F.2d at 280. However, he was left without compensation for the damages that he incurred during the two months in which he was without benefits due to the error of his caseworker.

177. 515 U.S. 472 (1995).

178. *Sandin*, 515 U.S. at 484.

179. *Id.* at 486.

of "importance."[180] The Court's ruling in *Sandin* is presently confined to prisoners' rights cases, and the Court's reluctance to find a liberty interest for an incarcerated individual, as well as its regard for the state's interest in security,[181] were obvious factors in this case. Nevertheless, *Sandin* may have significant repercussions in all administrative due process contexts.[182] The "importance" threshold may be particularly problematic for poor people because the amount of property or liberty at issue in any particular due process claim almost always will be small enough to enable courts to find that their interest is simply not important enough, thus further undermining procedural due process protections to the poor and the disenfranchised. Moreover, it completely sidesteps the issue of fairness. The Court's reasoning in *Sandin* seems to imply that the Constitution will tolerate unfairness as long as the courts do not deem the unfairness to be important.[183]

B. *The End of* Goldberg*?*

Most significantly for the poorest of the poor, the welfare reform bill recently enacted by Congress encourages states to test the validity of *Goldberg* itself.[184] In that statute, Congress abolished the New Deal-era program of Aid to Families with Dependent Children and replaced it with a new program, Temporary Assistance to Needy Families (TANF).[185] This law states emphatically that welfare benefits are no longer entitlements.[186] Since the new welfare benefits are no longer entitlements, the Court might find that they no longer trigger due process protections. Therefore, welfare beneficiaries may no longer be constitutionally entitled to pre-termination hearings, or to any other due process protections.

In *Goldberg*, the Court glossed over the issue of whether the plaintiffs had a protected property interest, noting only that benefits were statutory entitlements.[187] In *Board of Regents v. Roth*, the Court further clarified that a person is entitled to benefits only if he or she can demonstrate "a legitimate claim of entitlement" to them, grounded in statutory

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180. *See* Morawetz, *supra* note 131, at 98.

181. *See* Hewitt v. Helms, 459 U.S. 460 (1983).

182. *See* Pierce, *supra* note 4, at 1989 (stating that *Sandin* may be the first of a series of counterrevolutionary decisions).

183. Moreover, the Court in *Sandin* appeared to place a high threshold on importance when it found that thirty days of solitary confinement was not "important" enough to merit constitutional protection. *Sandin*, 515 U.S. at 486.

184. *See* Pierce, *supra* note 4, at 1976, 1989-90; Zietlow, *supra* note 27, at 1126-27.

185. The Welfare Reform Act of 1996, Pub. L. No. 104-193 § 103, 110 Stat. 2105, 2112 (codified in scattered sections of 42 U.S.C.).

186. *Id.* § 401.

187. *See* Goldberg v. Kelly, 397 U.S. 254, 262, 263 n.8 (1970) (characterizing welfare benefits as statutory entitlements for those eligible and "welfare entitlements as more like 'property' than a 'gratuity'").

law or other sources.[188] After *Roth*, it appears that discretionary programs probably do not trigger due process protections.[189] For example, in the case of *Colson v. Sillman*, the court found that no due process protections were warranted for recipients of state funded children's medical benefits because the statute defining the program stated that their availability depended on money being appropriated for them.[190] Under the new welfare statute, states may run out of money because states also are not entitled to federal money with which to pay for benefits.[191] Therefore, states may link the right to welfare benefits on appropriations, creating contingent entitlements similar to those at issue in *Colson*. The TANF program, while giving a large amount of discretion to states, also goes a step further by emphatically stating that benefits are not entitlements.[192] Given the Court's ruling in *Roth*, and Congress' clear intentions, it is unlikely that the Court would find an entitlement to welfare benefits if it were to decide *Goldberg* today. Without such a property interest to trigger protections, it is unlikely that the Court would find any constitutional requirement to process for welfare recipients under its current mode of analysis.

The TANF program delegates wide discretion to states in establishing and administering welfare programs.[193] Several states have taken the hint from Congress, and restricted the procedural rights of beneficiaries and applicants to their welfare programs.[194] Both Wisconsin and Michigan, considered to be pioneering states in welfare reform issues, have taken steps to reduce the due process rights of welfare recipients. Under the new "Wisconsin Works" (W-2) program, the administering agency, the Department of Workforce Development (DWD), is only required to review agency decisions that involve the denial of an application based solely on the determination of financial eligibility.[195] On all other matters, the DWD is not required to review the local agency's decision, although

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188. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The Court noted that its decision in *Goldberg* was triggered by the fact that welfare recipients "had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them." *Id.*

189. *See* Morawetz, *supra* note 131, at 104. However, welfare recipients might still be entitled to procedural protections from government action that is completely arbitrary, such as the denial of benefits based on eye color or hat size. *See generally* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Fallon, *supra* note 1 (discussing procedural protections of the due process clause against arbitrary decisions by the government).

190. 35 F.3d 106, 109 (2d Cir. 1994). *But see* Eidson v. Pierce, 745 F.2d 453, 462 (7th Cir. 1984) (alluding that establishment of eligibility is contingent on availability of resources as establishing an entitlement).

191. *See* Zietlow, *supra* note 27, at 1127.

192. The Welfare Reform Act § 401.

193. The Welfare Reform Act § 401.

194. These measures will almost certainly be subject to challenge on constitutional grounds, and may be found to be unconstitutional by the courts. Such a challenge would give the Supreme Court the opportunity to reinterpret its *Goldberg* ruling. *See infra* Part VII.

195. WIS. STAT. § 49.152(1) (1996).

it is authorized to do so.[196] There is no requirement to continue benefits while an appeal is pending under the W-2 dispute resolution process. Thus, the state of Wisconsin is disregarding the essentials of the *Goldberg* ruling. Moreover, the review need not include the bedrocks of due process—prior notice and the opportunity for a hearing.[197] Rather, the W-2 program allows only for a "review" by the agency or the DWD, and prompt review and notification are not specifically required.[198]

Similarly, in Michigan, the Family Independence Agency (FIA) has proposed regulations that would allow the agency to close or reduce assistance at the time when notice of the proposed action is sent.[199] The regulation would eliminate the procedural protections of advance notice and pre-termination hearings.[200] Moreover, the Administrative Law Judges (ALJs) who conduct the hearings are now strictly limited as to what they can determine in the hearings. ALJs have no authority to make decisions on constitutional grounds, overrule statutes, overrule promulgated regulations or overrule or make exceptions to the agency policy set out in program manuals.[201] Any such issues must be referred to a review board known as the Policy Hearing Authority. These regulations will make it difficult for welfare recipients to win any constitutional, statutory, or policy arguments at their hearings. Like the restrictions on LSC attorneys, their obvious if unstated purpose is to stifle the participation of welfare recipients with regard to any policy issues that may have an impact on a larger number of people.[202]

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196. *Id.* § 49.152.

197. *Id. See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (stating that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that . . . deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing").

198. WIS. STAT. § 49.152(2). The lack of a requirement for prompt review is particularly significant given the fact that benefits need not be provided while one is awaiting review. This issue was one of the bases for the Court's ruling in *Goldberg*. *See supra* notes 79-81 and accompanying text.

199. *See* MICH. ADMIN. CODE § 400.902 (1997) (proposed version) (copy on file with author).

200. The proposed rules would still allow the reinstatement of benefits if a claimant requests a hearing, in writing, within ten days of the mailing of the notice of the negative action, significantly easing the impact of the lack of prior notice on the recipient. *Id.* § 400.904(5).

201. FAMILY INDEPENDENCE AGENCY, STATE OF MICHIGAN, DELEGATION OF HEARING AUTHORITY (1997) (copy on file with author).

202. The TANF program requires recipients to participate in work activities in order to receive their benefits. *See* The Welfare Reform Act of 1996, Pub. L. No. 104-193 § 824(o)(2), 110 Stat. 2105. Until recently, it appeared that welfare recipients who work would also be exempt from statutory worker protections, such as the Fair Labor Standards Act and the Occupational Health and Safety Act, making even those who work second class citizens with little hope of belonging to society. However, the recently passed House Appropriations Bill, Pub. L. No. 105-133, 111 Stat. 251 (1997), states that welfare workers are "employees" subject to statutory protections. The willingness of Congress to agree to this requirement indicates at least some political will to limit the disenfranchisement of the poor. It also indicates the gains that may result when the poor are supported by powerful lobbyists for big labor, for whom the protections were a priority. *See* Adam Clymer, *White House and the G.O.P. Announce Deal to Balance Budget and to Trim Taxes*, N.Y.

C. *The Lack of Counsel*

Another significant blow to the procedural rights of poor people, initiated by Congress and supported by court rulings, is the decline in access to legal representation for poor people. The principle development in this area is Congress's recent cuts in funding for the Legal Services Corporation (LSC). Representation by an attorney is crucial to enforce the rights, both procedural and substantive, of the poor.[203] The Legal Services Corporation is the principal provider of counsel to the poor.[204] However, in recent years Congress has drastically cut funding to the LSC.[205] As a result, the number of attorneys available to poor people has diminished significantly.[206] Moreover, recent Court rulings indicate that resort to the courts to find a right to counsel would be fruitless. The lack of counsel is a significant blow to the ability of those who cannot afford an attorney to participate in the legal process.

In particular, the lack of representation by counsel affects women and people of color, who have historically suffered from discrimination, most severely. Studies show that women have a particularly hard time speaking for themselves in court and other formal situations because of speech patterns that accompany gender domination.[207] Some linguists have noted significant differences in the speech patterns of women and men, with men being more direct and efficient in transmitting information, and women more concerned at being polite and avoiding offending the listener.[208] Other linguists critique this finding and argue that women's speech patterns are just different "strategies" for conveying information, which are most pronounced in the speech of racially and

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TIMES, July 29, 1997, at A1 (noting that "[u]nions had feared that if those employees were paid less, they would undercut union workers").

203. Zietlow, *supra* note 27, at 1114-15.

204. *See* Houseman, *supra* note 120, at 836-37 (describing the importance of Legal Services Corporation to poverty law).

205. For example, Congress reduced LSC funding by thirty percent to $278 million in fiscal year 1996, a reduction of $122 million from fiscal year 1995. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321. The budget for fiscal year 1997 provides $283 million in funding, virtually the same level as in 1996. Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 (1997). The proposed budget for fiscal year 1998 has increased slightly, with an appropriations amount of $300 million. S. 1022, 105th Cong. (1997) (passing Senate with 99-0 vote and currently awaiting House action).

206. In 1980, 6,559 attorneys were employed by LSC-funded programs. LEGAL SERVICES CORPORATION, CHARACTERISTICS OF FIELD PROGRAMS SUPPORTED BY THE LEGAL SERVICES CORPORATION START OF 1984—A FACT BOOK 21 (1984). In 1996, the number of attorneys employed by the LSC-funded programs was reduced to only 3,642. LEGAL SERVICES CORPORATION, CHARACTERISTICS OF FIELD PROGRAMS SUPPORTED BY THE LEGAL SERVICES CORPORATION START OF 1996—A FACT BOOK 7 (1996).

207. *See* Colene Flynn, *In Search of Greater Procedural Justice: Rethinking* Lassiter v. Department of Social Services, 11 WIS. WOMEN'S L.J. 327, 345-48 (1996); White, *supra* note 65, at 4.

208. *See* White, *supra* note 65, at 14-16.

economically subordinated women.[209] Both theories indicate the importance of counsel to aid those women in telling their stories to decision makers.[210]

Despite the evidence that counsel is particularly important for the poor and the disenfranchised, the Supreme Court has never found a constitutional right to a government funded attorney for a civil litigant. In *Lassiter v. Department of Social Services*, the Court found a limited right to a determination of whether appointment of counsel was necessary in proceedings to determine whether parental rights should be terminated.[211] However, the Court indicated that a presumption exists against constitutionally requiring the appointment of counsel unless the parent also risked criminal prosecution.[212] In *Walters v. National Ass'n of Radiation Survivors*, the Court evinced even greater hostility toward a constitutional right to representation by counsel when it upheld a ten dollar limit on the amount that attorneys could be reimbursed for helping clients to obtain VA benefits.[213] Presumably, the Court's decision in *Walters* was based on the fear of the expense to the government that paying attorneys a standard fee would entail.[214] If so, it is yet another example of how the cost calculating, utilitarian approach of *Mathews* harms poor people.

Statistics show that poor people are more likely to prevail in hearings if they are represented by counsel, because without counsel, even formal procedures are often ignored by judges.[215] Formal procedures are designed to foster participation and enhance the fairness of the decision-making process.[216] Without attorneys to enforce those procedural protections, however, the ability of poor people to participate in decisions that affect their lives will be limited.[217] In practical terms, the declining availability of counsel to poor people may be the greatest blow to their ability to participate in those decisions, and the most significant factor in the due process counterrevolution.

D. *Limits on Civil Litigation*

Recent restrictions on the ability of the poor to use civil litigation to effectuate law reform constitute another development in the due process

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209. *Id.* at 15-16.

210. *See also* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1597-1607 (1991) (critiquing the mediation process because lawyers are often excluded and arguing that exclusion of attorneys disproportionately hurts women clients).

211. 452 U.S. 18, 31-32 (1981).

212. *Lassiter*, 452 U.S. at 25-27.

213. 473 U.S. 305, 334 (1985).

214. *Walters*, 473 U.S at 320-21 (noting that "the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard").

215. *See* Zietlow, *supra* note 27, at 1114 nn.13-15 (citing statistical studies).

216. *See* Fiss, *supra* note 151, at 1077-78 (arguing that the judicial process knowingly struggles against inequalities of wealth between the parties).

217. *See* Zietlow, *supra* note 27, at 1115 n.22 (providing transcript of Jernigan "trial").

counterrevolution. Restrictions recently imposed by Congress have limited the activities of attorneys funded by the Legal Services Corporation to prevent LSC attorneys from bringing class actions,[218] and from challenging welfare reform measures in court or in administrative hearings.[219] Proposed amendments to Federal Rule of Civil Procedure 23 also would restrict plaintiffs' use of class actions. These developments restrict the ability of the poor to participate through the means of civil litigation, cutting off another avenue of process.

LSC attorneys are now prohibited from representing clients in class action suits, which have historically been a tool for lawyers for the poor to use to enact law reforms which benefit the poor.[220] The ability to use civil litigation to effectuate law reform is particularly important for those disenfranchised due to their race, class or gender because their lack of economic resources and corresponding lack of political clout make it difficult for them to effectively use the political process to achieve reform and for each to hire an individual attorney for their case. The prohibition on class action representation by LSC-funded attorneys, by far the principal provider of legal representation for the poor, thus cuts off one of the main avenues for poor people to fight for legal reform.[221]

The fastest developing and most crucial current legal issue for the poor are the major changes that have resulted from state and federal welfare reform measures. Yet, restrictions on LSC attorneys insure that poor people will find it extremely difficult to influence those reform measures through the use of the civil litigation process. Those restrictions prohibit LSC recipients from initiating litigation involving, or challenging, or participating in, efforts to reform a federal or state welfare system.[222] The new regulation limits the scope of permissible representation to individual issues which do "not involve an effort to amend or otherwise challenge existing law."[223] These restrictions clearly limit the ability of LSC attorneys to effectively represent their clients in welfare related cases because they mistakenly assume that attorneys can bifurcate individual issues from challenges to the legitimacy of laws and regulations in the

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218. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 § 504, 110 Stat. 1321.

219. Legal Services Corporation: Welfare Reform, 62 Fed. Reg. 30,763, 30,766 (1997) (to be codified at 45 C.F.R. § 1639.3).

220. *See* FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR 307 (1971) (stating that poverty lawyers saw class actions as a major vehicle for reforming laws that affect the poor); Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 350 (1988) ("In its twenty-two years of existence, subdivision (b)(2) has contributed to the revolutions in civil and welfare rights that have marked the legal history of an era."). For example, *Goldberg* was brought as a class action suit.

221. The new restrictions on LSC funds also prohibit lobbying by anyone employed in a program which receives those funds, thus cutting off the other main avenue for law reform. *See infra* notes 244-51 and accompanying text.

222. Legal Services Corporation: Welfare Reform, 62 Fed. Reg. 30,763, 30,766 (1997).

223. *Id.*

representation of their clients.[224] Most importantly, however, these restrictions severely limit the ability of poor people to participate in decisions about governmental policies that will almost surely impact on their lives.[225] The LSC restrictions are an example of how procedure without substance can be hollow for poor people. Even if LSC attorneys continue to be funded, their ability to help their clients and bring about substantive justice has been hampered severely by the restrictions.

The proposed amendments to Federal Rule of Civil Procedure 23 also limit the ability of plaintiffs to bring class actions and reduce procedural protections for class action plaintiffs. Two proposed changes most threaten the procedural rights of class actions plaintiffs. One proposed amendment would allow for the certification of classes for settlement purposes only.[226] This proposed amendment contains no effective guidelines for certifying such a class, it may violate the constitutional "case or controversy" requirement, and it invites collusion between lawyers who wish to settle actions to insure payment of attorneys' fees, raising ethical concerns.[227] Moreover, to the extent that the proposed changes would encourage settlement of class actions, they would concomitantly reduce the procedural protections of class action litigants, rendering them subject to the more informal, and less protective, settlement process.[228] A second proposed amendment to Rule 23 would allow for interlocutory appeal of trial court orders certifying classes, but not for court orders denying class certification.[229] Again, the pattern is clear. This proposed change would favor defendants, who tend to be richer, more powerful, and more likely to benefit from delay, and harm plaintiffs, who tend to have fewer resources. Thus, both proposed changes would limit the ability of poor people to effectuate law reform through class actions, further contributing to the due process counterrevolution.

E. *Barriers to Political Participation*

The ultimate form of participation in a democracy is the ability to take part in the political system. Yet, the rising costs of political cam-

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224. *See* Recent Legislation, *Constitutional Law—Congress Imposes New Restrictions On Use of Funds By The Legal Services Corporation*, 110 HARV. L. REV. 1346, 1347 n.12 (1997).

225. In addition, at least one state, Michigan, has promulgated rules that exempt welfare eligibility standards from the notice and comment provisions of the Administrative Procedure Act. MICH. COMP. LAWS. § 24.207(7)(m) (Supp. 1997). Without the notice and public hearing required administratively, welfare recipients will have even less opportunity to influence welfare policy.

226. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL AND CRIMINAL PROCEDURE 41-43 (1996) (containing the August 1996 proposed amendments to Fed. R. Civ. Pro. 23(b)(4)).

227. *See* Letter from Steering Committee To Oppose Proposed Rule 23, to Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure (May 28, 1996) (on file with author).

228. *See* Delgado et al., *supra* note 151, at 1395; Fiss, *supra* note 151, at 1076-78.

229. H.R. 1252, 105th Cong. § 3 (1997).

paigns and resulting importance of campaign fund raising has had the effect of limiting the ability of people without money to have an impact on that process.[230] The Supreme Court has contributed to this phenomenon in its decisions equating spending money with speech in the realm of campaign finance. Moreover, restrictions on the ability of LSC funded agencies to lobby on behalf of their clients further reduce the ability of poor people to participate in public policy making. Thus, poor people are excluded from perhaps the most important form of process—politics itself—and risk complete disenfranchisement.

The Supreme Court linked traditional notions of process with participation in the political process in its decision in *Atkins v. Parker*.[231] In *Atkins*, the plaintiffs challenged a generalized notice that the state of Massachusetts issued to food stamp recipients on due process grounds.[232] The notice informed recipients that their food stamp benefit levels might be decreased as a result of changes to governing regulations, but did not indicate the impact of the changes on an individual's case.[233] The Court found that recipients were not entitled to individualized notices or prior hearings because across the board cuts did not trigger the protections of the Due Process Clause.[234] Instead, the Court found that the legislative process gave recipients all the process that they were due when benefit levels are adjusted by the legislature.[235] Thus, the Court refused to protect poor people through judicial process and sent them into the political realm to fend for themselves as if they were not severely handicapped in that arena.[236]

The Supreme Court has recognized limited economic rights to participate in the political process in cases involving clear economic barriers to participation. For example, the Court struck down the Texas system of financing primary elections in which the candidates themselves were required to pay the filing fees,[237] and a Louisiana law restricting the right to vote in some municipal elections to "property taxpayers."[238] Of course, the pre-*Goldberg* Court invalidated state poll taxes in a ruling that was

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230. In fact, it could be persuasively argued that only the very rich really have the ability to participate in the political process under the current campaign finance system.

231. 472 U.S. 115 (1985).

232. *Atkins*, 472 U.S. at 120-21.

233. *Id.*

234. *Id.* at 129-30.

235. *Id.* (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 432-33 (1982)).

236. In an interesting related development, the Ohio state legislature passed a bill which requires applicants for welfare to receive a voter registration application at their required orientation meeting. OHIO REV. CODE ANN. § 5101.54(f) (Banks-Baldwin 1997). Apparently, the author of this provision recognized the importance of political participation for welfare recipients.

237. Bullock v. Carter, 405 U.S. 134 (1972).

238. Cipriano v. City of Houma, 395 U.S. 701, 705-06 (1969).

based in part on the recognition that southern states had used those taxes to exclude African Americans from voting.[239]

In all of these cases, state fees were a concrete barrier to the basic rights to vote and to run for political office. However, the Court has been considerably less sensitive to the impact of one's income on the ability to participate in the political process in cases involving less tangible economic barriers to participation which are more intangible. For example, in *Buckley v. Valeo*, the Court found that the expenditure of money on political campaigns is political speech, protected by the First Amendment.[240] The Court upheld restrictions on direct contributions to campaigns, but struck down provisions of federal campaign finance laws that limited independent expenditures and expenditures by candidates of personal or family funds. Relying on similar logic, the Court also has struck down restrictions on the amount of money that corporations could spend on public initiative campaigns.[241]

In the campaign finance cases, the Court ruled on the side of autonomy of people with financial resources, despite the adverse effect that the ruling would have on the ability of people without those resources to participate in the debate. Because the Court has been unwilling to intervene on behalf of the disenfranchised, it has compounded the injustice inherent in a capitalist society.[242] Since the Court's rulings, the price of campaigns has skyrocketed.[243] Special interest Political Action Committees (PACs) have become the most important source of campaign funding, and have taken on the role of shaping the political agenda, determining which issues are addressed, and which are ignored, in the political debate. Yet PACs are inherently non-democratic because they are privately run and therefore unaccountable for their campaign tactics. Because the power PACs have is directly related to the amount of money

239. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665-66 (1966).

240. Buckley v. Valeo, 424 U.S. 1 (1976).

241. *See* Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley, 454 U.S. 290 (1981) (striking down City of Berkeley ordinance limiting contributions to $250 to committees formed to support or oppose ballot measures); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (striking down a Massachusetts statute aimed at prohibiting corporate expenditures for the purpose of influencing votes).

242. *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410 (1986) ("[A]utonomy may be *insufficient* to insure a rich public debate. Oddly enough, it might even be *destructive* of that goal.") (emphasis added); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 783 (1987) (advocating an activist role of the state in First Amendment cases to protect minority voices from being drowned out). Phillip Fremont-Smith, a spokesman for the National Republican Congressional Committee, equated spending money with political speech when he recently explained, "I haven't seen any skittishness from donors. People want to be involved in politics. They want to add their voice." Leslie Wayne, *The Parties Talk of Reform, And Bring in Record Money*, N.Y. TIMES, Aug. 6, 1997, at A1.

243. *See* Joseph Finley, Comment, *The Pitfalls of Contingent Public Financing in Congressional Campaign Spending Reform*, 44 EMORY L.J. 735, 735-37 (1995); Marty Jezer & Ellen Miller, *Money Politics: Campaign Finance and the Subversion of American Democracy*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467, 468-89 (1994); Wayne, *supra* note 242, at A1.

that they raise, few PACs represent the interests of the poor. Few PACs represent the interests of minorities, and those that do rely on limited funding and therefore have limited power. Moreover, the increased importance of money in the political process by its very nature reduces the access of the poor to that process. The Court's overly capitalist interpretation of the First Amendment, equating money with speech, has further reduced the ability of the poor and the disenfranchised to participate, and has thus contributed to the due process counterrevolution.

Because the access of most people to politicians is limited due to their lack of economic resources, they must resort to lobbyists to voice their cause.[244] Yet, recently enacted restrictions on LSC funds will decrease the number of lobbyists for the poor. In 1996, Congress passed legislation that would prohibit the use of any LSC funds by any agency that is engaged in lobbying activities,[245] or by any agency that is engaged in welfare reform litigation or lobbying.[246] In response to public criticism and court rulings finding the regulations prohibiting lobbying with non-LSC funds unconstitutional,[247] the rule was amended to allow agencies to use non-LSC funds for lobbying.[248] However, the restrictions on lobbying for welfare reform issues remain. Moreover, the access to lobbyists is still limited to those funded by non-LSC funds. Thus, that channel to participation in the political process has been narrowed.

Recent reforms in public benefits program indicate that the voices of poor people are not being heard due to the barriers to their participation in the political process, and the importance of money in that process. For example, the TANF program places a five year life time limit on the receipt of welfare benefits.[249] Amendments to the federal food stamp regulations similarly limit the receipt of food stamps to three months in a 36 month period if the recipient does not fulfill the work requirement.[250] The limit on food stamps is particularly significant for unemployed "able" adults, for whom food stamps were the only source of income. Leaving aside the issue of whether other reforms, such as work require-

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244. The successful lobbying of labor unions on behalf of statutory protections for welfare recipients who work illustrates the impact of powerful allies to speak for the poor within the political process.

245. *See* Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. No. 104-134 § 504, 110 Stat. 1321.

246. *Id.* § 504(a)(16).

247. *See* Legal Aid Soc'y v. Legal Services Corp., 961 F. Supp. 1402 (D. Haw. 1997) (enjoining the LSC from enforcing restrictions on the recipients' use of non-LSC funds because the court determined a fair likelihood that those regulations infringed on First Amendment rights), *cited in* Legal Services Corporation: Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 62 Fed. Reg. 27,695, 27,695 (1997) (to be codified at 45 C.F.R. § 1610).

248. *See* Legal Services Corporation: Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 62 Fed. Reg. 27,695 (1997) (to be codified at 45 C.F.R. § 1610).

249. The Welfare Reform Act of 1996, Pub. L. No. 104-193 § 408(a)(7), 110 Stat. 2105 (to be codified at 42 U.S.C. § 608(a)(7)).

250. The Welfare Reform Act § 824(o)(2).

ments, will benefit the poor, it is clear that the stringent time limits on the receipt of benefits will cause hardship to many people, particularly during hard economic times. It is apparent that the voices of those people were not heard when these limits were proposed and enacted.[251] Thus, the TANF program is a striking example of how the lack of procedural rights can result in a lack of substantive rights.

V. THE WIDENING GAP

The due process counterrevolution will most severely affect the rights of poor people. The counterrevolution also may impact some middle class people. Those who fail to pay their child support or are arrested for drunk driving are affected by recent statues enacted by some states that reduce procedural rights in those arenas. However, procedural protections for the more affluent owners of "old property" have not been threatened by the counterrevolution. Instead, in some statutory arenas the procedural rights of the more affluent have been expanded. Moreover, the Supreme Court has greatly expanded the rights of the most affluent members of society in recent cases regarding the regulatory takings doctrine. As a result of these developments, the gap between the procedural rights of the rich and the poor has widened and may grow wider still.

A. *Exceptions to the Counterrevolution*

Because it hinged on expanding the definition of property to include government benefits, the due process revolution had the greatest positive impact on recipients of those benefits, many of whom have low incomes. Therefore, the recipients of government benefits have the most to lose from the due process counterrevolution in the civil and administrative realms. Moreover, the developments in other procedural areas, described above, are clearly the most harmful to those who lack economic resources. Yet, the "old property," that is real property and other tangible economic assets, remain protected, and unaffected by the counterrevolution.[252] Moreover, while most public employees may lose the procedural rights that they currently enjoy under the counterrevolution, due process protections will continue to apply to academics and to those specialized government employees whose skills could not be transferred easily to the private realm, and who are generally well compensated.[253] Therefore, the people who are least likely to be harmed by the due process counterrevolution are those who already have the most resources in our society.

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251. It is also possible, as Denise Morgan suggested to me in a recent conversation, that Congress heard the voices of poor people but just did not care. Even if Congress did hear the viewpoint of poor people that opposed recent reforms, their actions indicate that the voice was not being heard "loud" enough, most likely because of the lack of financial resources to "amplify" their voices.

252. *See* Pierce, *supra* note 4, at 1995-97.

253. *See id.*

Some aspects of the due process counterrevolution may affect the majority of people in this country who are middle and working class. For example, Congress recently enacted a statute requiring states to implement procedures to improve child support enforcement by providing for the suspension of professional licenses of people who are behind in their child support payments.[254] Some states have passed laws allowing for the suspension of drivers' licenses of those arrested for driving while intoxicated, without providing for prior notice or hearings.[255] These laws will harm middle class people who own cars and earn enough to incur child support obligations. However, they arguably will be more harmful to the poor who cannot afford to pay child support, and who cannot afford to pay a lawyer to help them beat or plea-bargain drunk driving charges.

Moreover, even as the due process rights of the poor and the middle class are being reduced, the rights of the more affluent are being expanded statutorily. For example, the Health Care Quality Improvement Act of 1986 strengthens procedural protections for doctors subject to disciplinary review board actions.[256] Those protections include enhanced notice requirements and detailed provisions governing the hearing process.[257] The purpose of the bill was to provide protections and incentives for physicians participating in professional peer reviews and limit the threat of private money damage liability under federal anti-trust laws.[258] Similarly, the Taxpayer Bill of Rights contains provisions for civil damages for unauthorized collection of taxes and disclosure of information.[259] Although the bill purports to enhance the procedural rights of all taxpayers, it will obviously be of most use to those who pay higher taxes because they are likely to sustain higher damages. Both acts illustrate the ability of money to bargain for more procedural protections through the use of the political process.

B. *A New Process Revolution?*

Even as the Court has cut back significantly on the definition of what liberty and property merit due process protections, the Court has expanded greatly its protection of the property of the affluent in society through its activist approach to cases involving compensation for regu-

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254. 42 U.S.C. § 666(a)(16) (West Supp. 1997). The statute provides for prior notice of license suspension, but does not specifically require a hearing prior to suspension. *Id.*

255. *See* CAL. VEH. CODE § 23157 (West 1997); 1997 Ohio Legis. Bull. 5 (Anderson) (to be codified at OHIO REV. CODE ANN. § 4511.191).

256. Health Care Quality Improvement Act of 1986 §§ 411-412, 42 U.S.C. §§ 11,111-11,112 (1994).

257. *See id.*

258. *Id.* § 402 (stating the findings of Congress prompting the Act).

259. Omnibus Taxpayer Bill of Rights, Pub. L. No. 100-647 § 7433, 102 Stat. 3730, 3748-49 (1988) (codified as amended in scattered sections of 26 U.S.C.).

latory takings.[260] In recent rulings, the Court has taken an activist stance in increasing the burden that the state must meet in order to use its police power to regulate private property by limiting development in furtherance of the public interest. The regulatory takings cases rest, at least in part, on the notion that private property owners are entitled to use their property in whatever way that they want.[261] Thus, the Court has seemingly created and expanded a new form of entitlement to private property. Moreover, the Court has created a new categorical approach to evaluating state action in regulatory takings, greatly increasing both the amount of process and the compensation that is due for private property owners in that context.

The Takings Clause of the Constitution is similar to the Due Process Clause in that it is the other constitutional provision that expressly protects property from government interference.[262] It is by nature more protective of the property of the more affluent, because an individual must own tangible property of value to benefit from the protections of the Takings Clause.[263] In the arena of compensation for regulatory takings, the court first determines whether or not the state's use of its police power to limit the property owner's use of his land is a taking.[264] Then, the court determines whether or not the state must compensate the property owner for any decrease in the value of the property resulting from the state's use of its power.[265] This two-step process is analogous to the Court's two-step due process jurisprudence—determining first whether a property interest or liberty interest exists which triggers protections, and then what protections are due. Even as the Court has restricted both steps of the due process analysis at the expense of the poor and the disenfranchised, it has expanded both steps of its regulatory takings doctrine to the benefit of the most affluent members of society.

In the first step of the regulatory takings doctrine, the Court has taken an extremely broad view of the ability of owners of real estate, the

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260. *See* Robert J. Hopperton, *Standards of Judicial Review in Supreme Court Land Use Opinions: A Taxonomy, an Analytical Framework, and a Synthesis*, 51 WASH. U.J. URB. & CONTEMP. L. 1, 81-87 (1997). The Court has expanded the doctrine of regulatory takings in several cases. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

261. *See Nollan*, 483 U.S. at 831.

262. *See* Fallon, *supra* note 1, at 359-60.

263. W. David Koeninger has suggested to me in a conversation that perhaps poor people who are advocating for more procedural rights should argue that their property falls under the Takings Clause, rather than the Due Process Clause. For example, public housing tenants that face the demolition of their units without compensation other than their replacement by Section 8 certificates, could argue that their property is being taken without compensation. *See generally* W. David Koeninger, *A Room of One's Own and Five Hundred Pounds Becomes a Piece of Paper and "Get a Job:" Evaluating Changes in Public Housing Policy from a Feminist Perspective*, 16 ST. LOUIS U. PUB. L. REV. (forthcoming 1997). I agree that this is an interesting idea which should be explored.

264. Penn Central Transp. Co. v. New York, 438 U.S. 104, 124-25 (1978).

265. *Penn Central*, 438 U.S. at 124-25.

most traditional form of "old property," to use their property without state interference. Of course, not all people who benefit from compensation will be very affluent. However, to benefit from the clause, a person must own at least some real property, taking them out of the category of abject property. Moreover, the real estate at issue is sometimes quite valuable. For example, in *Lucas v. South Carolina Coastal Council*, the plaintiff sought and received over $1.2 million in compensation for the regulatory taking of two beach front lots on an island in South Carolina.[266] The state of South Carolina had passed a Coastal Preservation Act that had the effect of prohibiting development on the two beach front lots.[267] Accepting the trial court's finding that the prohibition deprived the plaintiff of all of the value of his land, the Court found that any state action which has such an effect constitutes a per se taking.[268] In *Nollan v. California Coastal Commission*, the Court found that the denial of a land use permit to owners of beach front property who wished to tear down a bungalow and build a larger house was a taking that required compensation.[269] The Court's reasoning in both cases rests on the premise that property owners are entitled to use their property in any manner that they wish.[270] Thus, the Court's rulings enhance the value of the ownership interest of affluent property owners based on their entitlement to use it as they choose.

The second means by which the Court has expanded the scope of its regulatory takings doctrine is by heightening its scrutiny of state action to determine whether compensation is constitutionally required. In previous cases regarding regulatory takings, the Court had recognized the ability of states to remove all of the value of private property, without compensating the owner, when the state's interest in doing so was sufficiently compelling.[271] In recent cases, however, the Court has applied an extremely high level of scrutiny to determine whether the state's interest is sufficiently compelling. For example, in *Nollan*, for the first time the Court imposed a "nexus" requirement—requiring that the state imposed condition must serve the same governmental purpose as the development

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266. 505 U.S. 1003, 1009 (1992).

267. *Lucas*, 505 U.S. at 110-11. The Court was extremely eager to hear the case in *Lucas*, granting certiorari even though the issue was arguably not ripe for review. *Id.* at 1061-62 (Stevens, J., dissenting). Prior to the ruling of the South Carolina court finding no compensable taking, the South Carolina legislature passed a statute which allowed property owners such as Lucas to apply for special permits which would exempt them from the coastal preservation regulations. *Id.* at 1010-11. Lucas had not even applied for such a permit at the time that the Court agreed to hear the case. *Id.* at 1042 (Blackmun, J., dissenting).

268. *Id.* at 1030 (stating that when a regulation totally hinders productive and beneficial uses of property, "compensation must be paid to sustain it").

269. 483 U.S. 825, 841-42 (1987).

270. *See Nolan*, 483 U.S. at 831.

271. *See Lucas*, 505 U.S. at 1047-49 (Blackmun, J., dissenting) (noting that the Court had repeatedly recognized the government's ability to regulate property without compensation no matter how adverse the financial effect may be by weighing private and public interests).

ban.[272] In *Dolan v. City of Tigard*, the Court added a level of scrutiny to the "nexus" requirement, stating that the government's purpose must be "roughly proportional" to the proposed impact of the regulation for the "nexus" requirement to be met.[273] And, the Court clarified that the city or state has the burden of establishing the constitutionality of its regulations by making an "individualized determination."[274]

Most significantly, in *Lucas*, the Court for the first time created a categorical rule that if the regulation removed all of the value of the land, it was a per se taking. The categorical approach is the highest level of scrutiny to which a court may subject state action.[275] It is "uncompromisingly deadly to legislative action."[276] The categorical approach allowed the *Lucas* Court to completely disregard evidence that the plaintiff knew that his property had been flooded in at least half of the prior forty years.[277] The categorical approach also does not take into account the extent to which the state's action may be justified as protective of the safety of its people. In *Lucas*, the state's arguably compelling interest in limiting coastal development was highlighted by the extensive damage to ocean front property caused by hurricane Hugo prior to the passage of the Coastal Preservation Act in question.[278] The Court's categorical approach disregarded even such a compelling interest on the part of the state.

The high level of scrutiny to which the Court subjects regulatory takings contrasts markedly with the rational basis scrutiny merited by most due process categories.[279] This categorical approach also stands in sharp contrast to the Court's *Mathews v. Eldridge* balancing test.[280] The *Mathews* balancing test requires courts to balance the interests of the individual against those of the state, and insures that the cost of the process always will weigh against the individual.[281] The categorical approach, on the other hand, allows courts to completely disregard societal interests and concerns once the individual interest has been established. Moreover, the cost to the state is immaterial in the categorical approach. Ironically, the state of South Carolina could have paid for many *Goldberg-*

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272. *Nollan*, 483 U.S. 837.

273. 512 U.S. 374, 391 (1994).

274. *Dolan*, 512 U.S. at 391.

275. *See* Hopperton, *supra* note 260, at 83-84.

276. *Id.* at 7.

277. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1038 (1992) (Blackmun, J., dissenting).

278. *See Lucas*, 505 U.S. at 1075 (Stevens, J., dissenting); *see also id.* at 1040 (Blackmun, J., dissenting) (noting that petitioner did not even challenge the state legislature's finding that the building ban was necessary to protect property and life).

279. *See* Fallon, *supra* note 1, at 314-15; Rutherford, *supra* note 5, at 25.

280. 424 U.S. 319 (1976).

281. *Mathews*, 424 U.S. at 335.

style hearings with the $1.2 million that it had to pay as compensation to the petitioner as a result of the Court's ruling in *Lucas*.

The extraordinarily heightened level of scrutiny to which the Court subjected the state legislation in *Lucas* and *Dolan* is reminiscent of the substantive due process approach used by the Court to invalidate state statutes during the *Lochner* era.[282] Overwhelmed by the sense of unfairness by the state taking over $1 million from a private citizen, the Court relied on substantive notions of fairness and justice to create a remedy for the landowner whom, it found, had been wrongfully deprived of his property.[283] Moreover, like the Court in *Lochner*, the *Lucas* Court refused to presume the validity of state regulations when they are reasonably related to a state interest.[284] This approach is a major departure from the Court's usual rational basis scrutiny of state statutes governing economic issues.[285] The Court's regulatory takings doctrine represents the kind of strict scrutiny that it has so far refused to apply to economic regulations that affect poor people. Even as the Court takes away the procedural rights of the poorest of the poor and refuses to recognize economic rights on their behalf, it has resorted to a long discredited Lochnerian approach to find substantive due process rights for the most affluent in our society.

VI. REINTERPRETING THE DUE PROCESS CLAUSE

The formalist individualist approach that the Court has taken to due process issues since the due process revolution has failed to bring about the fairness and justice that should be essential elements of due process. The Court's broad communitarian language of equality in *Goldberg* envisioned a world in which one's procedural rights would not depend on the level of one's income. However, the promise of *Goldberg* faded in the ensuing years as the Court became mired in formalistic reasoning and analysis. With or without the Court's formal acknowledgment, it is clear that substantive values affect all of its procedural decisions.[286] It is time for the Court to return to the communitarian notion of process and justice that it articulated in *Goldberg* and give substance to process, to counter the due process counterrevolution.

The Court has applied an "organic" approach to process in the past which is based on a substantive communitarian notion of fairness rather than the individualist formalist approach which it has adopted in the

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282. *See Lucas*, 505 U.S. at 1069 (Stevens, J., dissenting). In *Lochner v. New York*, 198 U.S. 45 (1905), the Court struck down a state statute that limited the number of working hours of bakers to 60 hours per week and 10 hours per day as violative of the substantive due process right to contract.

283. *Lucas*, 505 U.S. at 1019-32. The Court's approach is particularly ironic given that the facts of *Lucas* indicate that the owner knew very well that the land in question was in danger of being flooded, and the houses washed away, in the event of a hurricane or other major storm. *See id.* at 1020-22.

284. *See* Dolan v. City of Tigard, 512 U.S. 374, 406 n.9 (1994) (Stevens, J., dissenting).

285. *See* Fallon, *supra* note 1, at 314-15.

286. *See* Alexander, *supra* note 6, at 324; MASHAW, *supra* note 1, at 5.

more recent years. Such an organic approach would, by its very nature, be more responsive to the needs of the poor. Several scholars have recently called for the Court to abandon the formalist approach in favor of a more organic approach which allows for the incorporation of more expansive notions of justice and fairness.[287] My approach would build on theirs, but would emphasize the potential of an organic approach to foster communitarian values such as economic justice and fairness throughout society.

A. *Revisiting the Organic Approach*

In order to address the widening gap between the procedural rights of the rich and the poor, the Court must take a new approach to due process which expressly hinges on the need for substantive fairness. The approach to process currently adopted by the Court has failed to provide that substantive fairness for poor people in this country. Instead, the amount of process that one receives is commensurate with one's level of income. This unequal treatment is antithetical to the promise of the due process clause because it is arbitrary. To remedy the problem, the Court must recognize the impact of money on process, and acknowledge the importance of procedural parity to a functional democracy. In *Goldberg*, the Court espoused a communitarian view of process in which substantive fairness was a primary value, but adopted a formalist approach which led to individualism and formalism that belied its original promise. However, prior to *Goldberg*, the Court addressed some due process issues with an organic approach that emphasized the importance of treating people fairly, and with dignity. The Court should return to that approach in order to adequately address the dire needs of poor people who are threatened with complete disenfranchisement from our society.

The essence of due process is that the government should not act arbitrarily towards its citizens.[288] In recent years, however, the general prohibition of arbitrary government action, with its inherent promises of fairness and equality, has been lost in the technical positivist doctrine of the Court's due process decisions.[289] In contrast, an organic, less formal approach to due process would allow the Court to depart from the bifurcated analytical structure which currently dominates its due process jurisprudence.[290] Instead, the Court would rely on a more flexible notion that "when the state inflicts any serious injury on an individual, it must

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287. *See* MASHAW, *supra* note 1, at 42; Law, *supra* note 134, 810-14; Mashaw, *Dignitary Process*, *supra* note 132.

288. *See* Fallon, *supra* note 1, at 322-23 (identifying the recurring theme in due process cases that the government cannot be arbitrary); Rutherford, *supra* note 5, at 6 (discussing substantive and procedural prohibitions against arbitrariness).

289. *See* Mashaw, *Dignitary Process*, *supra* note 132, at 436 (arguing that the positivist approach leads to bizarre constitutional variations of claims).

290. *See* Law, *supra* note 134, at 810-14.

give her a fair opportunity to learn what is going on and to object."[291] Justice Frankfurter applied such an organic approach to process in his concurrence to *Joint Anti-Fascist Refugee Committee v. McGrath*, when he addressed the due process rights of members of organizations which were included in a list of "communist" organizations to be published and sent to the Loyalty Review Board by the Attorney General for use in firing federal employees.[292] In his concurrence, Frankfurter argued that members of those organizations had a right to the essentials of due process, notice and a hearing, before the list was published.[293] Referring to due process as a "feeling of just treatment . . . evolved through centuries,"[294] Frankfurter stated that "fairness of procedure is . . . ingrained in our national traditions and is designed to maintain them."[295] In an opinion decided the year after *McGrath*, the Court relied on similar reasoning when it found that pumping of the stomachs of prisoners violated their substantive due process rights because it "shocks the conscience."[296]

A return to the organic approach to process would allow the Court to sidestep the positivist problem in *Goldberg*, *Roth* and their progeny that results when a court must determine whether or not an interest is substantial enough to trigger protections.[297] The Court would no longer become mired in a tortured determination of whether a constitutionally protected interest is implicated. Instead, it would rely on a more basic premise that the state should not treat its citizens arbitrarily because to do so would be unfair.[298] That premise arguably underlies all of the Court's due process jurisprudence,[299] but it is especially prevalent in the *Goldberg*. In his elegant *Goldberg* opinion, Justice Brennan espoused the view that the government should treat all people fairly, and with dignity, regardless of their income or status in society.[300] The Court's opinion in

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291. *Id.* at 810-11.

292. 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring). The plurality opinion, written by Justice Burton for himself and Justice Black, held only that the publication was not authorized by the Executive Order to the Attorney General. *Id.* at 126.

293. *McGrath*, 341 U.S. at 161 (Frankfurter, J., concurring). *But see* Barsky v. Board of Regents, 347 U.S. 442 (1954) (upholding medical license suspension without a hearing when the doctor refused to testify before the House Un-American Activities Committee).

294. *McGrath*, 341 U.S. at 161 (Frankfurter, J., concurring).

295. *Id.*; *see also* Hurtado v. California, 110 U.S. 516, 532 (1884) (holding that due process requires the protection of "the very substance of individual rights to life, liberty and property").

296. *See* Rochin v. California, 342 U.S. 165, 172 (1952); Fallon, *supra* note 1, at 324 (stating that the *Rochin* Court applied substantive due process to administrative actions).

297. *See* Law, *supra* note134, at 813-14.

298. *See* Fallon, *supra* note 1, at 322-23 (identifying the recurring theme in due process cases that the government cannot be arbitrary); Rutherford, *supra* note 5, at 6 (discussing substantive and procedural prohibitions on arbitrariness).

299. For example, the principle that the government cannot act arbitrarily is the rationale for the Court's landmark ruling in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). *See* Alexander, *supra* note 6, at 327 n.12.

300. Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970) ("From its founding the Nation's basic commitment has been to foster the dignity and well being of *all* persons within its borders.") (emphasis added).

Goldberg thus prefigures a humanist view of justice, and a commitment to substantive equality, that is arguably consistent with the organic approach.[301] If the Court used an organic approach to process, it would be more responsive to the needs of the poor, as it was in *Goldberg*.

In his book, Due Process in the Administrative State, Jerry Mashaw critiques the functionally oriented policy analysis of the Court's recent due process decisions, and argues that such an analysis belies the more meaningful and elastic promise of the due process clause.[302] As an alternative, Mashaw suggests that courts should attempt to formulate basic political principles which merit procedural protections.[303] Mashaw's "dignitary perspective," which mirrors an organic approach to process, would extend procedural protections to "natural rights" such as the constitutional values of privacy, free expression and religious freedom.[304] Equality, predictability, transparency and rationality, and participation, are the core process values in Mashaw's theory.[305] Mashaw emphasizes that his primary goal is to protect individual liberty, not to reinforce communitarian values such as economic justice.[306] However, the elastic nature of Mashaw's theory, like the Court's organic approach to process, allows courts to incorporate the notions of fairness and equality to use process to strengthen the community as a whole. Under this communitarian interpretation of Mashaw's "dignitary" theory, the right of all members of society to participate in decisions that affect their lives, regardless of their level of income, would be paramount.[307]

In order for the Due Process Clause to foster the meaningful participation of poor people in decisions that affect their lives, it must incorporate an element of equal protection.[308] That is, people should be able to enjoy the same procedural protections regardless of their level of income.[309] The prevention of arbitrary action by the state is essential to due process, and unequal treatment is more likely to be arbitrary.[310] Therefore, equality should be a core value of the Court's approach to process.[311] In order for process to foster equality in a meaningful fashion,

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301. *See* White, *supra* note 65, at 3.

302. *See* MASHAW, *supra* note 1, at 42.

303. *Id.*

304. *Id.* at 166.

305. *Id.* at 173-77.

306. *Id.* at 169.

307. *See* Flynn, *supra* note 207, at 330 (pointing out that the Court articulated the "promotion of participation and dialogue" as goals of the due process system in *Marshall v. Jerrico*, 446 U.S. 238 (1980)); Rutherford, *supra* note 5, at 42 (calling "participation" a major theme of due process).

308. *See* Rutherford, *supra* note 5, at 5.

309. *See* Zietlow, *supra* note 27, at 1143-49 (arguing that providing due process rights for more affluent people, but not for the poorest of the poor, would violate the Equal Protection Clause).

310. Rutherford, *supra* note 5, at 65.

311. *See* MASHAW, *supra* note 1, at 173 (listing "equality" as an intuitive process value); Rutherford, *supra* note 5, at 71 (arguing that the Due Process, Equal Protection and Privileges and Immunities Clauses all incorporate notions of equality). *But see id.* at 39-41 (noting that the Court

however, the Court must recognize the impact of economic forces on the ability of people to participate in decisions that affect them. The Court should acknowledge the economic needs of would-be participants, and weigh them in favor of finding procedural rights, when to do so would help to eliminate procedural inequity. If the Court is sensitive to the impact of money on procedural rights, its procedural decisions will be more likely to foster societal fairness. Under a communitarian organic approach, a procedure would be "fair" if it applied equally to all similarly situated participants, regardless of their level of income, or the amount of resources at stake in the individual case.

B. *Giving Substance to Process*

All of the Supreme Court's due process decisions incorporate some substantive values. Arguably, a substantive rule and the procedure applying it must be always viewed as one package.[312] For example, the Court has incorporated the substantive value of fairness into its procedural jurisprudence in its "minimum contacts" analysis to determine whether a court has personal jurisdiction over a defendant.[313] Even so, until recently the Court has been reluctant to expressly acknowledge any notions of substantive due process for the past five decades.[314] In the context of regulatory takings, the Court appears to have returned to a Lochnerian approach to strike down legislative action in the context of regulatory takings. The Court has been willing to recognize substantive due process to protect the rights of the most affluent in our society. Under a communitarian notion of process, the Court would also be willing to recognize substantive due process rights to protect the rights of the least affluent, who face the risk of complete disenfranchisement in our society.

Historically, the Court has been very reluctant to find economic rights for the poor in the Constitution. However, the Court has informally recognized economic need as a factor in several cases where it ruled on the side of constitutional substantive and procedural rights for the poor. For example, in *Goldberg*, the Court was clearly swayed by the substantive economic needs of the plaintiffs in its decision regarding procedural rights. The "brutal need" of the recipients of government benefits influenced the Court as it found increased procedural rights for the recipients

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does not seem concerned with balancing power in "minimum contacts" due process cases—in all instances, the party with more resources seems to prevail, and that even in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), where the Court expressly incorporated the analysis of fairness into the "minimum contacts" equation, the Court appeared to disregard the obvious imbalance of bargaining power on the part of the franchisees).

312. *See* Alexander, *supra* note 6, at 327; *see also* MASHAW, *supra* note 1, at 5 (stating that question of substance and process are "functionally inseparable").

313. *See* Fallon, *supra* note 1, at 317-18.

314. *See id.* at 322 (stating that the Court is hesitant to find substantive due process rights).

of those benefits in the Constitution.[315] In *Goldberg*, the Court recognized welfare benefits as the sole source of income of the recipients when it held that those recipients were entitled to a pre-termination hearing.[316] The Court's protective attitude towards the poor in *Goldberg* is so apparent that it inspired Justice Black, in his dissent, to accuse the majority of taking a substantive due process approach which incorporated the notion of economic justice in its procedural due process analysis.[317]

In a few cases involving substantive rights, the Court has applied an informally heightened level of scrutiny to government action, acknowledging the economic needs of the parties involved. For example, in *Department of Agriculture v. Moreno*, the Court applied a modified rational basis review to strike down a statute that differentiated between households receiving food stamps.[318] Similarly, in *Plyler v. Doe*, the Court applied an informally higher standard of review in upholding an equal protection challenge to a Texas statute which denied access to public education for children of illegal immigrants.[319] Both cases involved plaintiffs with few economic resources. The Court also has recognized the severity of depriving people of the means of their livelihood in rulings finding pre-termination procedural rights for government employees.[320]

In a few other cases, the Court has applied a hybrid analysis based on both due process and equal protection principles to find economic based procedural rights in some circumstances. For example, the Supreme Court has found a constitutional right to waiver of appellate court fees for indigent litigants in criminal cases.[321] The Court has also recognized the right to waiver of civil court fees in divorce cases[322] and appeals of parental rights termination decisions.[323] Concomitantly, relying on similar principles, the Court has struck down state statutes requiring filing fees for political candidates as unconstitutionally limiting the ability

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315. *See supra* notes 78-80 and accompanying text.

316. Goldberg v. Kelly, 397 U.S. 254, 264 (1970). *But see* Mathews v. Eldridge, 424 U.S. 319, 340-41 (1976) (noting that recipients of disability benefits may have other sources of income when the Court determined that they were not entitled to pre-termination hearings).

317. *See Goldberg*, 397 U.S. at 276-77 (Black, J., dissenting); *see also* DAVIS, *supra* note 60, at 115-16.

318. 413 U.S. 528, 534 (1973) (analyzing the legislative purpose behind the statute that prohibited the distribution of food stamps to households containing unrelated adults, and finding it constitutionally invalid under even a rational basis review because the legislature intended to harm a politically unpopular group, hippies, when it enacted the statute).

319. 457 U.S. 202, 220-24 (1982).

320. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542-43 (1985).

321. *See* Mayer v. City of Chicago, 404 U.S. 189, 196-97 (1971) (finding a constitutional right to waiver of appellate fees in criminal misdemeanor cases); Griffin v. Illinois, 351 U.S. 12, 18-19 (1956) (finding a constitutional right to waiver of appellate fees in criminal matters when the defendant risks incarceration).

322. Boddie v. Connecticut, 401 U.S. 371, 380-81 (1971).

323. M.L.B. v. S.L.J., 117 S. Ct. 555, 570 (1996).

of poor people to participate in the political process.[324] Thus, the Court has sometimes been willing, albeit reluctantly, to incorporate economic justice as a substantive value into its analysis when determining the procedural rights of the poor.

Finally, in two of its most recent rulings, the Court has indicated both a receptiveness to substantive due process and a solicitous attitude towards the poor and the disenfranchised. In *M.L.B. v. S.L.J.*[325] and *Romer v. Evans*,[326] the Court relied on notions of substantive fairness to find rights to participation for people who have been disenfrancished due to their income or status as a group that suffered from the prejudice of the majority.

In *M.L.B.*, the Court ruled that the state of Mississippi could not bar an indigent woman from appealing a trial court ruling terminating her parental rights because she could not afford to pay the fees associated with the appeal.[327] The *M.L.B.* Court strictly limited its ruling to cases involving parental rights terminations, focusing on the fundamental nature of the parent-child relationship.[328] However, the Court's decision to even hear the case is significant. It marks the first time in almost a quarter century that the Court addressed the constitutional rights of civil litigants to waiver of fees, and only the second time that the Court has found a constitutional right to the waiver of fees in a civil case.[329] In *M.L.B.*, the Court relied on both the Due Process and Equal Protection Clauses of the Constitution. Due process was implicated because the proceedings below did not appear to be fair, and the petitioner was denied any means of redressing that unfairness.[330] Significantly, however, the Court stated that its ruling was based primarily on economic based equal protection principles because the Mississippi rule prohibited the petitioner from appealing based solely on her inability to pay the costs.[331] Thus, the Court's decision was based on the substantive values of both fairness and equality in an organic approach to procedural rights.

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324. *See supra* notes 237-39 and accompanying text.

325. *M.L.B.*, 117 S. Ct. at 567-68.

326. 116 S. Ct. 1620 (1996).

327. *M.L.B.*, 117 S. Ct. at 570.

328. *See id.* at 569 ("[W]e have repeatedly noted what sets parental status termination decrees apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody.").

329. *See* Boddie v. Connecticut, 401 U.S. 371, 375-76 (1971) (finding a constitutional right to apply for waiver of filing fees in divorce cases); *supra* text accompanying notes 55-56. *But see* Ortwein v. Schwab, 410 U.S. 656, 659-60 (1973) (per curiam) (finding that the State of Oregon was not constitutionally required to waive fees for welfare recipients seeking judicial review of administrative decisions); United States v. Kras, 409 U.S. 434 (1973) (finding no such right to waiver of fees in bankruptcy cases); *supra* text accompanying notes 57-59.

330. *M.L.B.*, 117 S. Ct. at 566.

331. *Id. But see id.* at 570 (Kennedy, J., concurring) (arguing that "due process is quite a sufficient basis for our holding," and stating that the fundamental nature of the parent child relationship was sufficient to merit the Court's holding under the *Mathews v. Eldridge* calculus).

The recent case of *Romer* also provides guidelines for a new approach to due process.[332] In that case, the Court struck down, on equal protection grounds, a state constitutional amendment prohibiting states and municipalities from passing legislation proscribing discrimination on the basis of sexual orientation.[333] As in *Moreno*, the Court applied an informally heightened standard of review to strike down a state law under rational basis analysis and scrutinized the legislative purpose behind the amendment.[334] The Court found that the legislative purpose reflected animosity towards an insular class of persons, namely, gays and lesbians.[335] In its analysis, the Court also emphasized the fundamental nature of the participatory rights implicated by the amendment itself.[336] The Court pointed out that the amendment restricted the procedural rights of gays and lesbians in two ways. First, it prohibited them from using the legislative process to fight discrimination.[337] Second, and more significantly, the Court pointed out that the amendment arguably barred gays and lesbians from challenging arbitrary decision by governmental bodies.[338] In its decision, the Court therefore indicated that there is some fundamental right to participate which is implicated by the Equal Protection Clause.[339] That freedom implicates the ability to participate in decision making processes at several different levels, and it implicates the ability to participate equally. Here, the Court again combined the substantive values of fairness and equality in an organic fashion to protect an insular minority.

Both *M.L.B.* and *Romer* provide guidelines for the Court to effectively address the procedural needs of poor people. In *M.L.B.*, the Court acknowledged the impact of the petitioner's economic need on her ability to participate in a decision that would dramatically affect her life. In *Romer*, the Court applied the level of scrutiny, and the type of analysis, which is appropriate for addressing procedural issues that impact on poor people. Thus, the Court followed its admonition in its *Carolene Products* footnote that courts must sometimes protect insular minorities from the

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332. 116 S. Ct. 1620 (1996).

333. *Romer*, 116 S. Ct. at 1629.

334. *See id.* at 1628-29 (citing Department of Agriculture v. Moreno, 413 U.S. 528 (1973)).

335. *Id.*

336. *Id.* at 1625-26.

337. *See id.* at 1625.

338. *Id.* at 1626. In *Romer*, the court stated:

> At some point in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and thus forbidden basis for decision. Yet a decision to that effect would itself amount to a policy prohibiting discrimination on the basis of homosexuality, and so would appear to be no more valid under Amendment 2 than the specific prohibitions against discrimination the state court held invalid.

Id.

339. *See id.* at 1628 ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.").

political process.[340] The Court should do the same with regards for the economically disadvantaged. Because the poor have been so disenfranchised by their inability to participate in the decisions that affect their lives, the Court must be especially solicitous of their needs. While a conservative Court may be reluctant to do so, both *M.L.B.* and *Romer* indicate some receptiveness to such an approach.

C. *A Communitarian Theory of Process*

My communitarian theory of process would build on the Court's organic approach by adding economic based fairness as an element of the fundamental notion implicated in the organic approach. It would borrow the elastic nature of Mashaw's "dignitary theory" as well as borrowing the values of equality, predictability and participation which are essential to his theory. However, I explicitly recognize the potential of a more elastic approach to foster fairness in a community, rather than an individual value, by adding economic fairness as another essential value. Finally, I would encourage the Court to give substance to process, as it has been willing occasionally in recognizing substantive and procedural economic rights.

To illustrate how the Court would apply my communitarian theory of process, imagine that the Court is called upon once again to determine whether or not welfare recipients have a right to a pre-termination hearing. This time, however, the welfare recipients cannot argue that they have an entitlement to benefits because they are provided under a block grant system that specifically denied their entitlement status. How is the Court to rule? Under my approach, the Court would not allow itself to become bogged down in an analysis of whether or not benefits were an entitlement before it decided whether or not the constitution required procedural protections. Instead, the Court would recognize that if welfare recipients did not have pre-termination hearings, the state could act arbitrarily in denying them benefits, and find that the danger of that arbitrary action alone is enough to violate the constitutional provision of due process. Second, the Court would find it constitutionally impermissible for welfare recipients to have fewer procedural rights than other, more affluent recipients of government benefits, such as holders of medical licenses and members of the legal bar. Finally, the Court also would find that the dire consequences of disenfranchising the poorest of the poor by subjecting them to a system that is completely arbitrary and would violate the fundamental notion of fairness which is essential to a communitarian notion of process.[341]

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340. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

341. Similarly, the Court should take a solicitous approach toward the rights of the poor to uphold campaign finance reform legislation, and strike down restrictions placed on legal services attorneys.

VII. CONCLUSION

In this article, I have argued in favor of an approach to process that acknowledges the necessity of substantive economic justice, because process without substance has failed to meet the needs of the people who most need procedural protections. Until now, the Court's approach to process has resulted in a system in which poor people are increasingly disenfranchised at every level where they should have meaningful involvement in the decisions that affect their lives. I have argued that the discrepancy between the way the Court treats the procedural rights of poor and more affluent people violates the notions of fairness and equality that should be an integral part of the Court's procedural jurisprudence.

In order to address the increasing disenfranchisement of the poor, and the disparity between the procedural rights of the rich and the poor, I have suggested that the Court adopt a communitarian organic approach to due process that incorporates the values of equality and fairness along with a protective attitude toward the needs of the poor. Because the poor lack money and power, they need to resort to courts to protect them, even as the Court had suggested in *Carolene Products*. Under my communitarian approach, fairness and equality would be essential procedural values. The Court would acknowledge the impact of economic resources on the ability of the poor to participate in decisions that affect their lives, and decide procedural issues in a manner that would reduce that impact as much as possible. In the egalitarian spirit of *Goldberg*, the Court should be willing to return substance to process, in order to create a system in which all citizens enjoy the rights of citizenship regardless of their level of income.