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Wealth, Equal Protection, and Due Process

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WEALTH, EQUAL PROTECTION, AND DUE PROCESS

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ABSTRACT

Increasingly, constitutional litigation challenging wealth inequality focuses on the intersection of the Equal Protection and Due Process Clauses. That intersection—between equality and due process—deserves far more careful exploration. What I call "equal process" claims arise from a line of Supreme Court and lower court cases in which wealth inequality is the central concern. For example, the Supreme Court in Bearden v. Georgia *conducted analysis of a claim that criminal defendants were treated differently based on wealth in which due process and equal protection principles converged. That equal process connection is at the forefront of a wave of national litigation concerning some of the most pressing civil rights issues of our time, including: the constitutionality of fines, fees, and costs; detention of immigrants and criminal defendants for inability to pay cash bail; loss of voting rights; and a host of other ways in which the indigent face both unfair process and disparate burdens. I argue that an intersectional "equal process" approach to these cases better reflects both longstanding constitutional doctrine and the practical stakes in such litigation. If courts properly understand this connection between inequality and unfair process, they will design more suitable and effective remedies. More broadly, scholars have bemoaned how the Court turned away from class-based heightened scrutiny in equal protection doctrine. Equal process theory has the potential to reinvigorate the Fourteenth Amendment as a guardian*

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against unfair process and discrimination that increases inequality in society.

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INTRODUCTION

Increasingly, constitutional litigation challenging wealth inequality focuses on the intersection of the Equal Protection and Due Process Clauses. Most prominent, perhaps, was the discussion in *Obergefell v. Hodges* in Justice Anthony Kennedy's majority opinion of the "profound" connection between equality and due process.[1] The Court relied on prior cases in making such a connection explicit. Those included fundamental rights equal protection cases, such as *Zablocki v. Redhail*, involving the right to marry, as well as cases such as *Lawrence v. Texas*, involving findings of animus, in which rational basis review has had "teeth."[2] Few noticed, however, that the *Obergefell* Court began its discussion of equality and due process by citing to a seemingly inapposite line of cases that includes *Bearden v. Georgia*.[3] In *Bearden*, in an opinion by Justice Sandra Day O'Connor, the Court held that the trial judge could not revoke a defendant's probation for failure to pay a fine and victim restitution without making findings that either he had the ability to pay or that alternative forms of punishment would not satisfy state interests.[4] The *Bearden* Court explained that where the state judge both used inadequate process, and, as a result, disparately subjected the poor to imprisonment, "[d]ue process and equal protection principles converge in the Court's analysis."[5] What does a ruling about probation and criminal fines have to do with marriage equality? In this Article, I describe how the reliance on the neglected *Bearden* ruling in *Obergefell* was no accident. The approach in *Bearden*, long considered marginal and relevant only to certain

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1. 135 S. Ct. 2584, 2602-03 (2015). The Court elaborated:

> The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.

Id.

2. *Id.* at 2603-04 (first citing Zablocki v. Redhail, 434 U.S. 374, 383-87, 398 (1978); then citing Lawrence v. Texas, 539 U.S. 558, 575, 578 (2003)).

3. *Id.* at 2602-03 (citing Bearden v. Georgia, 461 U.S. 660, 665 (1983)).

4. *Bearden*, 461 U.S. at 672-73.

5. *Id.* at 665.

access-to-courts issues, now lies at the center of the jurisprudence of wealth inequality under the Constitution.[6]

This Article explores the constitutional intersection between equality and procedural due process. The Equal Protection Clause provides that no state shall deny to a person "the equal protection of the laws."[7] The Supreme Court has held that this prohibition on discrimination bars a state from "punishing a person for his poverty,"[8] and it has condemned the "evil" of "discrimination against the indigent."[9] However, in the well-known school funding case of *San Antonio Independent School District v. Rodriguez*, the Court ruled that wealth disparities leading to funding inequities do not receive strict scrutiny under the Equal Protection Clause.[10] Many scholars have observed that the *Rodriguez* ruling, and related rulings, pose an obstacle to a class-conscious Equal Protection Clause.[11] The Court has suggested economic class is not a suspect

6. *See, e.g.*, Colin Reingold, *Pretextual Sanctions, Contempt, and the Practical Limits of* Bearden*-Based Debtors' Prison Litigation*, 21 MICH. J. RACE & L. 361, 362 (2016) ("Today, *Bearden* is invoked in courtrooms throughout America to protest when judges attempt to jail a defendant for reasons that directly or indirectly stem from poverty."); *see also* Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1027-31 (2016) (describing the importance of *Bearden* claims but also the value of state law debtors' prison bans).

7. U.S. CONST. amend. XIV, § 1.

8. *Bearden*, 461 U.S. at 671.

9. Douglas v. California, 372 U.S. 353, 355 (1963).

10. 411 U.S. 1, 29 (1973) ("[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny."); *see also* Harris v. McRae, 448 U.S. 297, 323 (1980) ("[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.").

11. *See, e.g.*, Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1281-82 (1993); Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 629 (2008); *see also* Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, LAW & CONTEMP. PROBS., Fall 2009, at 109, 111-14 (arguing that the Court has engaged with economic rights only "tangentially" in part due to "the Court's miserly determination of the appropriate level of judicial scrutiny"); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 285-91 (1991) (describing the general Burger Court turn from fundamental rights protection for economic rights, due to concerns with redistributive consequences); Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. CHI. L. REV. 1869, 1925 (2018); Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?,* 56 SYRACUSE L. REV. 1, 4-5 (2005).

class.[12] Yet wealth disparities do still receive careful equal protection scrutiny, just not based on equal protection alone.[13]

Instead, due process also plays a role. Mirroring the language of the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment provides that a state shall not "deprive any person of life, liberty, or property, without due process of law."[14] The focus of procedural due process case law is on assuring that a person receives meaningful notice and an opportunity to be heard—to prevent arbitrary and unfair process.[15] Such cases develop procedures to ensure that actors such as judges do not deny benefits or take action against a person without fairly considering a person's ability to pay.[16] What I call "equal process" claims arise from the line of Supreme Court and lower court cases in which wealth inequality is the central concern. In cases such as *Bearden,* the Supreme Court does not apply equal protection strict scrutiny.[17] However, the combined concern with wealth inequality and unfair process results in a constitutional violation.[18] In still other cases, equal protection and substantive due process play a role where fundamental rights are implicated by government action.[19]

That "equal process" connection between wealth, equality, and due process is at the forefront of a wave of national litigation concerning the constitutionality of fines, fees, cash bail, and other ways in which the indigent lose important rights.[20] Almost every state increased the cost of fines and fees in recent years.[21] In

12. *Bearden*, 461 U.S. at 666 n.8 ("When the court is initially considering what sentence to impose, a defendant's level of financial resources is a point on a spectrum rather than a classification. Since indigency in this context is a relative term rather than a classification, fitting 'the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished.'" (quoting North Carolina v. Pearce*,* 395 U.S. 711, 723 (1969))).

13. For early arguments that both substantive due process and equal protection warrant constitutional protection for the poor, see Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 5 (1987); and Frank I. Michelman, *The Supreme Court 1968 Term: Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 17, 33 (1969).

14. U.S. CONST. amend. XIV, § 1.

15. *See infra* Part I.A.

16. *See infra* Part I.A.

17. *See* 461 U.S. at 666-67.

18. *See id.* at 672-74.

19. *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 107, 120-21 (1996).

20. *See infra* Part II.

21. *State-by-State Court Fees*, NPR (May 19, 2014, 4:02 PM), https://www.npr.org/2014/

response, litigation is pending in Alabama, California, Georgia, Louisiana, Michigan, Missouri, Montana, North Carolina, Pennsylvania, Virginia, and many more localities.[22] Take, for example, a ruling regarding bail-setting in Dallas, Texas.[23] A federal judge ordered Dallas County courts to provide meaningful hearings before jailing people.[24] The lead plaintiff in the lawsuit was charged with misdemeanor shoplifting, and she could not pay bail set at $500.[25] Her hearing lasted about twenty seconds, and, as a transgender person, she was sent to twenty-four-hour solitary confinement in a men's facility.[26] The judge found such hearings unconstitutional, in part based on videos showing the hearings typically lasted under thirty seconds but resulted in detention lasting for days, weeks, or even months.[27]

In this Article, I argue that Section 1 of the Fourteenth Amendment should be understood holistically as part of a structure designed to ensure citizenship (and the rights thereof) and government's duties to persons. Courts should not divorce equality concerns from concerns regarding procedural and substantive fairness, particularly when powerful liberty, property, and life interests are at stake. This understanding fits with an approach the U.S. Supreme Court has adopted in a range of doctrines. Kerry Abrams and I have developed how the Court engages in what we term "cumulative" constitutional analysis of several different types, including intersectional analysis, in which two constitutional rights bolster and inform each other.[28]

05/19/312455680/state-by-state-court-fees [https://perma.cc/4VA6-7HKF].

22. For descriptions of pending litigation, see *infra* Part II.

23. *See* Julieta Chiquillo & Cary Aspinwall, *Dallas County's Bail System Is Unfair to the Financially Challenged, Federal Court Rules*, DALLAS NEWS (Sept. 20, 2018, 7:37 PM), https://www. dallasnews.com/news/courts/2018/09/20/federal-court-orders-dallas-county-make-individual-assessments-before-setting-bail [https://perma.cc/UPN9-ELHC].

24. *Id.*

25. *See* Jolie McCullough, *Poor Inmates Sue Dallas County over Bail System Following Harris County Ruling*, TEX. TRIB. (Jan. 22, 2018, 6:00 AM), https://www.texastribune.org/2018/01/22/following-harris-county-ruling-poor-inmates-sue-dallas-county-over-bail/ [https://perma. cc/9P3S-YY4C].

26. *Id.*; Mustafa Z. Mirza, *Dallas County's Secret Bail Machine*, MARSHALL PROJECT (Sept. 4, 2018, 3:47 PM), https://themarshallproject.org/2018/09/04/dallas-county-s-secret-bail-machine [https://perma.cc/U932-R4XK].

27. Chiquillo & Aspinwall, *supra* note 23.

28. Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L.

Equal process claims are an important, but little-noticed, example of that intersectional analysis. Part II develops how equal protection process claims are prominent in litigation that challenges pretrial bail decision-making, driver's license revocation, costs and fees, and Department of Justice government consent decrees that concern fines and fees, such as the one negotiated in Ferguson, Missouri.[29] Lower and appellate courts are split over whether to treat practices that disproportionately burden the poor as due process or equal protection claims. Some federal courts have already misunderstood the constitutional claims to be solely procedural due process in nature, and, as a result, judges have neglected the class-based equality dimension. Other judges have misunderstood the claims as solely equal protection claims, receiving only rational basis scrutiny, and have not considered the procedural fairness dimension. Treating these claims as equal protection claims, judges correctly note that heightened scrutiny does not currently apply to wealth-discrimination claims. Treating these claims as procedural due process claims, judges may find a minimal hearing adequate in some circumstances. But when judges have properly understood these as equal process claims, courts have followed the reasoning of cases such as *Bearden* correctly and understood unfair process to raise far greater constitutional concerns when it centers on wealth inequality. Getting the equal process connection right will be crucial as these access-to-justice questions are litigated.

Part III describes how a series of important constitutional doctrines and rulings have neglected the connection between process and inequality in outcomes. Fundamental rights equal protection cases provide another important type of intersectional cumulative analysis. The Court's decision in *Obergefell* could have also benefitted from equal process reasoning.[30] The absence of discussion of procedural rights and wealth-based concerns made the ruling's significance uncertain outside of categorical same-sex marriage bans. Others, such as Cary Franklin, have focused on how the Court

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REV. 1309, 1310 (2017). That article briefly discussed the *Bearden* line of cases as an example of the connection between equal protection and due process cases. *Id.* at 1345.

29. *See infra* Part II.C. (describing Department of Justice "equal process" remedies).

30. See Abrams & Garrett, *supra* note 28, at 1334-37, for a detailed discussion and critique of the *Obergefell* ruling and its failure to explain the connection drawn between equal protection and due process claims and cases.

has neglected wealth-based concerns in the fundamental rights cases concerning abortion, or how the Court, more broadly, has neglected equality concerns in abortion cases.[31] The Supreme Court's *Trump v. Hawaii* travel ban ruling did not address procedural due process claims raised in the litigation. Although it was not wealth, but rather religion- and nationality-based discrimination at issue, an equal process approach could have impacted the analysis in the case.

More broadly, equal process theory can help to address the long-standing concern that the Fourteenth Amendment does not sufficiently address class-based discrimination.[32] There is cause for more optimism than is often expressed.[33] The connection between procedural due process and equality is increasingly prominent in litigation.[34] However, the Supreme Court is not eager to develop substantive due process law and is unlikely to expand fundamental rights protection.[35] The equal process line of cases is a more promising area to develop the law. Another reason to focus on the intersection between procedural due process and equality is that it gets at the heart of an urgent, practical problem: indigent people often suffer from both (1) arbitrary decision-making and inadequate access to courts, as well as, (2) the unequal outcomes that result.[36] A new generation of litigation is making equal process relevant as income inequality has increased in society and as awareness that fines, fees, bail, and other decisions dramatically disadvantage the poor. That said, there are real shortcomings of equal process case law. I discuss how equal process cases have largely failed to address the race disparities in challenged government practices, and why

31. *See* Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 47-69 (2018).

32. *See* Harris v. McRae, 448 U.S. 297, 323 (1980) ("[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification."); Klarman, *supra* note 11, at 283-84; *see also* Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407, 408 (2010).

33. *But see* Cary Franklin, *The New Class-Blindness*, LAW & POL. ECON. (Aug. 2, 2018), https://lpeblog.org/2018/08/02/the-new-class-blindness/[https://perma.cc/6W9M-U3YC] ("[H]oldings that explicitly vindicate the constitutional rights of people without financial resources remain rare, and that rarity bolsters the widespread perception that Fourteenth Amendment law offers virtually no protection against class-based discrimination.").

34. *See infra* Part III.

35. *See infra* Part III.

36. *See infra* Part I.A.

this reflects flaws in the Court's Fourteenth Amendment jurisprudence.[37]

A final reason why the connection between equality and due process is important is that in an era of widening inequality more regulation both contributes to inequality and may be enacted to address it.[38] There is an urgent need for constitutional litigation to address the intersection between arbitrariness and class. Equal process claims lie at that intersection. Part III concludes by discussing implications of equal process for process theory and anti-subordination theory of equal protection. Equal process claims provide a satisfying combination of the two approaches. The connection can bring out both equal protection concerns with status and subordination and due process concerns with deprivation and arbitrary treatment.

The equal process theory will increasingly matter as access-to-justice litigation is brought to challenge unfair treatment of the poor. However, this theory will also matter more if the government makes available new social benefits to ensure that the poor are not unfairly denied access. Wealth does matter under the Fourteenth Amendment. The intersection between poverty and the criminal justice system helps us to understand how. If courts understand the equal process connection, then constitutional rights under both equality and due process can effectively protect the poor from unfair punishment.

I. WEALTH AND SECTION 1 OF THE FOURTEENTH AMENDMENT

While large bodies of constitutional law interpret and apply individual clauses of Section 1 of the Fourteenth Amendment—including the Citizenship Clause, the Equal Protection Clause, and the Due Process Clause (but not the Privileges or Immunities

37. *See generally* Olatunde C.A. Johnson, *Inclusion, Exclusion, and the "New" Economic Inequality*, 94 TEX. L. REV. 1647, 1650-51 (2016) (describing efforts to redress structural inequality and questioning whether class-based approaches adequately address racial inequality).

38. Regarding empirical evidence of widening income inequality in the United States and elsewhere, see, for example, ANTHONY B. ATKINSON, INEQUALITY: WHAT CAN BE DONE? 105 (2015); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 247-49 (Arthur Goldhammer trans., 2014).

Clause)—those clauses were understood to, at least in part, operate together to ensure broad citizenship and larger equality in the rights of all persons.[39] To be sure, very different constitutional tests are used in equal protection law versus due process law.[40] The Due Process Clause of the Fourteenth Amendment repeats the language from the Fifth Amendment making it binding on the states.[41] The Fifth Amendment language, in turn, stems from a longstanding English tradition that judges link to the "law of the land" language in the Magna Carta.[42] The Equal Protection Clause was newly adopted in the Fourteenth Amendment.[43] However, concepts of equality and due process are, and have long been, linked in theory and in application to a wide range of social and governmental practices.[44] In some constitutional litigation, both equality and procedural or substantive due process rights are implicated.[45] That connection is particularly important in cases in which wealth matters. This connection is important because wealth is not subject to heightened scrutiny under the Equal Protection Clause and because procedural unfairness can more severely impact indigent people who do not have the same access to attorneys and other aspects of the legal process. In the Sections that follow, I describe first procedural due process rulings focusing on wealth, then equal protection rulings, and, finally, how the two come together in equal process rulings.

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39. *See infra* Part I.C.

40. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1988) ("Since its inception, the Equal Protection Clause has served an entirely different set of purposes from the Due Process Clause.").

41. *See* U.S. CONST. amend XIV, § 1.

42. *See* Francis W. Bird, *The Evolution of Due Process of Law in the Decisions of the United States Supreme Court*, 13 COLUM. L. REV. 37, 37 (1913); *see also* Griffin v. Illinois, 351 U.S. 12, 16 (1956) ("Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta.").

43. *See* U.S. CONST. amend. XIV, § 1.

44. *See, e.g.*, Deborah Hellman, *Equality and Unconstitutional Discrimination*, *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 51, 51-53 (Deborah Hellman & Sophia Moreau eds., 2013); Abrams & Garrett, *supra* note 28, at 1332; Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 136-37 (2007).

45. *See infra* Part I.C.3.

A. Procedural Due Process

The Fourteenth Amendment of the Constitution forbids states from depriving "any person of life, liberty, or property, without due process of law."[46] In many contexts, litigants have challenged wealth distinctions used by the State that affect liberty or property interests.[47] In some settings, other constitutional rights are also implicated. For example, in *Gideon v. Wainwright*, in which the Court held that a state must provide trial counsel for an indigent defendant charged with a felony, both the Sixth Amendment right to counsel and procedural due process were implicated.[48] Indeed, in one of the Court's earliest constitutional criminal procedure rulings, the Scottsboro Boys case of *Powell v. Alabama*, the Court relied on both due process and equal protection in highlighting the rights of indigent defendants.[49]

More recently, in a range of situations involving administrative proceedings and challenges to the denial of government benefits, the Supreme Court has followed the test set out in *Mathews v. Eldridge*, asking a court to balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[50]

That said, in other situations, the Court has highlighted a far more traditional analysis, describing due process as "flexible" and using an approach that "calls for such procedural protections as the particular situation demands."[51] In the context of criminal procedure rules in particular, the Court has sometimes stated that tradition

46. U.S. CONST. amend. XIV, § 1.
47. *See, e.g.*, Mackey v. Montrym, 443 U.S. 1, 12 (1979).
48. 372 U.S. 335, 339 (1963).
49. 287 U.S. 45, 50 (1932).
50. 424 U.S. 319, 335 (1976).
51. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

and "fundamental fairness" define procedural due process, not a *Mathews* cost-benefit analysis.[52]

In the context of government benefits that are particularly important, the analysis may call for quite a bit more process. Thus, in *Goldberg v. Kelly*, the Court emphasized that welfare benefits provided "the means to obtain essential food, clothing, housing, and medical care" and therefore found that a full hearing must be conducted before termination of benefits.[53] In contrast, in *Mathews,* the Court did not find the same exigency in the context of Social Security disability benefits.[54] In the context of drivers' licenses, the Court found violative a scheme in which an uninsured driver who did not post security after an accident had a license suspended, focusing on the lack of an opportunity to be heard before suspension occurred.[55] The Court emphasized that there was a "substantial" interest in being able to hold a valid driver's license, which weighed heavily in the analysis.[56]

Another factor that is relevant to the private interest involved is the duration of the deprivation.[57] Longer deprivations may disparately affect indigent persons.[58] Further, the deprivations may be hard for the state to remedy. The Court emphasized in *Mackey* that the state "will not be able to make a driver whole for any personal inconvenience and economic hardship suffered by reason of any delay in redressing an erroneous suspension through postsuspension review procedures."[59]

Second, the *Mathews* analysis focuses on the risk of an erroneous deprivation. The Court has emphasized that: "The Due Process

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52. Medina v. California, 505 U.S. 437, 443 (1992). However, the Court has applied the *Mathews* test to procedures for pretrial detention and involuntary civil commitment. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (plurality opinion); Heller v. Doe, 509 U.S. 312, 330-31 (1993); Foucha v. Louisiana, 504 U.S. 71, 80 (1992). The Court has also applied the *Mathews* test to defense access to expert witnesses. *See* Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (citing fundamental fairness concerns as well).

53. 397 U.S. 254, 264, 270 (1970).

54. 424 U.S. at 349.

55. Bell v. Burson, 402 U.S. 535, 539-42 (1971).

56. Mackey v. Montrym, 443 U.S. 1, 11-12 (1979) ("The duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved."); *see Bell*, 402 U.S. at 539.

57. *Mathews*, 424 U.S. at 341.

58. *Id*. at 342.

59. 443 U.S. at 11.

Clause simply does not mandate that all governmental decision-making comply with standards that assure perfect, error-free determinations."[60]

Third, the analysis asks what government interests justify the relative lack of process provided. In *Mackey,* for example, where the issue was summary suspension of drivers' licenses for those who refuse to take a breath-analysis test, the Court emphasized a strong interest in public safety and compliance.[61]

In a recent case applying the *Mathews* framework, *Turner v. Rogers*, the Supreme Court found that civil detention for contempt based on nonpayment of child support violated due process when insufficient notice and fact-finding were conducted.[62] Indeed, the Court highlighted that the trial judge had not made a finding that Turner had any ability to pay the owed child support, leaving that part of the form blank before ordering him incarcerated.[63]

In a separate group of cases such as *Boddie v. Connecticut*, the Supreme Court has found that making access to courts dependent on ability to pay filing fees violates procedural due process.[64] In *Boddie,* the Court struck filing fees and court costs, approximately $60, imposed for seeking a divorce.[65] The Court noted that: "The arguments for this kind of fee and cost requirement are that the State's interest in the prevention of frivolous litigation is substantial, its use of court fees and process costs to allocate scarce resources is rational."[66] The Court noted the availability of alternative ways to secure that government interest though, such as penalties for malicious filings.[67]

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60. *Id.* at 13.

61. *Id.* at 18 ("The Commonwealth's interest in public safety is substantially served in several ways by the summary suspension of those who refuse to take a breath-analysis test upon arrest. First, the very existence of the summary sanction of the statute serves as a deterrent to drunken driving. Second, it provides strong inducement to take the breath-analysis test and thus effectuates the Commonwealth's interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings. Third, in promptly removing such drivers from the road, the summary sanction of the statute contributes to the safety of public highways.").

62. 564 U.S. 431, 447-48 (2011).

63. *Id.* at 449.

64. 401 U.S. 371, 374 (1971).

65. *Id.* at 372, 374.

66. *Id.* at 381.

67. *Id.* at 381-82.

The Supreme Court has held that the Due Process Clause, therefore, does not ensure full and free access to courts, but where important individual interests are at stake (such as marriage dissolution rights) and where the state has created a monopoly on the ability to access that interest, the ability to pay cannot be unduly relied upon.[68] This type of procedural due process analysis plays an important role in the modern wave of fines and fees litigation, but with an equally important equal protection component.

B. Wealth and Equal Protection

The Supreme Court's opinion in *San Antonio Independent School District v. Rodriguez* addressed a claim that wealth-based classifications should receive heightened scrutiny under the Equal Protection Clause.[69] The case involved a challenge to a school funding scheme that relied on local tax revenue.[70] The Court explained that heightened scrutiny had been warranted in prior rulings when "the class discriminated against ... because of their impecunity ... [was] completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[71] In a five-to-four decision, the Court denied relief in the case, finding that reduced school funding in less wealthy districts did not constitute such an absolute deprivation.[72] The Court highlighted that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."[73]

At the time, commentators opined that further expansion of the Equal Protection Clause to more closely scrutinize wealth categories was inadvisable, because it would engage the Court in wealth

68. *See id.* at 374.

69. 411 U.S. 1, 17 (1973).

70. For an excellent description of the background of the case, see Michael Heise, *The Story of* San Antonio Independent School Dist. v. Rodriguez*: School Finance, Local Control, and Constitutional Limits*, *in* EDUCATION LAW STORIES 51, 51-74 (Michael A. Olivas & Ronna Greff Schneider eds., 2008); and Richard Schragger, San Antonio v. Rodriguez *and the Legal Geography of School Finance Reform*, *in* CIVIL RIGHTS STORIES 85, 85-109 (Myriam E. Gilles & Risa L. Goluboff eds., 2008).

71. *Rodriguez*, 411 U.S. at 20.

72. *Id.* at 62.

73. *Id.* at 23-24.

distribution, and because it would create extremely broad substantive review of most legislation and regulations.[74] In contrast, critics of the ruling viewed it as a troubling missed opportunity—a case where race and class were fundamentally connected; nowhere is that connection more important than in education.[75]

That said, the *Rodriguez* opinion also addressed a separate constitutional theory: the question of whether education was a fundamental right under the Fourteenth Amendment.[76] The Court applied rational basis scrutiny and denied relief.[77] In part for that reason, *Rodriguez* does not stand for any general proposition that wealth-based criteria do not receive heightened review under the Equal Protection Clause. The *Rodriguez* Court did not say anything categorical about either class discrimination or a fundamental right to education.[78] Indeed, one reason the *Rodriguez* Court denied relief was that while the class of plaintiffs was varied and statewide, the funding scheme did not clearly target an identifiable group of indigent people.[79] The Court explained:

> An educational financing system might be hypothesized, however, in which the analogy to the wealth discrimination cases [such as *Griffin*, *Douglas*, and *Mayer*] would be considerably closer. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of

74. *See* Klarman, *supra* note 11, at 217, 285 (describing the Burger Court's "judicial overreaction to what many regarded as the dangerously open-ended potential" of fundamental rights doctrine, alongside concern for the "potential for judicial wealth redistribution"); Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 58.

75. *See* Gerald Torres, *The Elusive Goal of Equal Educational Opportunity*, *in* LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR 331, 335 (Paul D. Carrington & Trina Jones eds., 2006); Camille Walsh, *Erasing Race, Dismissing Class:* San Antonio Independent School District v. Rodriguez, 21 BERKELEY LA RAZA L.J. 133, 171 (2011).

76. 411 U.S. at 30 ("[T]he [mere] importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."); *see also id.* at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.").

77. *Id.* at 6, 18.

78. *See generally id.*

79. *See id.* at 54-55.

> "poor" people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today.[80]

Note that in 1980, in *Harris v. McRae*, the Court noted that it "has held repeatedly that poverty, standing alone, is not a suspect classification," but cited a ruling that did not actually explicitly discuss that question.[81]

Yet, in its later 1982 ruling in *Plyler v. Doe*, the Court applied intermediate scrutiny to a Texas rule denying free public education to school-aged children who did not have immigration status.[82] As Kerry Abrams and I have separately written, "Read instead as an intersectional rights case, *Plyler* takes on a different cast. Although the state has an interest in an educated population, the real interest at stake is the interest of the children themselves."[83] Thus, *Plyler* involves both equal protection and substantive due process interests, as "*Plyler* can be read as a case in which the equal protection interest of undocumented children is read intersectionally with the due process interest in obtaining an education, even while neither interest on its own would merit heightened scrutiny."[84]

In a subsequent ruling in 1986, in *Papasan v. Allain*, the Court found merit to an equal protection claim challenging Mississippi's sale of public lands held for the benefit of public schools in twenty-three counties.[85] The Court noted, "As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions [of] whether

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80. *Id.* at 25 n.60; *see also* Luke van Houwelingen, *Tuition-Based All-Day Kindergartens in the Public Schools: A Moral and Constitutional Critique*, 14 GEO. J. ON POVERTY L. & POL'Y 367, 375 (2007). One critique, however, is that the Court did not find the economic class sufficiently narrowed based on class, when, as the Court acknowledged, it was, in fact, also narrowed based on race. *See Rodriguez*, 411 U.S. at 12 ("The residents are predominantly of Mexican-American descent: approximately 90% of the student population is Mexican-American and over 6% is Negro."); *see also* Darren Lenard Hutchinson, *"Unexplainable on Grounds Other than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 699-700.

81. 448 U.S. 297, 323 (1980) (citing James v. Valtierra, 402 U.S. 137 (1971)).

82. *See* 457 U.S. 202, 218 n.16, 230 (1982).

83. Abrams & Garrett, *supra* note 28, at 1338.

84. *Id.*

85. *See* 478 U.S. 265, 286-87 (1986).

a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe [upon] that right should be accorded heightened equal protection review."[86] Rather than challenging a state-wide school funding scheme, as in *Rodriguez*, this case centered on a single aspect of state policy and "a state decision to divide state resources unequally among school districts."[87]

Compare, though, the result in *Kadrmas v. Dickinson Public Schools* where the Court upheld a $97 fee for bus service imposed on an indigent child who lived sixteen miles from a public school, stating that because there was no fundamental right or category such as sex or alienage involved, no equal protection violation occurred.[88] Or, compare the result in *McGinnis v. Royster*, in which the Supreme Court rejected as satisfying a legislative rational basis review, an equal protection challenge to a New York law that denied "good time credit" from state prisoners who were jailed pretrial; these prisioners argued that they were disadvantaged as compared to those who could afford to make bail.[89] Justice Douglas dissented, calling this a "discrimination ... against those too poor to raise bail and unable to obtain release on personal recognizance."[90] Moreover, he noted a policy concern that detained people are far more likely to be sentenced to prison, citing to studies of the pretrial process conducted in the 1960s by the Vera Foundation.[91]

Understanding why some cases such as *Rodriguez* and *McGinnis* come out one way and a line of other cases come out a different way helps one to understand both the limits of the Equal Protection Clause in addressing government decision-making that disparately affects the indigent and also why due process analysis can aid in the analysis. In some cases the Supreme Court has insisted on equality as to wealth, including situations when substantial individual interests were at stake, such as education in *Plyler v. Doe,* or, in other cases, marriage, and family decision-making.[92] Thus, some of

86. *Id.* at 285.

87. *Id.* at 288.

88. *See* 487 U.S. 450, 461-63, 465 (1988).

89. *See* 410 U.S. 263, 276-77 (1973).

90. *Id.* at 280 (Douglas, J., dissenting).

91. *See id.* at 282-83 ("Detained persons are more likely to be sentenced to prison than bailed persons regardless of whether high or low bail amounts have been set.").

92. *See* 457 U.S. 202, 205 (1982).

those cases touch on fundamental rights recognized under substantive due process. For example, in *Zablocki v. Redhail*, the Court discussed an equal protection violation where the right to marry was conditioned on full payment of any outstanding child custody.[93] The Court emphasized, however, that the statute "significantly interfere[d]" with a fundamental right to marry and linked the analysis to substantive due process rulings regarding "decisions relating to procreation, childbirth, child rearing, and family relationships."[94]

In criminal cases, judges have focused more directly on economic status and class equality. In *Williams v. Illinois*, the Court stated: "[T]he Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."[95] In that case, an indigent person could not pay the statutory fine and was kept an additional 101 days in jail, because the judge treated each day as the equivalent of $5 to "work out" the imposed fine.[96] Similarly, in *Tate v. Short*, where a statute imposed a fine, and the judge imprisoned an indigent person who could not pay it, the Court held that "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."[97]

Justice John Marshall Harlan had long disagreed with such rulings in the way that they seemed to rely on equal protection rather than due process.[98] He concurred in *Williams,* arguing that equal protection was not the right analysis but that the proper approach was to rely on due process,[99] and he dissented in *Griffin*.[100] Justice Harlan's point has real merit, since a significant component of the concern is not with equality in outcomes but the fairness of

93. *See generally* 434 U.S. 374 (1978).

94. *Id.* at 386.

95. 399 U.S. 235, 244 (1970).

96. *See id.* at 236-37.

97. 401 U.S. 395, 398 (1971) (quoting Morris v. Schoonfield, 399 U.S. 508, 509 (1970)).

98. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 29 (1956) (Harlan, J., dissenting).

99. *See* 399 U.S. at 260 (Harlan, J., concurring in result) ("An analysis under due process standards, correctly understood, is ... more conducive to judicial restraint than an approach couched in slogans and ringing phrases ... that blur analysis by shifting focus away from the nature of the individual interest affected.").

100. *See* 351 U.S. at 29, 39 (Harlan, J., dissenting).

the process. Justice Harlan's separate opinions may explain why the Court eventually came to see that both equal protection and due process should play a role in the analysis. Thus, in another group of cases, to which I turn next, the Court adopted an approach at the intersection of equal protection and due process.

C. Equal Protection and Due Process

The Equal Protection Clause and the Due Process Clause came together in the Supreme Court's ruling in *Bearden v. Georgia*. There, the Court considered "whether the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution."[101] The Supreme Court explained in *Bearden* that "[d]ue process and equal protection principles converge in the Court's analysis" of cases where defendants are treated differently and subject to criminal punishment based on relative wealth.[102] The Court noted that "we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question of whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause."[103] Before turning to the facts and the ruling in *Bearden*, which are both worthy of elaboration, it is useful to highlight what this analysis entails.

This type of analysis, relying on two separate constitutional provisions, is what Kerry Abrams and I have called an intersectional analysis. The Supreme Court has set out several types of cumulative constitutional analyses, including aggregate harm approaches, in which multiple discrete acts add up to a harm of sufficient magnitude to receive constitutional relief, and hybrid rights, in which the Court suggests that the presence of more than one partial violation can result in relief.[104] A third category of cumulative constitutional rights, intersectional rights, "occurs when the action ... violates more than one constitutional provision [but

101. Bearden v. Georgia, 461 U.S. 660, 661 (1983).

102. *Id.* at 665.

103. *Id.*

104. Abrams & Garrett, *supra* note 28, at 1310 (setting out three general types of cumulative constitutional rights).

only results in relief] when the Constitutional provisions are read to inform and bolster one another."[105] Thus, a case such as *Bearden* should not be seen as a case involving two separate constitutional claims. Instead, the reasoning explains how two constitutional claims are related and bolster each other. An intersectional approach is not unusual, and many other examples can be documented across a range of constitutional rights.[106] The bolstering relationship between equal protection and procedural due process is particularly well explained in *Bearden* and in the related line of cases regarding punishment for inability to pay and access to justice.[107]

1. The Bearden *Ruling*

The *Bearden* case involved a challenge by a man who had been sentenced to probation and ordered to pay criminal fines of $500 and $250 in restitution.[108] He was able to borrow $200 from his parents, but, as an illiterate person with a ninth-grade education, he had not been successful in his efforts to find employment.[109] He told his probation officer that he would not be able to make his next payment on time, and the officer found him in violation.[110] After an evidentiary hearing before a trial judge, his probation was revoked.[111]

The *Bearden* Court explained its ruling by highlighting both the inequality inherent in incarcerating a person due to indigency and also the inadequate procedures used by the trial judge: "Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay."[112] The *Bearden* ruling also discussed that the state possessed alternatives that would not so severely burden the poor.[113] The majority noted that

105. *Id.* at 1313.
106. *See id.* at 1313-14.
107. *See id.* at 1345.
108. *See* 461 U.S. at 662-63.
109. *Id.*
110. *Id.*
111. *Id.* at 663.
112. *Id.* at 672.
113. *See id.* at 671-72.

"the sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine."[114] The majority added that a reduced fine or public service can adequately serve the state's interest in accomplishing deterrence and punishment.[115] In the manner of a procedural due process ruling, rather than an equal protection ruling curing discriminatory treatment, the Court then set out the process that a judge should apply in a parole revocation hearing.[116] The Court stated that if parole is to be revoked for failure to pay a fine or restitution, then the judge must inquire into the reason why the defendant failed to pay.[117] If the reason was lack of financial resources, then "alternative measures of punishment" should be used, but if it was a willful failure to pay, then the judge may revoke parole and sentence the defendant to further imprisonment.[118] Citing to an equality concern with disparate treatment based on wealth, Justice O'Connor wrote that "[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine."[119] But in the next sentence, in a reference to due process standards, Justice O'Connor additionally wrote that "[s]uch a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment."[120]

It is not just the need to examine procedural fairness that makes the Due Process Clause relevant to the analysis, but also the non-categorical nature of income inequality. Justice O'Connor notes that financial resources are on a spectrum, as is the inequality created by relying on inability to pay in incarcerating individuals.[121] For that reason, "[a] due process approach has the advantage in this context of directly confronting the intertwined question of the role that a defendant's financial background can play in determining an appropriate sentence."[122] That reasoning helps to explain why an

114. *Id.* at 672.
115. *Id.*
116. *See id.* at 672-73.
117. *Id.* at 672.
118. *Id.*
119. *Id.* at 672-73.
120. *Id.* at 673.
121. *See id.* at 666 n.8.
122. *Id.* ("When the court is initially considering what sentence to impose, a defendant's

equal process approach may be particularly well-suited to class-based discrimination claims. Procedure and substance can both be implicated by government conduct that is wealth-based.

In a wonderful passage, the *Bearden* Court explained: "Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into" the government's ends and means, and the affected individual's interests.[123] This ruling was not novel.[124] The Court explained that it was not only "following the framework" of prior rulings, such as *Williams v. Illinois* and *Tate v. Short*, which adopted an equal protection analysis,[125] the Court was also "asking directly the due process question" regarding whether the burden imposed was "fundamentally unfair or arbitrary" given the indigent person's inability to pay the fine.[126]

Again, the inquiry is not just a *Mathews v. Eldridge* cost-benefit procedural due process balancing, because it examines the individual interests on a spectrum depending on financial background and ability to pay fines and fees.[127] Importantly, however, the Court did not conduct a typical Equal Protection Clause analysis either.[128] For example, the Court did not state what level of scrutiny it was applying.[129] The Court did not suggest that it was departing from *Rodriguez* and applying heightened scrutiny to class-based discrimination.[130] Instead, the result followed from the combination of class-based harm and unfair and arbitrary procedures.[131] It was an intersectional and cumulative analysis.

The *Bearden* ruling provides a clear-eyed discussion of the rationale that operates across a line of decisions regarding access to

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level of financial resources is a point on a spectrum rather than a classification. Since indigency in this context is a relative term rather than a classification, fitting 'the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished.'" (citing North Carolina v. Pearce, 395 U.S. 711, 723 (1969))).

123. *Id.* at 666-67.

124. *See id.* at 665.

125. *Id.* at 665-67 (citing Williams v. Illinois, 399 U.S. 235, 260 (1970) and Tate v. Short, 401 U.S. 395, 398 (1971)).

126. *Id.* at 666.

127. *See id.* at 674.

128. *See id.* at 666-67.

129. *See id.* at 665.

130. *See id.* at 672-73.

131. *See id.*

courts that have developed at the intersection between equal protection and due process cases. The Court in *Griffin v. Illinois* held that states cannot condition the right to appeal on a person's ability to afford the cost of a trial transcript.[132] The Court held:

> It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty.[133]

2. Access to Justice and Other Equal Process Cases

The *Bearden* ruling grew out of a larger line of cases developing similar reasoning. For example, in *Draper v. Washington* the Court rejected a process in which the State only permitted an indigent to obtain a free transcript of the trial if the trial judge agreed that the contentions on appeal were not frivolous.[134] The Court had also struck down filing fees for state habeas corpus applications and the process of seeking leave to appeal from a state supreme court.[135] In *Douglas v. California*, the Supreme Court went further, holding that waiving fees to comply with *Griffin* is not enough: that counsel must be provided to indigent convicts during their first appeal.[136]

As the Court later explained in *Ross v. Moffitt*, "[t]he precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment."[137] The Court noted that:

> Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry

132. *See* 351 U.S. 12, 19-20 (1956).

133. *Id.* at 18 (citation omitted); *see also* Mayer v. City of Chicago, 404 U.S. 189, 196-97 (1971) (holding that the State could not deny a free transcript to an indigent defendant, which constituted "a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way").

134. 372 U.S. 487, 499-500 (1963).

135. Smith v. Bennett, 365 U.S. 708, 713-14 (1961); Burns v. Ohio, 360 U.S. 252, 253 (1959).

136. 372 U.S. 353, 355 (1963).

137. 417 U.S. 600, 608-09 (1974).

> which emphasizes different factors. "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.[138]

Cases in criminal settings adopted more deferential approaches where the state already provided some meaningful level of access to indigent defendants. In *Ross v. Moffitt*, the Court explained that "[t]he duty of the State ... is not to duplicate the legal arsenal that may be privately retained by a criminal defendant ... but only to assure the indigent defendant an adequate opportunity to present his claims fairly."[139] There, the Court found that while the state must waive fees and provide counsel during appeals, petitioners in subsequent discretionary post-conviction proceedings need not receive the same appointment of counsel.[140] The Court relied not on the due process clause, finding that sufficient process and access to courts had been provided by the state during trial and appellate stages, but instead focused on the claim that it was a denial of equal protection to not provide an attorney post-conviction.[141] On that bare equal protection claim, the Court concluded that there was not enough support for the argument that indigent post-conviction petitioners were disadvantaged in the process.[142] It is important to note the difference in the analysis, as compared with cases such as *Douglas, Griffin*, and *Bearden*. The Court only focused on one of the two potentially applicable constitutional provisions and denied relief.[143]

In *James v. Strange*, a case that has present-day implications for debt collection practices, Justice Louis Powell, Jr. wrote an opinion for the Court in 1972 finding that Kansas unconstitutionally imposed severe and punitive policies when engaging in debt collection against former felons to recover costs of their indigent

138. *Id.* at 609.
139. *Id.* at 616.
140. *Id.*
141. *Id.* at 611 (finding that the "question is more profitably considered under an equal protection analysis").
142. *Id.* at 617-18.
143. *Id.* at 611, 617-18.

representation.[144] Without the exceptions that existed for other civil debtors for necessary aspects of support such as food, fuel, transportation, and clothing, these practices, such as garnishment of wages or welfare, made the treatment of indigent criminal defendants unlike that of other classes of debtors.[145] Using strong language, Justice Powell wrote: "State recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect."[146] Justice Powell concluded the opinion stating: "The statute before us embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law."[147] The focus was on equal protection, but the Court also relied on due process cases regarding garnishment of wages of the indigent, such as *Sniadach v. Family Finance Corp*.[148] In contrast, in *Fuller v. Oregon*, the Court rejected a challenge to indigent defense fees, where, after conviction, a defendant is able to pay the fees, not relying on an equal process theory in that case.[149]

3. Equal Protection and Substantive Due Process

The same reasoning adopted in the *Bearden* line of cases concerning equal protection and procedural due process claims similarly applies when it is a substantive due process claim. In its 1996 ruling *M.L.B. v. S.L.J.*, a case in which indigent mothers had to prepay court costs for documents, including transcripts in the record, to appeal the termination of their parental rights, the Court relied heavily on the *Bearden* line of cases.[150] In an opinion by Justice Ruth Bader Ginsburg, the Court explained that the cases do not mean that wealth-based sanctions are impermissible when they are "not merely *disproportionate* in impact," but they are impermissible when "they are wholly contingent on one's ability to

144. 407 U.S. 128, 141-42 (1972).
145. *Id.* at 135.
146. *Id.* at 141-42.
147. *Id.* at 142.
148. *Id.* at 135-36 (quoting North Carolina v. Pearce, 395 U.S. 337, 340 (1969)) (stating that garnishment proceedings "impose tremendous hardship on wage earners with families to support").
149. 417 U.S. 40, 47-48 (1974).
150. 519 U.S. 102, 127 (1996).

pay."[151] That reasoning not only included a component focused on the degree of deprivation, as in procedural due process cases, but also the inequality with which that deprivation is imposed.[152] It is both an equality- and due process-based reasoning, and it applies here not in a setting involving criminal punishment, but civil fees regarding parental rights.[153] The Court in *M.L.B.* strongly emphasized that it was not just in criminal punishment-related settings that it questioned the ability to impose major consequences for inability to pay.[154] The Court noted that in *Mayer v. City of Chicago*, the criminal conviction in question was a petty offense that carried with it no jail time but did carry a fine.[155] The problem with all such statutes is that "they are wholly contingent on one's ability to pay," and therefore impose consequences only on persons that fall within the class of individuals that cannot pay.[156] Moreover, the Court noted that it opened no floodgates by applying this approach to "cases typed 'criminal,'" since the Court had already found that parental rights implicate important personal interests.[157]

Thus, these equal process cases are not just about differential wealth-based punishment of the poor. They include cases in both civil and criminal contexts, as well as cases regarding access to courts. Each category of cases implicates important individual interests. The *M.L.B.* ruling makes clear that the equal process claim is not strictly limited to the criminal setting, and it raises the question whether other theories might similarly be amenable to the approach. The next Part, however, discusses several examples of areas in which the Court did not adopt such an approach, including because there was not a sufficiently clear class-based distinction being made.

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151. *Id.*
152. *Id.* at 120.
153. *Id.* at 120-21.
154. *Id.* at 127-28.
155. *Id.* at 112. The case was "quasi criminal in nature." Mayer v. City of Chicago, 404 U.S. 189, 196 (1971).
156. *M.L.B.*, 519 U.S. at 127.
157. *Id.*

II. FINES, FEES, AND EQUAL PROCESS

A new wave of litigation promises to bring equal process claims to the forefront in challenges against "new debtors' prisons" and the regulations, statutes, and discretionary decision-making that disparately punish the poor. In the Sections that follow, I describe litigation concerning topics such as pretrial detention and cash bail, both for criminal defendants and noncitizen detainees; fines and fees, including driver's license revocation; and modern-day debtors' prison litigation by the Department of Justice, such as the *Ferguson* consent decree. I focus on the equal process reasoning adopted by litigants and the lower courts, as well as failures to properly apply the theory and why doing so can lead to unsound results when courts erroneously dismiss civil rights lawsuits, when courts hand plaintiffs victories, and when the remedies fail to ensure both equality and fair process.

A. Litigation Challenging Pretrial Detention

Lower courts have long applied the equal process cases in a way that has far-reaching consequences. For example, in *Frazier v. Jordan*, in 1972, the Fifth Circuit stated that a local court may not "constitutionally impose a sentence requiring an indigent defendant to pay a fine forthwith or serve a specified number of days in jail," because unlike "[t]hose with means [to] avoid imprisonment[,] the indigent cannot escape imprisonment."[158] In 1976, in *Pugh v. Rainwater*, the Fifth Circuit en banc asked whether, "in the case of indigents, equal protection standards require a presumption against money bail" and "accept[ed] the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible."[159] The Fifth Circuit, there, rejected a narrow view that the equal process line of cases applies only to criminal punishment imposed after a conviction in favor of the principle that imprisonment at any stage raises real constitutional concerns (perhaps greater concerns), because such individuals

158. 457 F.2d 726, 726, 728 (5th Cir. 1972).
159. 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc).

"remain clothed with a presumption of innocence and with their constitutional guarantees intact."[160] The panel recognized that "[r]esolution of the problems concerning pretrial bail requires a delicate balancing of the vital interests of the state with those of the individual," as the State "has a compelling interest in assuring the presence at trial of persons charged with crime," while individuals are presumed innocent until proven guilty, and, therefore, retain their constitutional rights.[161] Relying on the equal process analysis discussed here, particularly the U.S. Supreme Court's rulings in *Williams* and *Tate,* the Court of Appeals concluded: "The demands of equal protection of the laws and of due process prohibit depriving pretrial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail."[162]

A series of recent rulings have similarly involved challenges to pre-trial detention and bail-related practices.[163] The Fifth Circuit recently ruled in *ODonnell v. Harris County* that the cash bail system in Harris County, Texas, violated the due process clause, because it adopted a "flawed procedural framework" in which judges could set bail based on arbitrary and wealth-based criteria.[164] However, an Eleventh Circuit ruling in *Walker v. City of Calhoun*, distinguished that ruling, finding that sufficient individualized process had been provided.[165] Lower courts that have granted relief have also focused on a *Bearden*-style equal process approach, rather than exclusively focusing on a procedural due process analysis.[166]

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160. *Id.*

161. *Id.*

162. *Id.* at 1057.

163. *See, e.g.*, Walker v. City of Calhoun, No. 4:15-CV-0170-HLM, 2016 WL 361612, at *10-11, *14 (N.D. Ga. Jan. 28, 2016) (granting preliminary injunction enjoining city from mandating fixed-payment bail schedule); Thompson v. Moss Point, No. 1:15cv182LG-RHW, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 16, 2015) (same).

164. 882 F.3d 147, 154 (5th Cir. 2018); *see also* Pierce v. City of Velda City, No. 4:15-cv-570-HEA, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015) (same).

165. 901 F.3d 1245, 1261 n.10 (11th Cir. 2018); *see also* Edwards v. Cofield, No. 3:17-CV-321-WKW, 2018 WL 4101511, at *1 (M.D. Ala. Aug. 28, 2018) (denying both plaintiff's motion for preliminary injunction and defendants' motion to dismiss in challenge to pretrial bail practices); Buffin v. City & County of San Francisco, No. 15-cv-04959-YGR, 2018 WL 424362, at *1 (N.D. Cal. Jan. 16, 2018).

166. Schultz v. Alabama, 330 F. Supp. 3d 1344, 1359, 1376 (N.D. Ala. 2018) (distinguishing *Walker* and granting a preliminary injunction to enjoin the practice of pretrial bail).

In my view, the Fifth Circuit also focused too much on procedural due process. The remedy specifically focused on process in the form of requiring trial judges to render individualized, case-specific findings.[167] However, as John Monahan and I have written, that remedy might not sufficiently eliminate troubling race- and income-based disparities.[168] Indeed, the Fifth Circuit ruling could lead to greater disparities and worse outcomes. Nothing in the remedy requires that trial judges monitor the patterns in outcomes pretrial, examining whether race or income disparities persist or are magnified.[169] The equal process theory described here helps one to understand what went wrong. The Fifth Circuit remedy is a procedural due process remedy, and, as a result, it focused on the process: asking trial judges to render individualized rulings.[170] That remedy does not ask that disparities be examined, and, as a result, it does not take correct account of the equal process command of *Bearden*.

The same unequal result could occur in California, which has passed state legislation to bar cash bail but permits individual districts and judges to exercise complete discretion.[171] Preserving a right to a hearing without any attention to the equality of outcomes that arise from that process provides only a hollow right that does not take seriously the central Fourteenth Amendment concern that grave individual rights not depend on one's wealth. The focus should remain both on equality and due process.

Other litigation has challenged the use of ability to pay to sentence criminal defendants. The Ninth Circuit has applied *Bearden* to hold that judges must consider financial circumstances before applying a U.S. Sentencing Guidelines enhancement based on a failure to pay fines and fees.[172] That remedy may better address inequality than the Fifth Circuit's ruling simply requiring more

167. *See ODonnell*, 882 F.3d at 545.

168. Brandon L. Garrett & John Monahan, *Judging Risk* 1-2 (Univ. Va. Sch. of Law Pub. Law & Legal Theory, Working Paper No. 2018-44, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3190403 [https://perma.cc/S4ZU-CX8S].

169. *Id.* at 40-41.

170. *See ODonnell*, 882 F.3d at 545.

171. Erwin Chemerinsky, *This Is Not the Way to Reform California's Bail System*, SACRAMENTO BEE (Aug. 22, 2018, 8:30 AM), https://www.sacbee.com/opinion/op-ed/article217018990.html [https://perma.cc/FSG8-7XJE].

172. United States v. Parks, 89 F.3d 570, 572 (9th Cir. 1996).

individualized attention to a case. However, absent ongoing analysis of patterns in dispositions, that remedy may be inadequate as well. Courts should consider ongoing monitoring and structural oversight in settings in which both equality and due process are implicated by patterns of inadequate individual decision-making.

Still additional litigation has challenged immigration detention in which bail decisions similarly disparately affect indigent persons.[173] For example, the Ninth Circuit affirmed a preliminary injunction in *Hernandez v. Sessions* by relying on a due process analysis.[174] The Court explained:

> Given that the detainees have been determined to be neither dangerous nor so great a flight risk as to require detention without bond, the question before us is: Is consideration of the detainees' financial circumstances, as well as of possible alternative release conditions, necessary to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings? We conclude that the answer is yes.[175]

The ruling cited to due process case law, but also discussed *Bearden* and court of appeals rulings such as *Pugh v. Rainwater* that adopt an equal process approach.[176] That ruling may have important implications as the Trump Administration has changed its practices to emphasize far greater use of detention for noncitizens.[177] The Ninth Circuit detailed the costs to immigrants of such detention: "[T]he American Bar Association describes evidence of subpar medical and psychiatric care in ICE detention facilities, the economic burdens imposed on detainees and their families as a result of detention, and the collateral harms to children of detainees whose parents are detained."[178] Those are both procedural failings, as well as substantive hardships imposed unequally based on

173. Hernandez v. Lynch, No. EDCV 16-00620-JGB (KKx), 2016 WL 7116611, at *1-2 (C.D. Cal. Nov. 10, 2016).

174. 872 F.3d 976, 990-91, 996-97 (9th Cir. 2017).

175. *Id.* at 990.

176. *Id.* at 990-92.

177. For discussion, see Michael K.T. Tan & Michael Kaufman, *Jailing the Immigrant Poor*: Hernandez v. Sessions, 21 CUNY L. REV. 69, 87-88 (2017).

178. *Hernandez*, 872 F.3d at 995.

citizenship and wealth categories. Ongoing monitoring of the decision-making that results from the federal court ruling should also occur in that context.

B. Litigation Challenging Fines and Fees

Another body of national litigation is challenging fines and fees that disproportionately affect low-income people. One focus of that litigation is rules in every state that permit suspension of drivers' licenses for failure to pay traffic fees, failure to appear in court, and other non-driving-related offenses.[179] In 2016, the Department of Justice recommended in a Dear Colleague Letter that states repeal such laws.[180] In many states, large swaths of the driving population have driver's license suspensions; a study found that over four million people, or 17 percent of drivers in California, for example, had such suspensions in 2013 (the state has now adopted legislation that has ended the practice).[181] A forthcoming study of North Carolina drivers' licenses is the first to conduct detailed empirical analysis of state-level suspensions.[182] That paper, by Will Crozier

179. Andrea M. Marsh, *Rethinking Driver's License Suspensions for Nonpayment of Fines and Fees*, NAT'L CTR. ST. CTS. (2017), https://www.ncsc.org/~/media/Microsites/Files/Trends%202017/Rethinking-Drivers-License-Suspensions-Trends-2017.ashx [https://perma.cc/5X63-3853]; Mario Salas & Angela Ciolfi, *Driven by Dollars: A State-by-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt*, LEGAL AID JUST. CTR. (2017), https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf [https://perma.cc/W2UW-AATM]; *see also* Joseph Shapiro, *How Driver's License Suspensions Unfairly Target the Poor*, NPR (Jan. 5, 2015, 3:30 AM), https://www.npr.org/2015/01/05/372691918/how-drivers-license-suspensions-unfairly-target-the-poor [https://perma.cc/GK35-FRN4].

180. Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen. of the Civil Rights Div. & Lisa Foster, Dir. of the Office of Access to Justice to Colleague (Mar. 14, 2016), https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf [https://perma.cc/9VAQ-AB2J]; *see also* ALAN M. VOORHEES ET AL., MOTOR VEHICLES AFFORDABILITY AND FAIRNESS TASK FORCE: FINAL REPORT xii (2006), https://www.state.nj.us/mvc/pdf/about/AFTF_final_02.pdf [https://perma.cc/N2H9-6WXF] (describing a study of suspended drivers in New Jersey, which found that 42 percent of people lost their jobs as a result of the driver's license suspension, that 45 percent could not find another job, and that this had the greatest impact on seniors and low-income individuals).

181. LAWYERS' COMM. FOR CIVIL RIGHTS, NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 13-14 (2015), http://www.lccr.com/not-just-ferguson-problem-how-traffic-courts-drive-inequality-in-california-4.20.15.pdf [https://perma.cc/GE2K-UGJX]; *see* Assemb. Comm. 103, 2017-2018, Reg. Sess. (Cal. 2017).

182. Brandon L. Garrett & William Crozier, Driver's License Suspension in North Carolina 3 (Mar. 19, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3355599 [https://perma.cc/F9CC-Q2QS].

and me, finds that, as of 2017, there are about 8,250,000 adult drivers in North Carolina, and 1,225,000 active driver's license suspensions in North Carolina with 827,000 for failure to appear, 263,000 for failure to comply, and 135,000 for both.[183] "This constitutes about 15% of all adult drivers in the state.... These are just those with active suspensions, and not those that have been suspended in the past and had their licenses restored."[184] The authors of this study analyzed individual and county characteristics of these cases to better understand the patterns in suspension of drivers' licenses in North Carolina, and found both geographic and racial disparities in such suspensions.[185]

A driver's license is a protected property interest that, if issued by the state, cannot be revoked or suspended "without that procedural due process required by the Fourteenth Amendment."[186] Yet only four states require by statute that there be any inquiry into ability to pay or indigency prior to suspension of drivers' licenses.[187] Indeed, many states make indefinite suspension mandatory upon nonpayment of court debt.[188] An inadequate process combined with effects felt more severely by indigent drivers, where the suspensions arise from failure (and inability) to pay fines and fees, are factors that raise a classic equal process claim.[189] Equal process claims have been raised in litigation being brought in an increasing number of jurisdictions challenging such driver's license suspensions. Litigation challenging driver's license suspension for failure to pay fines and fees has been recently brought, or is pending, in a range

183. *Id*.
184. *Id.*
185. *See id.* at 9-13.
186. Bell v. Burson, 402 U.S. 535, 539 (1972).
187. Salas & Ciolfi, *supra* note 179, at 2.
188. *Id.* ("[Nineteen] states—almost 40% of the nation—have laws imposing mandatory suspension upon nonpayment of court debt.").
189. *See* U.S. CONST. amend. XIV, § 1.

of states, including California,[190] North Carolina,[191] Michigan,[192] Mississippi,[193] Montana,[194] Oregon,[195] Tennessee,[196] Virginia,[197] and

190. *See Landmark Lawsuit Settled, Paves Way for Fair Treatment of Low-Income California Drivers*, ACLU N. CAL. (Aug. 8, 2017), https://www.aclunc.org/news/landmark-lawsuit-settled-paves-way-fair-treatment-low-income-california-drivers [https://perma.cc/ EZ84-JN6L].

191. Johnson v. Jessup, 381 F. Supp. 3d 619 (M.D.N.C. 2019) (dismissing due process claim on the pleadings and rejecting application for preliminary injunction). *See generally* Class Action Complaint for Declaratory and Injunctive Relief, *Johnson*, 381 F. Supp. 3d 619 (No. 1:18-cv-00467). The complaint alleges procedural due process violations, regarding lack of pre-deprivation hearings and inadequate notice; for example, "Neither the North Carolina General Code, including Sections 20-24.1 and 20-24.2, nor the DMV mandates a deprivation hearing before indefinitely revoking a license for non-payment of fines and costs." *Id.* at 29. The Complaint also alleges an "Equal Protection and Due Process *Bearden* Violation." *Id.* at 27. "The Fourteenth Amendment of the U.S. Constitution prohibits punishing individuals for non-payment without first determining that they had the ability to pay and willfully refused to make a monetary payment." *Id.* (citation omitted).

192. *See* Fowler v. Johnson, No. 17-11441, 2017 WL 6540926, at *6 (E.D. Mich. Dec. 21, 2017) (sustaining preliminary injunction), *rev'g* 924 F.3d 247 (6th Cir. 2019).

193. *See SPLC Reaches Agreement with Mississippi to Reinstate Over 100,000 Driver's Licenses Suspended for Non-Payment of Fines*, S. POVERTY L. CTR. (Dec. 19, 2017), https://www.splcenter.org/news/2017/12/19/splc-reaches-agreement-mississippi [https://perma.cc/XB39-FEJS].

194. *See* Class Action Complaint at 4-5, DiFrancesco v. Bullock, No. 2:17-cv-00066-SEH, 2019 WL 145627 (D. Mont. Aug. 31, 2017); Angela Brandt, *Lawsuit Alleges Montana Discriminates Against Drivers Too Poor to Pay Fines*, INDEP. REC. (Sept. 6, 2017), https://helenair.com/news/crime-and-courts/lawsuit-alleges-montana-discriminates-against-drivers-too-poor-to-pay/article_a5c72474-b911-562c-84c5-78b7ce4ec9e8.html [https://perma.cc/BD9C-UMUR]. Legislation was enacted in Montana ending the practice in May 2019. Mont. Code Ann. § 46-18-201(6) (2019).

195. *See* Mendoza v. Garrett, 358 F. Supp. 3d 1145, 1150-51 (D. Or. 2018).

196. *See* Thomas v. Haslam, 329 F. Supp. 3d 475, 480, 484 (M.D. Tenn. 2018) (following class certification, finding that driver's license revocation violated due process and equal protection rights).

197. *See* Class Action Complaint at 1-2, Stinnie v. Holcomb, 355 F. Supp. 3d 514 (No. 3:16CV00044). In the Virginia litigation, the Department of Justice filed a statement of interest. *See generally* Statement of Interest of the United States, *Stinnie*, 355 F. Supp. 3d 514 (No. 3:16cv00044). The DOJ filing heavily relied upon *Bearden*, and it characterized the claim as not just a procedural due process claim, but rather the statement began by explaining:

> [S]uspending the driver's licenses of those who fail to pay fines or fees without inquiring into whether that failure to pay was willful or instead the result of an inability to pay may result in penalizing indigent individuals solely because of their poverty, in violation of the due process and equal protection clauses of the Fourteenth Amendment.

Id. at 1-2. As of July, 2019, the practice has been ended and rights retroactively restored, in a budget amendment effective for two years in Virginia. Pete DeLuca, *Va. Passes Amendment to Restore Thousands of Suspended Driver's Licenses*, NBC29 (Apr. 3, 2019, 1:05 PM), https://nbc29.com/story/40248983/va-passes-amendment-to-restore-thousands-of-suspended-drivers-licenses [https://perma.cc/9X3C-TMLF].

Washington.[198] The Sections that follow describe the reasoning in several of the cases in which there have been judicial rulings.

1. Due Process Reasoning and Driver's License Suspensions

In one such constitutional ruling, a federal district court in Virginia issued a preliminary injunction halting the automatic suspension of drivers' licenses in Virginia for failure to pay state court fines and costs,[199] affecting over 900,000 people with such suspensions.[200] The federal judge emphasized that procedural due process requires fair notice and an opportunity to be heard, applying the three-step *Mathews* analysis to examine the automatic suspension scheme.[201] The judge emphasized that the notice was not clear, and more important, there was no procedure for a hearing on the fact of the license suspension (with no waiver of the $145 DMV reinstatement fee for inability to pay).[202] The judge emphasized that "the [l]oss of a driver's license adversely affects people's ability to gain and maintain employment, often leading to a reduction of income," and in turn, this "deprives individuals of means to pay their court debt, hindering the fiscal interests of the government."[203]

This reasoning was exclusively a procedural due process analysis, and it did not focus on the unequal burden placed on indigent individuals and the discriminatory impact of doing so.[204] In the case of the Virginia statute, the failure to engage with equality concerns may not matter practically. The same day as the ruling, the Governor announced plans to end enforcement of the statute through legislation; the new statute restoring rights and ending the practice of suspending licenses for nonpayment of traffic fines and fees was enacted and took effect in July 2019.[205] The plaintiffs had

198. *See* Complaint for Declaratory and Injunctive Relief at 1-6, Fuentes v. Benton County, No. 15-2-02976-1 (Wash. Super. Ct. Oct. 6, 2015), https://www.aclu-wa.org/docs/complaint-9 [https://perma.cc/V3UL-9GJJ].

199. *Stinnie*, 355 F. Supp. 3d at 519-20.

200. Class Action Complaint, *supra* note 197, at 5.

201. *Stinnie*, 355 F. Supp. 3d at 528.

202. *Id.* at 529, 530-31.

203. *Id.* at 521, 531.

204. *Id.* at 519-20.

205. Justin Wm. Moyer, *Virginia Plans to End Driver's License Suspensions for Court Debt, Governor Says*, WASH. POST (Dec. 20, 2018, 5:28 PM), https://www.washingtonpost.com/local/virginia-plans-to-end-drivers-license-suspensions-for-court-debt-governor-says/2018/12/20/

raised equal protection claims, and those claims were simply not discussed in the preliminary injunction ruling.[206] In a North Carolina district court ruling, only the due process claim was the subject of a motion to dismiss, and the judge dismissed it, reasoning that there is no "fundamental right" to a driver's license and finding that sufficient notice and an opportunity to be heard were provided under the state statute, post-termination of the privilege.[207]

2. Equal Process Reasoning and Driver's License Suspensions

In contrast to the ruling in the Virginia litigation, equal process reasoning was adopted by the federal district court that certified a class action challenging the practice in Tennessee.[208] The plaintiffs had argued that their claim required only a "straightforward application" of the equal process line of cases, from *Griffin v. Illinois* through *Bearden*.[209] The defendants argued that only rational basis scrutiny applied to claims challenging class, under *San Antonio v. Rodriguez*.[210] The district court agreed that if the court treated the case as a purely equal protection matter, the claims might fail, but then went on to explain that based on another line of Supreme Court rulings, such as *Bearden,* "the Supreme Court has said, in no uncertain terms, that a different set of tools is called for."[211] Thus, "[i]n *Bearden* and elsewhere, the Supreme Court has recognized that, in select areas, 'more is involved ... than the abstract question whether [the challenged law] discriminates against a suspect class, or whether [the matter at issue] is a fundamental right.'"[212] The district court stated that "the ability to drive is crucial to the

0e8ee990-03b4-11e9-b990-da60de24fefb_story.html [https://perma.cc/8SJ5-CGLX].

206. *See Stinnie*, 355 F. Supp. 3d at 527; Gabby Birenbaum, *Northam Touts Opportunity to Get Suspended Driver's License Restored*, RICHMOND-TIMES-DISPATCH (July 2, 2019), https://www.richmond.com/news/virginia/government-politics/northam-touts-opportunity-to-get-suspended-driver-s-licenses-restored/article_a228d5f3-d58f-5036-ae39-3db9bc08dad1.html [https://perma.cc/KT4S-BCHG].

207. Johnson v. Jessup, 381 F. Supp. 3d 619, 631 (M.D.N.C. 2019).

208. *See* Thomas v. Haslam, 303 F. Supp. 3d 585 (M.D. Tenn. 2018); *see also* Robinson v. Purkey, 326 F.R.D. 105, 146, 170-71 (M.D. Tenn. 2018) (certifying class action challenging driver's license revocation in City of Nashville).

209. *Thomas*, 303 F. Supp. 3d at 607.

210. *Id.* at 610.

211. *Id.* at 612.

212. *Id.* (quoting Plyler v. Doe, 457 U.S. 202, 223 (1982)).

debtor's ability to actually establish the economic self-sufficiency that is necessary to be able to pay the relevant debt."[213]

The federal district court judge concluded that the Tennessee practice violated the Equal Protection and Due Process Clauses; an appeal is pending.[214] The judge called the practice "powerfully counterproductive."[215] The judge explained: "If a person has no resources to pay a debt, he cannot be threatened or cajoled into paying it; he may, however, become able to pay it in the future. But taking his driver's license away sabotages that prospect."[216] The judge elaborated on the consequences of a suspension:

> For one thing, the lack of a driver's license substantially limits one's ability to obtain and maintain employment. Even aside from the effect on employment, however, the inability to drive introduces new obstacles, risks, and costs to a wide array of life activities, as the former driver is forced into a daily ordeal of logistical triage to compensate for his inadequate transportation. In short, losing one's driver's license simultaneously makes the burdens of life more expensive and renders the prospect of amassing the resources needed to overcome those burdens more remote.[217]

The district judge noted that where many continue to drive, they may face further prosecution and further fines for driving with a suspended license.[218] Thus, court debt "leads to a license revocation; the revocation leads to another conviction, this time for driving on a revoked license; the new conviction creates more debt; and the cycle begins again, with the driver, who was already indigent, only deeper in the red to ... a debt spiral."[219] This ruling did constitute a proper *Bearden* analysis and a reliance on an equal process theory, as developed here. Both equality and procedural due process supported the judicial ruling.

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213. *Id.* at 615.

214. Thomas v. Haslam, 329 F. Supp. 3d 475, 480, 491, 494, 496-97 (M.D. Tenn. 2018) (following class certification, finding that driver's license revocation violated due process and equal protection rights).

215. *Id.* at 483.

216. *Id.* at 483-84.

217. *Id.* at 484.

218. *Id.*

219. *Id.*

Compare, however, a ruling in the District of Oregon, similarly challenging a state scheme suspending drivers' licenses for failure to pay traffic fines.[220] The federal judge denied relief, after citing extensively to the language in *Bearden* describing a cumulative equal protection and due process claim.[221] Yet after doing so, the judge proceeded to separately analyze equal protection and due process theories.[222] The judge concluded that no heightened scrutiny applied if it was treated as an equal protection theory (and that the access-to-justice cases turned on the presence of a connection to criminal imprisonment or a fundamental right to child custody).[223] The judge then conducted a procedural due process analysis, and again found the test not satisfied, with shell-game type reasoning noting that since there was no fundamental right implicated, an absence of a fair process to determine ability to pay was not needed.[224]

The judge appeared genuinely confused about why other courts seemed to have "applied a more stringent level of scrutiny," when they did not purport to do so.[225] What the judge did not appreciate was that, without heightened scrutiny, the cumulative effect of a due process and equal protection violation can make the constitutional violation more serious. That is why the Court granted relief in *Bearden*[226] and that is why other district judges have done so regarding driver's license suspensions that implicate wealth and unfair process.[227]

3. Fines and Fees Litigation

Court debt can result in a range of other consequences, and litigation has challenged other fines and fee-related practices. Fines and fees-related litigation has targeted courts that impose other consequences without considering ability to pay.[228] Based on the

220. Mendoza v. Garrett, 358 F. Supp. 3d 1145, 1150 (D. Or. 2018).
221. *Id.* at 1171-72, 1182.
222. *Id.* at 1176, 1178.
223. *Id.* at 1169-71.
224. *Id.* at 1179.
225. *Id.* at 1172.
226. *Id.* at 1167.
227. *See supra* notes 212-19 and accompanying text.
228. *See, e.g.*, Class Action Complaint, Kennedy v. City of Biloxi, No. 1:15-cv-348-HSO-

analysis discussed here, many of these challenged schemes seem obviously violative of *Bearden* and the equal process case law described. As a result, the lawsuits have been highly successful. Perhaps what is most remarkable is how persistent such fines and fees practices have been in local jurisdictions, despite their apparent constitutional flaws.

Two lawsuits in New Orleans have resulted in decrees that state judges violated constitutional rights of litigants by imposing criminal fines without considering ability to pay, as well as creating a conflict of interest in which the same judges imposing those fines and fees were largely funded through their imposition.[229] Lawsuits successfully challenged municipal fine practices in St. Louis, Missouri.[230] ACLU lawsuits in the state of Washington led to a settlement in a county with particularly aggressive fines and fees practices, as well as encouraging state legislation to provide indigent persons relief from interest payments.[231] A Southern Center for Human Rights lawsuit in Columbus, Georgia, challenging "victim fees" imposed on domestic violence survivors, settled with the City agreeing to end the practice and restitution to be paid

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JCG, 2016 WL 4425862 (S.D. Miss. Oct. 21, 2015); Complaint for Declaratory and Injunctive Relief, Fuentes v. Benton County, No. 15-2-02976-1 (Wash. Super. Ct. Oct. 6, 2015), https://www.aclu-wa.org/docs/complaint-9 [https://perma.cc/V3UL-9GJJ]; First Amendment Class Action Complaint at 2-3, Cain v. City of New Orleans, No. 2:15-cv-04479-SSV-JCW, 2015 WL 5460413 (E.D. La. Sept. 21, 2015); Complaint Class Action, Foster v. City of Alexander City, 3:15-cv-647-WKW, 2015 WL 5256630 (M.D. Ala. Sept. 8, 2015); Complaint Class Action, Edwards v. Red Hills Cmty. Prob., LLC, No. 1:15-cv-67 (M.D. Ga. Apr. 10, 2015), https:// www.clearinghouse.net/chDocs/public/CJ-GA-0010-0002.pdf [https://perma.cc/L4KP-M7GT]; Settlement Agreement and Release of Claims at 1-2, Thompson v. DeKalb County, No. 1:15-cv-00280-TWT, 2015 WL 6087502 (N.D. Ga. Mar. 19, 2015); Preliminary Injunction Order at 1-2, Mitchell v. City of Montgomery, No. 2:14-cv-186-MEF, 2014 WL 11099432 (M.D. Ala. May 1, 2014).

229. Matt Sledge, *New Orleans Judges to Appeal Decisions in Fines and Fees Lawsuits*, NEW ORLEANS ADVOC. (Aug. 21, 2018, 12:59 PM), https://www.theadvocate.com/new_orleans/news/courts/article_fbd197d6-a56b-11e8-befe-abaf6281ca54.html[https://perma.cc/N53N-UKGX].

230. *See* Settlement Agreement at 1-2, Jenkins v. City of Jennings, No. 4:15-CV-00252-CEJ (E.D. Mo. Dec. 14, 2016), https://www.clearinghouse.net/chDocs/public/CJ-MO-0006-0005.pdf [https://perma.cc/GH7F-2QK5]; Susan Weich, *Municipal Court Judges in St. Louis County Are Told to Open Doors*, ST. LOUIS POST-DISPATCH (July 1, 2014), https://www.stltoday.com/news/local/crime-and-courts/municipal-court-judges-in-st-louis-county-are-told-to/article_e965d081-758d-500a-abb7-a054916edad2.html [https://perma.cc/HC55-ZLY4].

231. Monica Llorente, *Criminalizing Poverty Through Fines, Fees, and Costs*, ABA (Oct. 2, 2016), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs.html [https://perma.cc/TT9Y-XAK8].

to those charged the fees.[232] Another lawsuit is challenging extra fees charged by a private company that profits from "pay-only" probation services in Georgia.[233] Other cases have successfully challenged criminal justice debt collection practices.[234]

Yet another set of lawsuits has challenged diversion programs that provide alternatives to incarceration, but only to defendants that pay the fees, and without basing fees on ability to pay. A case in Charlotte, North Carolina, challenged such a deferred prosecution program on behalf of a man who owed the victim $1899 in restitution, but could only pay $100 given his resources; the district attorney ended the practice of requiring payment of such amounts.[235] A series of state courts have struck down fee-based diversion programs.[236]

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232. *Columbus Court Abolishes "Victim Fee," Pays Restitution to Survivors of Crime*, S. CTR. FOR HUM. RTS. (Oct. 12, 2017), https://www.schr.org/resources/columbus_court_abolishes_victim_fee_pays_restitution_to_survivors_of_crime [https://perma.cc/C6CA-FFVU].

233. *Sentinel Offender Services Sued for Collecting Illegal Fees in Atlanta Municipal Court*, S. CTR. FOR HUM. RTS. (July 26, 2017), https://www.schr.org/resources/sentinel_offender_services_sued_for_collecting_illegal_fees_in_atlanta_municipal_court [https://perma.cc/GU5C-5CHZ].

234. *See, e.g.*, Rodriguez v. Providence Cmty. Corr., Inc., 191 F. Supp. 3d 758, 779-80 (M.D. Tenn. 2016).

235. Michael Gordon, *DA Drops 'Pay to Play' Requirement for Program that Helps Defendants Avoid Trial,* CHARLOTTE OBSERVER (Feb. 16, 2018), https://charlotteobserver.com/news/local/crime/article200492979.html [https://perma.cc/MA85-MR4X] ("In a change that could affect dozens of criminal cases each year, District Attorney Spencer Merriweather announced that his office's 'deferred prosecution' program will no longer require nonviolent, first-time defendants to pay down court-assigned restitution to $1,000 or less."); Michael Gordon, *Yes, Rich People Have a Better Chance of Getting Off in Court, Public Defender Says*, CHARLOTTE OBSERVER (Sept. 21, 2017, 11:56 AM), https://charlotteobserver.com/news/politics-government/article174707216.html [https://perma.cc/B49B-5X7E].

236. *See, e.g.*, Mueller v. State, 837 N.E.2d 198, 205 (Ind. Ct. App. 2005) ("A practice of requiring payment of a fee as an absolute condition of participation in a pretrial diversion program discriminates against indigent persons in violation of the Fourteenth Amendment."); Moody v. State, 716 So. 2d 562, 565 (Miss. 1998) (en banc) (finding unconstitutional fee-based diversion program, because "an indigent's equal protection rights are violated when all potential defendants are offered one way to avoid prosecution and that one way is to pay a fine, and there is no determination as to an individual's ability to pay such a fine"); Commonwealth v. Melnyk, 548 A.2d 266, 272 (Pa. Super. Ct. 1988) (finding that conditioning diversion on paying restitution would "deprive the petitioner her interest in repaying her debt to society without receiving a criminal record simply because, through no fault of her own, she could not pay restitution").

4. Fines, Fees, and Voting Rights

In thirty states, former felons who have not paid fines and fees have voting rights restricted.[237] These provisions have not been successfully challenged, but they should raise even greater constitutional concerns than driver's license suspension. Consider a case in which an equal process approach was not adopted. In its ruling in *Johnson v. Bredesen*, the Sixth Circuit rejected a challenge to a state law that required former felons to pay any outstanding child support before having their right to vote restored.[238] That court interpreted *Bearden* as applying heightened scrutiny because the right of physical liberty was involved, but deemed no such heightened scrutiny relevant where the right to vote was concerned.[239] Such an interpretation completely misunderstands the equal process line of cases, and *Bearden* itself, which was not a case that claimed to apply any heightened scrutiny under the Equal Protection Clause. Instead, it was both the concern with procedural due process and the unequal burdens of that process that resulted in a joint-constitutional violation.[240] Moreover, adding to those concerns, a loss of voting rights seems to further reinforce exactly what the Court was concerned with in its equal process cases.

Beth Colgan has recently written a detailed analysis of state statutes that disenfranchise former felons for failure to pay costs, fines, and fees.[241] Colgan notes that many courts have treated the question as a voting rights problem and have not properly understood the relevant claim as implicating the Equal Protection and Due Process Clauses.[242] In so doing, courts are failing to examine the *Bearden* and access-to-justice lines of cases: they have failed, as I have put it, to consider an intersectional equal process theory.[243] That is, courts must examine whether there are alternative means

237. Karin Martin & Anne Stuhldreher, *These People Have Been Barred from Voting Today Because They're in Debt*, WASH. POST (Nov. 8, 2016), https://www.washingtonpost.com/posteverything/wp/2016/11/08/they-served-their-time-but-many-ex-offenders-cant-vote-if-they-still-owe-fines/ [https://perma.cc/3CG2-5JFX].

238. 624 F.3d 742, 750 (6th Cir. 2010).

239. *Id.* at 748-49.

240. Bearden v. Georgia, 461 U.S. 660, 665-66, 672-73 (1983).

241. Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55 (2019).

242. *Id.* at 61-62.

243. Abrams & Garrett, *supra* note 28, at 1331.

for the government to accomplish its interest in repayment based on the person's ability to pay and without engaging in voter disenfranchisement. As Colgan points out, courts can still use the civil and criminal systems to collect debts: they can engage in debt collection to more directly obtain payment, rather than punish by removing an unrelated ability to vote.[244] Moreover, in an ostensibly debt-collection-related practice, States must include fair process for actually determining financial ability to pay. Blanket disenfranchisement for failure to pay court costs and fees imposed on indigent people should be considered a grave constitutional violation, implicating voting rights and equal process.

C. DOJ Pattern and Practice Litigation

Most states currently permit imprisonment for willful failure to pay fines, fees, and costs and impose other collateral consequences for failing to satisfy those debts, including extension of probation, denial of voting rights, restriction on expunction, and suspension of other privileges, such as drivers' licenses.[245] States even commonly charge indigent defense fees to defendants who are, by definition, indigent and therefore receive appointed counsel in criminal cases.[246] In reaction to criticism, advocacy, and litigation, many states are now reconsidering barriers to justice that may effectively create debtor-prisons by punishing indigent people who cannot pay for failure to pay fines and fees.[247] The Civil Rights Division of the Department of Justice has used its authority under the Violent Crime Control Enforcement Act of 1994[248] to obtain injunctive relief

244. Colgan, *supra* note 241, at 62-63.

245. *See* ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 50 (2016); ALICIA BANNON ET AL., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY, BRENNAN CTR. FOR JUST. 2, 25, 29 (2010), http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf [https://perma.cc/SJV9-9ZQX].

246. Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor [https://perma.cc/97VQ-QR5T].

247. Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 507 (2016); Arthur W. Pepin, *The End of Debtors' Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations*, CONF. ST. CT. ADMINS. 1 (2016), https://cosca-ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx [https://perma.cc/CP8R-8WUN].

248. 42 U.S.C. § 14141(b) (2012).

in cases involving discriminatory use of fines and fees, most prominently in Ferguson, Missouri.[249]

The Consent Decree reached in the Ferguson case is a model for designing careful remedies that take account of both process and equality values. I have described how the Harris County remedy adopted by the Fifth Circuit focused unduly narrowly just on asking judges to make individualized rulings (and without any requirement that they offer reasons for the decisions).[250] In contrast, the *Ferguson* Consent Decree contained broad systematic relief requiring data collection and monitoring of police conduct, civilian oversight, changes to municipal code enforcement, use of force training for police, and training on bias-free and community policing among the many remedial provisions in the agreement.[251] The patterns of alleged constitutional violations ranged from First Amendment violations, to race discrimination claims under the Fourteenth Amendment, to equal protection and due process claims concerning abuse levying fines and fees.[252] A cumulative remedy was designed to address multiple and systematic constitutional violations.

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249. Consent Decree at 83-84, United States v. City of Ferguson, No. 4:16-cv-000180-CPP (E.D. Mo. Mar. 17, 2016), https://www.justice.gov/art/file/833701/download [https://perma.cc/VN4Z-PYML]. For the investigative report by the Department of Justice, see CIVIL RIGHTS DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 3 (2015), https://justice.gov/sites/default/files/apa/press-release/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/K4XA-BD9L]; *see also* Neil L. Sobol, *Lessons Learned from Ferguson: Ending Abusive Collection of Criminal Justice Debt*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 293, 309 (2015).

250. *See supra* notes 168-71 and accompanying text.

251. Consent Decree, *supra* note 249, at 9, 11, 73, 99, 119.

252. Complaint at 20, 23, 32, United States v. City of Ferguson, No. 4:16-cv-00180 (E.D. Mo. Feb. 10, 2016), https://www.justice.gov/crt/file/832451/download [https://perma.cc/S9WM-QXSE]. The equal process claim is described in the introduction to the complaint as a practice by city officials to "prosecute and resolve municipal charges in a manner that violates due process and equal protection guarantees," alongside Fourth Amendment excessive force violations, race discrimination claims, and First Amendment violations. *Id.* at 1-2. Paragraph 81 details the equal process claim:

> Defendant, through its agents, has established and continues to implement practices and procedures that result in deprivations of due process and equal protection. These practices and procedures impede an individual's ability to challenge or resolve a municipal charge, and result in additional penalties, including incarceration, that are imposed to compel the payment of court debts—even though the court does not deem any municipal violation to itself justify a penalty of incarceration.

Id. at 23-24.

III. TOWARDS A NEW EQUAL PROCESS

Equal process claims and remedies should take a central place in not just litigation, but also our theory of the Fourteenth Amendment. In the Parts that follow, I describe the Supreme Court's failure to apply an equal process theory in (1) *Obergefell* and same-sex marriage rulings; (2) *Trump v. Hawaii* and executive power concerning immigration; and (3) abortion rights rulings. Next, I describe the potential for equal process claims in (1) challenging new forms of status, (2) rethinking process theory, and (3) reinvigorating litigation and remedies surrounding access to justice more broadly.

A. Supreme Court Failures to Apply Equal Process

There is nothing unusual about cumulative constitutional rights analysis; "any number of the most commonly litigated constitutional theories involve cumulative theories, particularly intersectional rights."[253] The connection between equality and procedural due process, however, has particular potential to address class-based discrimination concerns. When the government uses wealth categories, it often provides unfair process as well. In Part II, I described a wave of recent litigation raising equal process claims, although often without clearly setting them out as such. Here, I describe further missed opportunities in which the Supreme Court failed to adequately articulate an equal process approach. One missed opportunity already noted is the case of *Kadrmas v. Dickinson Public Schools*, in which the Court upheld a ninety-seven dollar fee for bus service imposed on an indigent child; the Court reasoned that no suspect class or fundamental right was involved.[254] However, it could have instead found it arbitrary to not base imposition of the fee on any determination of ability to pay. Below I turn to other such missed opportunities in the prominent areas of same-sex marriage rulings, immigration law, and abortion rights.

253. Abrams & Garrett, *supra* note 28, at 1354.
254. 487 U.S. 450, 453-54, 465 (1988).

1. Same-Sex Marriage and Equal Process

The equal process line of cases surfaced in *Obergefell v. Hodges*, in which Justice Kennedy cited to those cases as an example of the importance of the connection between equal protection and due process in setting out the constitutional right of same-sex couples to marry.[255] The opinion emphasized: "The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."[256] The Court drew together due process and equality concerns, noting: "In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right."[257]

In some respects, the use of the equal process cases was inapposite. *Obergefell* linked substantive due process with equality concerns in a fundamental rights equal protection analysis. Thus, the discussion in *Obergefell* turned from the citation to *Bearden* and noting that the Court has sometimes connected due process and equal protection theories, to cases such as *Loving v. Virginia* that involved substantive due process claims regarding a fundamental right to marry, as well as equal protection claims regarding race discrimination in anti-miscegenation laws.[258]

Obergefell did not discuss procedure. There was no discussion of due process or concerns with government rules affecting individuals based on characteristics such as wealth. *Obergefell* dealt with a rule more like that in *Loving*: state regulations categorically excluding couples from marriage.[259] However, seen another way, *Obergefell* could have discussed less categorical questions raised by discrimination against LGBTQ families and relationships. Perhaps *Obergefell* should have done so, taking the citation to *Bearden* more seriously. Indeed, *Obergefell* went on to cite *Zablocki v. Redhail* as another example of the "synergy" between equal protection and due process, noting how, in the case, there was both a due process concern and

255. 135 S. Ct. 2584, 2603 (2015).
256. *Id.* at 2602.
257. *Id.* at 2603.
258. *Id.*
259. *See id.* at 2593.

an equality concern where ability to marry was conditioned on financial ability to pay back child support.[260] Next, the Court cited *M.L.B. v. S.L.J.*, in which "the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights."[261]

Relying on those cases, the *Obergefell* Court could have discussed wealth inequality and the many contexts in which public benefits or access can disadvantage LGBTQ individuals and relationships. However, no wealth-based distinction was litigated. The states did not charge a fee for access to marriage, but rather denied access to the legal institution of marriage, which in turn brings with it public benefits and cost savings associated with the institution.[262] To be sure, many have pointed out that had the ruling focused more on equality, it would have had more implications for discrimination against LGBTQ individuals generally, including outside of and in addition to marriage.[263] Moreover, had the focus, even within marriage and family relationships, been on procedural due process, then the case would have had clearer application for financial and other burdens that states might place on LGBTQ relationships, outside of the context of categorically barring marriage.[264] *Obergefell* did not clearly explain the connection between equality and due process that was the center of its ruling. The Court did not set out the level of scrutiny that applied, and, therefore, litigants do not know whether heightened scrutiny necessarily applies in other cases of government action discriminating against LGBTQ individuals.[265] In addition, there was more than one intersection at play: not just the connection between a substantive due process fundamental right to marriage and equality, but also the concern that when disfavored groups are singled out in less categorical settings, their procedural rights may be harmed as well. Kerry Abrams and I have discussed

260. *Id.* at 2603.

261. *Id.* at 2604 (citing M.L.B. v. S.L.J., 519 U.S. 102, 119-124 (1996)).

262. *See id.* at 2606.

263. *See* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 173 (2015).

264. *See, e.g.*, Carl Tobias, *Implementing Marriage Equality in America*, 65 DUKE L.J. ONLINE 25, 37-39 (2015) (discussing state legislation that allows private individuals to discriminate against LGBTQ individuals).

265. Abrams & Garrett, *supra* note 28, at 1314-15.

how a clearer intersection analysis reasoning would have clarified and enhanced the impact of *Obergefell*.[266] However, the Court did not frame the case in a way that suited the equal process claims set out here: where there is a government classification that is wealth-based, and it implicates fairness of government procedures or access to fundamental rights.

2. Lack of Process and Trump v. Hawaii

In the discussion of *Trump v. Hawaii*, much of the analysis has focused on whether the Supreme Court correctly analyzed evidence of discriminatory intent relevant to a claim of religious or ethnic discrimination.[267] That focus makes sense, since that was the claim the majority opinion, as well as the dissents, discussed.[268] However, lower courts engaged with a different theory—a due process theory—that was initially quite prominent in the litigation.[269]

As in many cases, plaintiffs initially included a range of claims in their civil rights complaints, although the issues were narrowed over time and as higher courts limited their own review.[270] Procedural due process was especially important early on in the litigation, because the early executive orders applied to green card holders.[271] Arbitrary revocation of rights of legal permanent residents to enter the country raised serious due process concerns, and, in response to litigation, the Administration quickly amended the Executive Order so that it would not apply to green card holders.[272] However, that did not allay the concern that the Order permitted arbitrary treatment that affected legal permanent residents and citizens, particularly family members of those covered by

266. *See id.* at 1337.

267. *See generally* Neal Kumar Katyal, Trump v. Hawaii: *How the Supreme Court Simultaneously Overturned and Revived* Korematsu, 128 YALE L.J. 641 (2019).

268. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2418, 2421 (2018); *id.* at 2429 (Breyer, J., dissenting); *id.* at 2433 (Sotomayor, J., dissenting).

269. Third Amended Complaint for Declaratory and Injunctive Relief at 37-38, Hawaii v. Trump, 265 F. Supp. 3d 1140 (D. Haw. 2017) (No. 1:17-cv-00050-DKW-KSC), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev'd*, 138 S. Ct. 2392 (2018).

270. *See* Abrams & Garrett, *supra* note 28, at 1353 ("Aggregation of constitutional rights is a pervasive feature of constitutional litigation. Litigants would not neglect to include an additional or alternative constitutional theory in a complaint.").

271. *See* Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

272. *See Trump*, 138 S. Ct. at 2403-04, 2406.

the Order.[273] Indeed, the revisions to the Order permitted waivers by consular officials,[274] and there is evidence of poor process and potentially arbitrary outcomes.[275] The Supreme Court focused on the fact of some inter-agency deliberation in drafting and redrafting the Executive Orders,[276] but it did not consider that thin process and discretion of consular officials with few checks would disparately fall on persons based on religion and ethnicity.[277] An equal process claim would have resulted in a very different analysis. However, neither the majority nor the dissents considered such analysis, despite equal protection and due process claims being raised in the lower courts.[278]

3. Equal Process and Abortion Rights

In other prominent constitutional contexts, equality and process concerns have not been adequately or jointly considered. As Cary Franklin has detailed, beginning in the 1970s, the Supreme Court has moved far away from considering class in the abortion rights cases concerning government funding.[279] In more recent cases, such as *Whole Women's Health,* the effect of abortion regulation and whether it constitutes an "undue burden" is focused on how that burden falls disparately on indigent women.[280] However, the analysis, as Franklin highlights, is not explicitly class-based.[281] Wealth is in the background; it should be in the foreground.

One response based on the analysis here is that the claims could be framed as raising questions of wealth-based access. Even if the Supreme Court treats the relevant claims as substantive due process claims, rather than procedural due process claims, *M.L.B. v. S.L.J.* might still be applicable.[282] It is a longstanding concern, of course, that the Court has not treated abortion cases as equal

273. *See id.* at 2445 (Sotomayor, J., dissenting).
274. *Id.* at 2422 (majority opinion).
275. *See id.* at 2445 (Sotomayor, J., dissenting).
276. *See id.* at 2408-12 (majority opinion).
277. *See id.* at 2430-31 (Breyer, J., dissenting).
278. *See* Hawaii v. Trump, 265 F. Supp. 3d 1140, 1147 n.8 (D. Haw. 2017).
279. Franklin, *supra* note 31, at 70-73.
280. *Id.* at 77-78.
281. *Id.* at 78-82.
282. *See generally* 519 U.S. 102 (1996).

protection cases raising questions regarding disparate treatment of women.[283] However, the cases also do not examine procedure in the way that they might, given how focused abortion regulations are in restricting access to the indigent.[284] Thus, abortion cases may not only neglect equality by failing to analyze the regulations as disparately affecting women, but they may also neglect procedural due process by focusing on substantive due process and not on liberty and fairness concerns. The Supreme Court's abortion cases fail to conduct two separate and distinct intersectional, cumulative constitutional analyses.[285] A case which raises a state-law standard that does not take ability to pay into account would most clearly implicate the equal process cases.[286] However, the broader concern with wealth inequality, as connected with important procedural and substantive due process rights, seems well supported by case law, including *M.L.B.,* and could better inform doctrine.[287]

B. Challenging Status and Inequality

The connection between equality and due process is important and helps to bring out concerns with status and subordination. Status relationships may not be legal, but they may be social. Further, even as to legal status, as Reva Siegal puts it, "[t]he ways in which the legal system enforces social stratification are various and evolve over time."[288] Equal process claims combine a focus on subordination with the use of arbitrary procedure to create new forms of status or subordination.[289] The tiers of scrutiny are not consistently employed by courts in practice, and the Supreme Court has been very reluctant to recognize any new groups entitled to heightened scrutiny. In contrast, new government practices that

283. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 383 (1985); Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISC. 160, 163 (2013).

284. *See* Franklin, *supra* note 31, at 10-11.

285. *See* Abrams & Garrett, *supra* note 28, at 1353-55 (arguing that courts should conduct intersection analyses of equal protection and substantive due process rights).

286. *See id.* at 1332-33.

287. *See id.*

288. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

289. *See id.* at 1113-14.

disadvantage groups, including those not subject to strict scrutiny but that also follow unfair process, can receive review under equal process claims. Social stratification can reflect unfair and arbitrary process, and not just through the singling out of groups or animus.[290] As a result, equal process claims may better address systemic consequences of government action. That said, equal process claims cannot address social stratification that is not connected to state action or where state action does not hinge on ability to pay. Disparate impact theories have not been developed in the courts under an equal process theory. Much remains to be done to develop whether non-indigency, but rather other types of poor procedure that produce disparate outcomes, might similarly deserve equal process review.

1. Equal Process and Process Theory

How can we bring the Equal Protection Clause to bear on pressing questions of discrimination? One solution was John Hart Ely's process theory, used to help explain tiers of scrutiny (and develop them) under the Equal Protection Clause.[291] The focus there, following the *Carolene Products* "Footnote 4" language,[292] is to more strictly scrutinize government action disparately affecting groups persistently left out of the political process.[293] Political rights, such as voting rights, might be of special concern under such a theory, but so might other government action that systematically disadvantages a group. In some recent decisions, Supreme Court Justices have expressed skepticism about process theory's relevance or applicability, as have commentators such as Dan Ortiz, who have argued that controversial substantive judgments are unavoidable in constitutional interpretation.[294]

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290. *See id.*

291. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

292. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

293. ELY, *supra* note 291, at 73-77.

294. *See* Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 721-22 (1991) ("[T]he central inquiry of process theory, whether the political decision-making process has functioned properly, is substantive through and through."); *see also* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory,* 77 VA. L. REV. 747, 747-48 (1991) (contending that "the impossibility of devising a

However, equal process theory merely reflects the intersection of two powerful clauses of the Fourteenth Amendment. In so doing, equal process claims add something to that process theory approach. Here, I argue, relying on an intersectional theory of cumulative constitutional harm developed with Kerry Abrams, that separate concerns with procedural arbitrariness can heighten the concern about discrimination. Process can be seen as itself a separate component of the constitutional theory: it is both a procedural and substantive claim.[295] Groups left out of the political process may face arbitrary treatment, which is of distinct concern and adds weight to their claims,[296] even if they are not recognized as a suspect class (such as with class itself or indigency).[297] It distorts the democratic process to weigh down indigent people with costs that they cannot pay by means of a process that they cannot meaningfully use to challenge these unequal burdens. The Supreme Court, in cases such as *Bearden,* gets right a fundamental fact of democratic legitimacy: participation requires both attention to equality and fair process.[298]

2. Access to Justice

The access-to-courts and access-to-justice theories have never sat comfortably in constitutional law scholarship. One reason may be that they combine criminal procedure and civil rights. Criminal procedure claims are studied by different scholars and with different perspectives. Access-to-courts claims, since they have arisen in areas relating to appellate filing, rights of jailhouse lawyers, parole and probation, and court costs, are often not covered in traditional constitutional law casebooks, which instead often focus on cases such as *Rodriguez*[299] and the question of whether wealth classifications receive strict scrutiny under the Equal Protection Clause.[300]

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nonsubstantive condemnation of race discrimination (as Ely sought to do) is not a fatal flaw in political process theory").

295. *See* Klarman, *supra* note 294, at 747-48.

296. *See* ELY, *supra* note 291, at 73-77.

297. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 323 (1980) ("[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.").

298. *See* Bearden v. Georgia, 461 U.S. 660, 664-67 (1983) ("Due process and equal protection principles converge in the Court's analysis in these cases.").

299. *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

300. *See, e.g.*, Lloyd C. Anderson, *The Constitutional Right of Poor People to Appeal Without*

One goal here is to highlight the importance of these cases to mainstream constitutional theory. For better or for worse, one reason why is that criminal justice consequences affect so many people in society—that housing rights, voting rights, employment rights, and so many other rights, all connect with fines, fees, and criminal justice outcomes.

To complicate matters further, the equal process connection is not, by any means, the only useful theory available to challenge obstacles to justice or government programs that increase inequality. Other constitutional rights may be relevant and may strengthen claims challenging lack of access to justice or unequal burdens imposed by government. For example, in the fines and fees area, the Eighth Amendment's Excessive Fines Clause could be a robust source of protection.[301] It has been interpreted narrowly by the Supreme Court in the past, but that could change.[302] The narrow Eighth Amendment jurisprudence may explain why it has been the due process and equal protection clauses that have done so much work in the past.

It is highly problematic that the equal process cases do not sufficiently take account of race discrimination, particularly given the remedial purposes of the Fourteenth Amendment. As Olatunde Johnson has noted, rising concern with economic justice has often neglected racial inequality that accompanies and can drive economic inequality.[303] Supreme Court rulings such as *Rodriguez* that failed to remedy schemes that disparately impacted the poor similarly failed to discuss the disparate racial impact of such measures.[304]

Payment of Fees: Convergence of Due Process and Equal Protection in M.L.B. v. S.L.J., 32 U. MICH. J.L. REFORM 441, 485-87 (1999); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1164-65; Stephen I. Vladeck, Boumediene's *Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2117-19 (2009).

301. *See* U.S. CONST. amend VIII.

302. *See* Tamar R. Birckhead, *The New Peonage*, 72 WASH.& LEE L. REV. 1595, 1636-37 (2015); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 283-84 (2014); Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause,* 15 LOY. J. PUB. INT. L. 319, 320-23 (2014); *see also* People v. Malone, 923 P.2d 163, 163-65 (Colo. App. 1995) (vacating $100,000 fine levied against convinced criminal defendant).

303. Johnson, *supra* note 37, at 1665 ("Highlighting race, ethnic, and gender difference, then, is a necessary disruption of the current interest in economic inequality.").

304. *See Rodriguez*, 411 U.S. at 29 (noting that the Supreme Court "has never heretofore

Equal Process cases that have provided relief, however, have similarly neglected discussion of race.

Many of the fines, fees, and pretrial policies being challenged in current litigation have a dramatically racially disparate impact, in addition to their impact on the poor. The American Bar Association has highlighted how "[f]ines and fees that are not income-adjusted ... are regressive and have a disproportionate, adverse impact on low-income people and people of color."[305] The Department of Justice, post-*Ferguson*,[306] has reminded municipalities that racial disparities in fines and fees practices are unlawful.[307] Those racial disparities have often been neglected in judicial rulings, although they certainly have been raised by litigants. It is a troubling feature of our constitutional jurisprudence that courts can be more comfortable focusing on procedure and on disparate impact on the poor than on race disparities. It certainly is telling that a race disparity claim under *Washington v. Davis*[308] may be much harder to prove than an equal process claim under *Bearden v. Georgia*.[309] This is all the more troubling given the long history of abuse of fines and fees used to oppress and discriminate against blacks and minorities, including in the Jim Crow South.[310]

Equal process claims may play a greater role if new social benefits are adopted, such as through living-wage legislation, or college-

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held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny").

305. ABA, TEN GUIDELINES ON COURT FINES AND FEES 5 (Aug. 2018), https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/114.pdf [https://perma.cc/JDQ2-BN7F]. Regarding racial disparities in driver's license suspensions, see Garrett & Crozier, *supra* note 182; and BACK ON THE RD. CAL., STOPPED, FINED, ARRESTED: RACIAL BIAS IN POLICING AND TRAFFIC COURTS IN CALIFORNIA 1, 22-24 (2016), http://ebclc.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf [https://perma.cc/FBB5-Q45J].

306. *See* U.S. DEP'T OF JUSTICE, *supra* note 249.

307. Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen. of the Civil Rights Div., & Lisa Foster, Dir. of the Office of Access to Justice to Colleague, *supra* note 180 (emphasizing that practices related to the imposition of fines may "violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, when they unnecessarily impose disparate harm on the basis of race or national origin").

308. 426 U.S. 229 (1976).

309. 421 U.S. 660 (1983); *see also* M.L.B. v. S.L.J., 519 U.S. 102, 125-27 (rejecting respondents' argument that *Washington v. Davis* overruled "the *Griffin* line of cases," and noting that *Bearden v. Georgia*, adhered "to *Griffin*'s principle of 'equal justice'").

310. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II 53-57, 63-67 (2008); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 198-205 (1988).

tuition assistance programs. Such benefits should be made available equitably. If such benefits are denied or terminated unfairly or in a disparate manner, equal process claims will be an important way to challenge such treatment. In contrast, equal protection claims do not define the affirmative rights to minimal resources necessary for meaningful participation in society. They do not as readily support a living wage, public housing, or other mixed public and private goods. Such claims better support access to justice where the state has a monopoly on the good and conditions it in ways implicating wealth. A broader theory of the Equal Protection Clause, which many have advocated,[311] would be needed to support a race- and class-based equal citizenship approach to the Fourteenth Amendment.

CONCLUSION

"Equal process" claims arise from a line of Supreme Court and lower court cases in which wealth inequality is the central concern and in which "[d]ue process and equal protection principles converge in the Court's analysis."[312] These lines of cases are very much alive, but they have often been neglected, including because courts, and the Supreme Court itself, are sometimes reluctant to engage in cumulative constitutional analysis.[313] However, these cases exemplify why sometimes joint harms really are more problematic and deserve more careful scrutiny. The equal process connection is at the forefront of litigation concerning the constitutionality of fines,

311. *See, e.g.*, C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 959-98 (1983); Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 888-901 (1976); William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 1-2, 7-9, 37 (1985); *see also* Sundeep Kothari, *And Justice for All: The Role Equal Protection and Due Process Principles Have Played in Providing Indigents with Meaningful Access to the Courts*, 72 TUL. L. REV. 2159, 2201 (1998) ("The framers of the Fourteenth Amendment intended that due process and equal protection be intertwined, because they understood that substance, procedure, and equality were related steps in determining what is just and fair.").

312. Bearden v. Georgia, 461 U.S. 660, 665 (1983); *see supra* notes 1-4 and accompanying text.

313. *See supra* Part III.A.

fees, cash bail, and, perhaps soon, challenges to voting restrictions.[314]

The connection between equality and procedure will be all the more important if both the reliance on fines and fees, and, conversely, the provision of social benefits, are reconsidered and expanded. Far too often it is the poor who are disproportionately fined and deprived of the means to a livelihood.[315] That is exactly the type of government action that Section 1 of the Fourteenth Amendment can remedy. Equal process claims are likely to multiply as groups continue to litigate access-to-justice-related claims and claims related to the use of costs and fees to disparately burden those with inability to pay. A robust Fourteenth Amendment protection for class-based distinctions is supported by existing case law, so long as the *Bearden* line of cases is developed and, more particularly, expanded. If so, then the longstanding concern that the Fourteenth Amendment insufficiently protects class may be relaxed.

One goal of this Article is to caution courts to examine the connection between equal protection and due process claims carefully. When courts examine cumulative constitutional rights, "they should be clear about what interests are mutually reinforcing or not, why, and how this affects the analysis or the scrutiny."[316] Both outcomes and remedies are affected by whether courts consider both the equality and process dimensions of equal process claims.[317] In an era of rising income inequality, equal process claims may have an important role to play. Hopefully, courts will correctly develop these claims and the resulting remedies to ensure that all persons enjoy both equality and due process. Equal process theory has the potential to reinvigorate the Fourteenth Amendment as a guardian against discrimination that increases inequality in society.

314. *See supra* Part II.
315. *See* ABA, *supra* note 305, at 5.
316. Abrams & Garrett, *supra* note 28, at 1355.
317. *See supra* Part III.