

Cynthia R. Farina

*On Misusing "Revolution" and "Reform": Procedural Due Process
and the New Welfare Act*

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Abstract by Richard G. Rose

Farina uses a recent article by Richard Pierce as an opportunity to reengage the debate over procedural due process in the wake of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Farina summarizes Pierce's argument that current procedural due process doctrine has its roots in articles published in the Yale Law Journal. These articles gained popular approval among intellectual elites during the War on Poverty and were later cited by the Supreme Court in *Goldberg v. Kelly*. The Pierce argument contends that the *Goldberg* decision began a series of changes that transformed welfare and other forms of government benefits from a mere privilege to "new" property subject to strict procedural safeguards. Now, however, in light of PRWORA and Republican ascendancy in Congress, the Court has an opportunity to roll back the due process "revolution" of the 1970s and move constitutional doctrine inline with contemporary public views on the role of government and personal responsibility.

Farina takes issue with this argument on several fronts. First, Farina traces the transformation of modern procedural due process to Cold War hysteria and the Civil Rights movement, wherein modern society, increasingly complex, gave government a more pervasive role in the lives of citizens and hence made the rights/privilege distinction of the former procedural due process doctrine an inadequate basis for regulating interactions between government and citizen. Second, the author reinterprets the articles in the Yale Law Journal and *Goldberg v. Kelly* and its progeny to underscore that the doctrinal shifts were not "revolutionary" but rather pragmatic, incremental attempts to confront the increasingly complex relationship between citizen and government. In light of this reevaluation of Pierce's argument, Farina contends that a close reading of PRWORA makes it clear that welfare reform does not destroy the constitutionally-protected property interest in welfare benefits initially established by *Goldberg v. Kelly*. In fact, Farina concludes, so long as there are government benefits to be distributed, current due process will continue to require procedural rights be afforded to welfare recipients. In effect, the contemporary administrative state, in all its increasing complexity, precludes a reversal of current procedural due process, cobbled out as it has been in response to the ever-changing relationship between government and citizen.