TWO WRONGS DON'T ADD UP TO RIGHTS: THE IMPORTANCE OF PRESERVING DUE PROCESS IN LIGHT OF RECENT WELFARE REFORM MEASURES

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INTRODUCTION

The welfare reform measures currently pending before Congress,1

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would restrict and reduce welfare benefits in many ways. Perhaps the most dramatic change in the proposed reform measures, however, is the replacement of the current system of federal entitlements by a system based on block grants to be administered by state governments.\(^2\) The new block grant system would completely alter the existing process whereby welfare benefits are funded and administered by the federal government. Under the current system, states must comply with extensive federal regulations in order to receive federal matching funds for welfare benefits.\(^3\) The proposed system, however, would not require states to comply with an elaborate system of federal regulations, but would allow states to receive block grants with fewer restrictions attached.\(^4\) The block grant system would enable states to experiment with welfare reform without the procedural protections for welfare recipients provided by the current system of entitlements.

Absent the adoption of additional measures by states to ensure due process in the allocation of block grant funds, the new system will have a particularly harmful effect on welfare recipients, especially on women and people of color. Under the current system, welfare recipients are entitled to a due process hearing, which is subject to judicial review, if benefits are denied or terminated.\(^5\) Under the proposed block grant system, welfare recipients would no longer be


2. H.R. 4, supra note 1, § 103.


4. See H.R. 4, supra note 1, § 103. The Personal Responsibility Act would have ended the system of entitlements and replaced it with one of block grants of funding to the states. Id. The bill specifically stated that welfare benefits are no longer entitlements. Id. The transfer of the power to the states in administering welfare benefits was one of the primary goals of the drafters of the Personal Responsibility Act. See 141 Cong. Rec. S11,601-02 (daily ed. Aug. 5, 1995) (statement of Sen. Dole) ("Our bill is based on three conservative principles: First and foremost, welfare reform should be designed and run by those closest to the problem—the State.... States should not have to play a game of 'mother may I' with the Federal Government when it comes to welfare."). State governors also strongly support the provision of welfare benefits to states in the form of block grants, and recently unanimously endorsed a proposal to do so. See Todd S. Purdum, Governors Adopt Plan to Overhaul Aid for the Poor, N.Y. Times, Feb. 7, 1996, at A1.

5. See infra notes 60-100 and accompanying text (discussing due process concept in context of current dispute resolution scheme).}
entitled to such hearings. Because the vast majority of welfare recipients are women,6 a significant number are people of color;7 and, by definition, welfare recipients are low income, the loss of due process will be particularly harmful for them. Empirical studies illustrate the importance of due process to protect low income women and people of color from decisions based on prejudice.8 Process also serves as a means of empowerment for those who are disempowered from society due to their race, class, or gender.9 Moreover, recent welfare reform measures, which reduce benefits and tighten eligibility requirements, make the provision of due process even more crucial as recipients struggle to comply with ever more complex and draconian eligibility requirements. Therefore, any program of welfare reform must maintain a system of due process rights for welfare recipients.

Part I of this Article discusses why due process is particularly important for poor people, for women and for people of color. Part II examines the existing system of due process hearings and the reasoning behind that system. Part III addresses the new welfare system being considered in Congress, and its effect on due process. Part IV considers the current trend toward intrusive welfare reform measures, which heightens the importance of due process for welfare recipients. Part V analyzes the approach of the courts to across-the-board cutbacks in welfare benefits similar to those being considered in Congress. Part VI presents new approaches for maintaining due process for welfare recipients.

Because I am most familiar with the law of the state of Illinois,10 I refer frequently to Illinois law. The recent developments in welfare

6. See U.S. DEP’T OF HEALTH & HUMAN SERVICES, RECIPIENT CHARACTERISTICS STUDY: AID TO FAMILIES WITH DEPENDENT CHILDREN tbl. 8 (1979) [hereinafter RECIPIENT CHARACTERISTICS STUDY] (noting that in 1979, the last year that the Department of Health and Human Services (HHS) published statistics on the gender and race of recipients, 80.6% of families receiving AFDC were headed by mothers or other female relatives, while only 17.4% of families were headed by fathers or other male relatives).

7. See id. at tbls. 13-14 (reporting that in 1979, 43.9% of AFDC recipients were African American, 51.7% of recipients were white, 13.6% of recipients were of Hispanic origin, 1.4% were American Indian, 1.0% were Asian and 2.0% were other or unknown). Currently, 39% of AFDC recipients are white, 37% are African American, and 18% are of Hispanic origin. All Things Considered (Nat’l Pub. Radio broadcast, Sept. 19, 1995), available in LEXIS, News Library, Script File.

8. See infra notes 26-34 and accompanying text (discussing studies showing that decision makers are more likely to be influenced by prejudice in informal proceedings).

9. See infra notes 40-43 and accompanying text (discussing process as means of empowerment).

10. I am familiar with the law of the State of Illinois due to my four years of experience as an advocate for the poor on the south side of Chicago.
law in Illinois are typical of those throughout the country, and serve as useful illustrations of the arguments developed herein.

I. THE IMPORTANCE OF DUE PROCESS FOR LOW-INCOME PEOPLE OF COLOR, PARTICULARLY WOMEN OF COLOR

The lack of an entitlement to welfare benefits and accompanying due process rights\(^\text{11}^\) would harm welfare recipients by denying them the enforceable right to have the state treat them fairly in the allocation of those benefits. The right to fair treatment by the state is fundamental in our society, and structured rights serve to empower those who are disenfranchised due to their race, class, or gender. A system of structured rights, with built-in safeguards, is essential to those people; the most vulnerable in our society.

Since 1971, studies have illustrated the importance of formal process for low-income people, in situations where their property rights are in jeopardy. In 1976, a study of the landlord/tenant courts in Cook County, Illinois, entitled \textit{Judgment, Landlord}, analyzed the system of courts through which the property rights of low-income people most often are determined.\(^\text{12}\) The authors of the study found that in the relatively informal process of the landlord/tenant courts, tenants almost always lost their cases, and in most cases, were unable even to present a defense.\(^\text{13}\) The study showed that tenants were twice as likely to win their cases when the judges were compelled to adopt more formal procedures, as a result of the tenants being represented by attorneys.\(^\text{14}\) Significantly, whether the landlord was represented by an attorney had no statistical effect because the landlords did not need a formal process to win.\(^\text{15}\)

\(^{11}\) The current system of procedural protections for welfare beneficiaries is rooted in the entitlement status of welfare benefits. \textit{See infra} notes 78-81 and 166 and accompanying text. For a discussion of the procedural protections to which welfare recipients are currently entitled, see \textit{infra} Part II, notes 60-100 and accompanying text.


\(^{13}\) \textit{See id.} at 103 (reporting that in courts studied, tenants who appeared in court on trial day won possession judgments in only 11% of cases). Unrepresented tenants who attempted to raise valid defenses to non-payment of rent based on the conditions of their apartment (valid defense at the time under Illinois law), lost 93.3% of their cases. \textit{Id.} at 109.

\(^{14}\) \textit{Id.} at 114 (finding that 13.3% of tenants represented by attorneys won possession of their apartments, whereas only 6% of unrepresented tenants won possession). While 17.3% of tenants represented by attorneys succeeded in dismissing the case against them, only 7.8% of unrepresented tenants won dismissal motions. \textit{Id.} at 115. The improvement in the results for tenants who are represented by an attorney indicates the limits of structured process for unrepresented parties. \textit{See infra} note 22 (providing excerpt of transcript of hearing for unrepresented tenants).

\(^{15}\) Fusco et al., \textit{supra} note 12, at 116 (stating that \textit{pro se} landlords were awarded summary possession orders in 85.6% of cases, which was same percentage recorded for landlords
Another study of landlord/tenant courts, conducted in the Bronx in 1982, reached similar conclusions. That study found that most eviction cases pending in the Bronx courtrooms were decided not in the courtrooms, but by settlement in the hallways, and that the tenants fared poorly in those settlements. To improve the tenants' chances of winning, the South Bronx Legal Services Corporation embarked on a campaign to formalize the process by demanding trials for tenants and raising technical defenses and arguments. Landlords responded by advocating successfully for a less formal tribunal to resolve landlord/tenant disputes. Tenants did not fare nearly as well in the new, less formal tribunals.

As a legal services attorney in Chicago, Illinois, I witnessed the importance of structured process for my clients, low-income people who were predominantly African American. Much of what legal services attorneys do, in Chicago and elsewhere, is to insure that their clients get a full and fair hearing in their cases. For example, from my practice in the landlord/tenant courts in Cook County, Illinois, Judgment, Landlord appears to be an accurate portrayal of those courts. I have observed that tenants cannot win their cases, or even present a defense, unless their appearance in court is formalized by their representation by an attorney.

Much of the practice of legal services attorneys involves representing clients at due process hearings regarding government benefits.

17. Id. at 129.
18. Id. at 128-33.
19. Id. at 145.
20. Id.
21. My clients were almost all African American because my office was located in a segregated neighborhood on the south side of Chicago.
22. The following is an excerpt from a transcript of a "trial" in eviction court in Cook County, Illinois, which is typical of the "trials" of un-represented tenants. At issue was whether or not the tenant had violated her lease by possessing illegal drugs in her apartment. The trial transpired as follows:

ATTORNEY FOR LANDLORD: Your Honor, a single action for possession only based upon a landlord’s notice of termination.
THE COURT: All right. We have [the tenant in court]. No money?
ATTORNEY FOR LANDLORD: No money, your Honor.
THE DEFENDANT: No, I don’t.
THE COURT: All right. We’ll make it 14 days [to move] then, 2-15-94. Fourteen days, no money. Okay.
ATTORNEY FOR LANDLORD: Thank you.

Many of those hearings involve arbitrary denials or terminations of benefits by untrained, uninformed, or biased workers at the Department of Public Aid and other governmental agencies. For example, we represented clients at many hearings where welfare caseworkers had miscalculated the adjustments to be made to benefit levels of welfare recipients who work part time, and Social Security hearings where case workers had overlooked or disregarded evidence that established a claimant's disability. Therefore, I understand the importance of the procedural protections from personal experience. More importantly, our clients, low-income persons of color, benefited from those procedural protections, without which they risk losing the public benefits that are vital to their survival.

Both the studies of urban landlord/tenant courts and my experiences representing low-income people of color before urban courts and administrative agencies indicate the importance of a formal process for urban tenants in determining their property rights to their incomes and to the homes in which they live. They also illustrate the limits of the effectiveness of formal process for a person who is not represented by an attorney. Decisionmakers are more likely to gloss over formal protections unless they are enforced by the party's attorney or other representative. Formal processes should be improved to accommodate unrepresented parties. That does not reduce the importance of procedural protections, however, nor does it reduce their significance when properly enforced.

Scholars who have analyzed the results of these and other empirical studies have found that in a less formal process such as mediation, the party with less experience, money, and professional prestige is likely to fare poorly. Often, the losing party is one who is disempowered


24. Of course, it would be most advantageous to recipients if the initial decisionmaking process was improved. The right to due process provides the only legal right to such an improved system, and the only legal basis for advocating for reforms such as better qualified caseworkers or smaller case loads. Moreover, the right to a hearing remains the most important constraint on arbitrary decisionmaking because caseworkers are less likely to make arbitrary decisions if they know that their decisions can be appealed and overturned.

25. For example, I participated in an unemployment benefits hearing, in which the representative of the employer accused the referee of being biased against represented claimants. In fact, the employer's representative was not concerned about bias so much as the fact that the claimant had an hour-long hearing in which she presented her story and cross-examined his witnesses. I witnessed the same employer's representative at another hearing with the same referee in which the representative did not complain of bias. That hearing had lasted only 10 minutes.

26. See Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073, 1076 (1984) (espousing that poorer parties are disadvantaged in bargaining process because of limited resources to finance
due to race, level of income, or gender. The imbalance is due to the lack of procedural protections in the less formal alternative dispute resolution processes.

In the process of settlement, the inequalities of wealth between the parties is a legitimate component of the process. In contrast, the judicial process knowingly struggles against those inequalities by providing formalized procedural protections. Therefore, the more formal the decisionmaking process, the better chance the poorer, less educated party has to prevail. Furthermore, "deformalization may increase the risk of class-based prejudice." Empirical studies show that people are more likely to express their prejudices in less formal situations. As a result, decisionmakers are more likely to express, and be swayed by, their prejudices in less formal situations, such as mediation. Formalized safeguards in the judicial process, established by the rules of civil procedure, including the requirement of notice, and the rules of evidence which confine testimony to the legal issues presented at the case, aid in ensuring that the decision is made fairly. To protect parties from prejudice based on race or class, dispute resolution measures should retain as much formality as possible in their structure.

Feminist scholars also have critically analyzed alternative dispute resolution measures in family law matters, and noted the danger to women that the lack of procedural protections can pose. Media-
tors tend to ignore precedent and legal rules that might protect the women participating, base their decisions on facts that might be inadmissible at trial because of attorney-client or other privilege, and disregard facts that a judge might find relevant, including a history of abuse on the part of the respondent/abuser. Mediators also are more likely to be swayed by prejudice than judges because mediators are not restricted by the more formal rules of court proceedings.

Perhaps most significantly, denying women the ability to air their disputes in a formal court process, on their own or through the representation of an attorney, may effectively deny them their voice, as women have been taught by society to suppress their anger, and not to take a strong position in informal situations. "The process of claiming rights, by itself, can be empowering for people who have not shared societal power."

The concerns of these feminist scholars are applicable to recipients of AFDC, the vast majority of whom are women. AFDC recipients will be similarly silenced by the restrictions of the proposed block grant program. The proposed block grant system does not include any provisions for participation by welfare recipients, whether formal or informal. The proposed system would allow recipients no means to redress wrongs done to them by impersonal bureaucrats, completely denying recipients their voices, and serving further to disempower them. Because it leaves welfare recipients voiceless, the proposed block grant system decreases their access to the dominant socio-economic system, rather than increasing access, the stated goal of recent reform measures. Most significantly, the proposed system denies welfare recipients the ability to enforce their rights through an

36. See Grillo, supra note 27, at 1560 (arguing that informal law of mediation setting de-emphasizes or avoids discussion of principles, blame, and rights).
37. See Grillo, supra note 27, at 1597 (explaining that because lawyers are typically excluded from mediation sessions, privileged material may mistakenly be revealed by client during mediation which is often then impossible to keep out of later court proceeding).
38. Grillo, supra note 27, at 1463-64 (noting that it is typical for mediators to insist that parties waste no time complaining about past conduct of spouse).
40. See Grillo, supra note 27, at 1576 (finding that despite changes brought about by recent feminist movement, expressions of anger and aggression are still considered "masculine" in men and "unfeminine" in women).
41. Grillo, supra note 27, at 1558.
42. See RECIPIENT CHARACTERISTICS STUDY, supra note 6 (reporting gender disparity among AFDC recipients).
43. See H.R. 4, supra note 1, § 103 (stating that one purpose of the Personal Responsibility Act is to "end the dependence of needy parents on government benefits by promoting job preparation, work and marriage"). In other words, the purpose is to allow recipients access to the dominant society through the means of employment and marriage to working spouses.
effective appeals process. Welfare recipients must retain the voices they now have in a protective, formal appeal process.

Several scholars have recognized the importance of structured rights for people of color. These scholars emphasize the importance of structured rights for people of color, especially low-income and female people of color, from the perspective of those who have experienced the importance of those rights.\textsuperscript{44} Although the focus of these scholars is civil rights rather than procedural rights, their concerns are equally attributable to procedural rights regarding property.

Professor Patricia Williams tells a story about renting an apartment at the same time as her colleague, Peter Gabel.\textsuperscript{45} Williams recounts that Gabel, a white man who was sensitive about not alienating people with his legal knowledge and status as a lawyer and law professor, wanted an informal relationship with his landlord.\textsuperscript{46} He did not sign a lease, and gave a deposit in cash without receiving a receipt.\textsuperscript{47} In contrast, Williams, an African-American woman who grew up in low-income neighborhoods where landlords refused to give their tenants the protection of a lease, rented an apartment from a friend, but still insisted on a detailed, lengthily negotiated lease that established an arm’s length relationship with her landlord.\textsuperscript{48} That lease set forth the structured rights that she considered important to her as an African-American woman.

Procedural rights are particularly important for women of color because women of color have been historically discriminated against in our society.\textsuperscript{49} Poor women of color have felt the brunt of discrimination on many levels.\textsuperscript{50} They encounter discrimination when seeking jobs, housing, and financial assistance.\textsuperscript{51} As a result,
many are relegated to the most run-down, dangerous neighborhoods in urban areas.\footnote{See Nicholas Lehman, \textit{The Promised Land} 61-107, 234-52 (1991); Alex Kotlowitz, \textit{There Are No Children Here} (1991) (describing depleted neighborhoods and public housing developments that are home to many urban low income African Americans).}

Historically, the government also has discriminated against women of color with respect to welfare benefits. For example, when the Social Security Act was first enacted in 1934, states were allowed to set eligibility standards for receiving benefits, and to set the amount of benefits.\footnote{See Williams, \textit{The Ideology of Division}, supra note 50, at 723 (noting that some states intentionally excluded from welfare rolls single mothers who were persons of color).} At that time, Congress considered a provision that would have forbidden racial discrimination in the allocation of benefits, but rejected that measure.\footnote{Williams, \textit{The Ideology of Division}, supra note 50, at 723. Federal regulations prohibiting discrimination in the allocation of welfare (and other federal) benefits were enacted in 1964, following the passage of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (codified as amended at 42 U.S.C. § 2000d (1994)); 45 C.F.R. §§ 80.1-80.13 (1995).} As a result, many southern states discriminated against black welfare applicants, refusing them benefits and/or setting benefit levels so low that they were impractical, in order to maintain the low-wage market of women of color, who typically performed domestic and field work.\footnote{Williams, \textit{The Ideology of Division}, supra note 50, at 723-24; see also William H. Simon, \textit{Rights and Redistribution in the Welfare System}, 38 STAN. L. REV. 1431, 1492 (1986) (recounting that in 1960s, welfare reform proponents opposed state provisions used to discriminate against single black mothers who were receiving benefits). The case of King v. Smith, 392 U.S. 309 (1968), is an example of the result of successful advocacy in that arena. See infra note 75 (discussing facts of King case).}

Discrimination against poor people of color, in the allocation of government benefits, continues to this day. In 1992, a study conducted by the Social Security Administration found evidence of discrimination against African-American applicants for Social Security and Supplemental Security Income benefits.\footnote{See Stephen Labaton, \textit{Benefits Are Refused More Often to Disabled Blacks}, N.Y. TIMES, May 11, 1992, at 1 (reporting findings of General Accounting Office study that white applicants for Disability Insurance benefits had 8% better chance of receiving benefits after being turned down, while those who applied for Supplemental Security Income had 4% advantage over Black applicants). In Chicago, Black applicants had a 10-17% disadvantage among claimants seeking benefits in the appeals process. \textit{Id}. The study found significant disparities for every year as far back as 1961. \textit{Id}.} As a result of the investigation, the Social Security Administration created a special unit to process complaints of discrimination made by applicants for Social Security benefits.\footnote{See 20 C.F.R. § 404.940 (1995) ("[A]dministrative law judge shall be disqualified if he or she is prejudiced or impartial with respect to any party.").}

As Patricia Williams notes, "While rights may not be ends in themselves, it remains that rights rhetoric has been and continues to
be an effective form of discourse for blacks."58 Williams' example, comparing her approach to lease negotiation with that of Peter Gabel, and the Judgment, Landlord study, which showed that landlords did not need attorneys to win their cases, illustrate an important point: The powerful may willingly choose to give up their structured rights, but those who perceive themselves as less powerful are less willing to give up the empowerment of structured rights, such as due process. In fact, people not in power require structured rights, and cannot do without them. Many African Americans in the civil rights movement risked their lives in the fight for the structured right to vote in southern states, so that they could participate in the political process.59 People who are disempowered due to their race, class, or gender need a formalized, structured process so that their rights can be protected. They are, however, in grave danger of losing not only their benefits but the empowerment of due process as a result of current welfare reform measures.

II. THE EXISTING SYSTEM OF DUE PROCESS HEARINGS

The system of federally funded and state administered welfare benefits was created by the Social Security Act of 1935.60 The existing system of due process rights for welfare recipients is a result of the Supreme Court's ruling in Goldberg v. Kelly,61 that welfare recipients are entitled to a fair hearing before their benefits are terminated.62 The Court's ruling in Goldberg reflected the efforts of progressives who argued for welfare reforms during the 1960s. Some progressives argued that the treatment of welfare benefits should be used as a form of redistribution of wealth.63 They unsuccessfully attempted to establish a fundamental right to a minimum income for all citizens.64 Other progressives advocated procedural reforms to

58. Williams, Alchemical Notes, supra note 44, at 410.
59. The Court's finding in Atkins v. Parker, 472 U.S. 115, 130 (1985), that the legislative process provides welfare recipients all of the process that is due them when benefit levels are adjusted by the legislature, is particularly ironic in light of the prolonged and difficult struggle for African Americans to obtain the right to vote. Id. at 130; see infra notes 154-59 and accompanying text (discussing Atkins case).
61. 397 U.S. 254 (1970); see also Simon, supra note 55, at 1486 (discussing expansion of public assistance programs in 1960s and 1970s).
63. See Simon, supra note 55, at 1437-38, 1489-91 (chronicling arguments of progressives who advocated right to minimum income).
64. See Simon, supra note 55, at 1437-38, 1489-91 (commenting that attempts to incorporate need-based considerations into "mainstream legal approaches to welfare were largely unsuccessful"); see also Dandridge v. Williams, 397 U.S. 471, 487 (1970) (rejecting attempt to
the existing system of statutory entitlements as a means of protecting the recipients of those entitlements. They argued that the classical liberal notion of rights—creating a zone of liberty free from government intervention—should be extended to public assistance. Moreover, they embraced the liberal notion of individual rights, rather than the concept of welfare as a form of redistribution of wealth, with the right of a minimum income to all recipients. These reformers achieved significant benefits for welfare recipients, in the form of procedural rights. They failed, however, to establish any substantive rights to essential services for poor people, including the right to jobs, elimination of prejudice, or safety. Indeed, the only significant rights most welfare recipients currently enjoy are the due process protections against the arbitrary denial or termination of benefits by the state.

The property rights approach to welfare reform, which prevailed and culminated in the Goldberg ruling, is illustrated in Professor Charles Reich’s seminal article, The New Property. In his article, Reich argued that in modern society, the state has taken on a significant role in creating wealth through government employment, licensing, government benefits, and subsidies. Reich pointed out that the larger the role that government has in creating wealth, the more intrusive it becomes in administering that wealth, particularly for welfare recipients who are completely dependent on the state for their “wealth.”

establish fundamental right to income). In Dandridge, the Court found that a state needs only a rational basis to restrict eligibility for welfare benefits, similar to that needed to justify all economic regulations. 397 U.S. at 485. In his dissent, Justice Thurgood Marshall stridently objected, pointing out that the case involved “the literally vital interests of a powerless minority—poor families without breadwinners . . .” Id. at 520 (Marshall, J., dissenting). “It is the individual interests here at stake that . . . most clearly distinguish this case from the ‘business regulation’ equal protection cases.” Id. at 522 (Marshall, J., dissenting).

65. See Simon, supra note 55, at 1486 (citing Charles Reich as proponent for extending “classical notions of rights as zones of immunity from state power . . . to public assistance”).

66. Simon, supra note 55, at 1486.

67. Simon, supra note 55, at 1488. Professor Simon argues that the advocates of property rights abandoned the notion of welfare as a means for the redistribution of wealth. Id. Simon’s view, however, may oversimplify the “property rights” approach. Arguably, government licenses and benefits, government-created forms of property, are types of wealth redistribution.

68. Ironically, if reformers had been able to establish significant substantive rights for low-income people, such as a fundamental right to a minimum income, welfare recipients would neither be in danger of losing their procedural rights, nor the underlying entitlement to benefits.


70. Id. at 739.

71. Id. at 760.

72. Id. at 758; see also Charles A. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 YALE L.J. 1246, 1256 (1965) (espousing need for radical new approach to social welfare to protect and clarify legal rights of beneficiaries).
At the time that Reich wrote *The New Property*, many state governments intruded into the intimate details of the lives of welfare recipients as the state administered their benefits. For example, welfare recipients often were subjected to unannounced searches of their homes by caseworkers who were evaluating their "moral character," and stood in jeopardy of losing their benefits as a result of those investigations.\(^7\) The use of these intrusive measures by the state illustrated the dangers inherent in the burgeoning welfare state—the increased role of the state in creating wealth presumed, or at least ought to have presumed, that the state would administer that wealth fairly.\(^7\) The personal nature of the welfare caseworker’s scrutiny, however, allowed for unfair and discriminatory treatment of women who were welfare recipients, particularly African-American women who lived in the South.\(^7\) Reich advocated for procedural protections, including a fair hearing with judicial review, to insure the fairness of the state’s administration of the wealth that it created.\(^7\) He maintained that these protections should be provided as a matter of right to beneficiaries of public wealth.\(^7\)

Six years after Reich’s article, the Supreme Court in *Goldberg v. Kelly* extended the procedural protections advocated by Reich to welfare beneficiaries.\(^7\) In *Goldberg*, the Court found that welfare benefits, a form of property created by the state, are statutory entitlements for persons qualified to receive them.\(^7\) The Court held that as a form of property such entitlements are protected by the Due Process Clause of the Fourteenth Amendment.\(^8\) The Court stated that the Due

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73. Reich, *supra* note 69, at 761.
74. Reich, *supra* note 69, at 778-79.
75. Simon, *supra* note 55, at 1492. In *King v. Smith*, the Court struck down an Alabama statute that deemed the income of any man with whom a single mother was “cohabitating” to the household of that mother. 392 U.S. 309, 334 (1968). The state of Alabama defined “cohabitating” as a man and a woman having "'frequent' or 'continuing' sexual relations" regardless of whether the man lived with the mother. *Id.* at 314. In *King*, the mother was an African-American widow whom the state had determined was having an affair with a married man. *Id.* at 315-16. The state included the man’s income when calculating the income of Ms. King’s household, even though he was not the father of any of her children and he lived in a separate household with his wife and nine children. *Id.* Ms. King’s story was typical of those African-American welfare recipients whom the white Alabama state welfare workers had harassed, intruding on the intimate details of their lives and denying them benefits. Simon, *supra* note 55, at 1492.
76. Reich, *supra* note 69, at 780-83.
77. Reich, *supra* note 69, at 785.
79. *Id.* at 262.
80. *Id.* The Fourteenth Amendment to the United States Constitution provides, in relevant part, that “[n]o State shall ... deprive any person of life, liberty, or property, without due process of law ... ” U.S. CONST. amend. XIV, § 1. The Court explicitly noted that the right to due process was rooted in the statutory entitlement status of the welfare benefits. *Goldberg*, 397 U.S. at 262 n.8; see *infra* note 166. If welfare benefits are no longer statutory entitlements,
Process Clause requires that benefits cannot be terminated by the state without a pre-termination evidentiary hearing. The Due Process Clause requires, at a minimum, timely and adequate notice detailing the reasons for the termination, an effective opportunity to confront adverse witnesses and present evidence orally, the right to counsel at the hearing, and the right to an impartial decisionmaker who makes decisions based solely on the evidence presented at the hearing.

The fair hearing requirement is codified in the federal laws governing the system of Aid to Families With Dependent Children (AFDC). States must adhere to the fair hearing system to receive federal matching funds for their AFDC programs. As a result, states have set up systems of fair hearings as part of their administration of those benefit programs. For example, in Illinois, the administrative code creates a system of due process hearings that includes the right to a detailed notice when benefits are denied and prior to the termination of benefits; the right to a hearing before the termination of benefits; the right to a representative at the hearing; the right to review evidence in the Department's files; the right to present evidence in support of the recipient's case; the right to confront and cross examine the state's witnesses; and the right to subpoena witnesses. In addition, the recipient has the right to a fair and impartial hearing officer and to review the documents, the findings of fact, and the decision of the hearing officer.

the right to due process established by the Goldberg court would no longer apply. See infra note 166 and accompanying text.

81. Goldberg, 397 U.S. at 264.
82. Id. at 267-71.
83. 42 U.S.C. § 602(a)(4) (1994). This provision states: "A State plan for aid and services to needy families and children must: . . . (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted on with reasonable promptness." Id.
84. See id. § 602(b) (stating that Secretary of Health and Human Services shall approve any state plan for administration of welfare benefits that fulfills conditions of subsection (a)); id. § 604(a) (providing that Secretary shall stop making payments to any state that fails to comply substantially with requirements of § 602(a)).
86. See id. § 102.82. Under this provision, recipients have the right to continuous, unchanged benefits during the appeal process only if they appeal within 10 days of the notice of the adverse action. Id. § 102.81(a). The right to appeal the adverse action, however, does not expire until 60 days from the date of the notice. Id.
87. Id. § 104.21(a).
88. Id. § 104.22(a).
89. Id. § 104.22(b).
90. Id. § 104.22(c).
91. Id. § 104.22(b).
92. Id. § 104.20(b)(1).
The hearing officer, however, is not bound by the rules of evidence or procedure, "but (the hearing) shall be conducted in a manner best calculated to conform to substantial justice."

Finally, the recipient has the right to judicial review of the hearing process and decision.

This elaborate, formalized system stands in stark contrast to the somewhat haphazard miasma of the welfare bureaucracy, arising from overwork and indifference, that pervades the decisions of everyday caseworkers. The due process system acts as a structured safety net to protect the recipients from arbitrary decisionmaking by caseworkers.

In Goldberg, the State argued that pre-termination hearings would be too costly, considering the small amount of money that is at stake in each individual hearing. The Court rejected that argument, pointing out that although the amount of money at stake may seem small and inconsequential, it represents the only means of livelihood for welfare recipients. Much of the current welfare reform debate, however, focuses on the costs of the governmental bureaucracy administering the current system. This criticism provides the underlying rationale for much of the Personal Responsibility Act.

93. Id. § 102.83(b).
94. Id. § 104.23.
95. Id. § 104.70(g).
96. See generally Simon, supra note 23 (discussing dichotomy between bureaucratic indifference that welfare recipients face daily and elaborate system of formalized hearing rights); Susan D. Bennett, "No Relief but Upon the Terms of Coming into the House"—Controlled Spaces, Invisible Disenitlements and Homelessness in an Urban Shelter System, 104 YALE L.J. 2157, 2157-82 (1995) (describing in detail discouraging process of applying and waiting for government assistance to homeless women in Washington, D.C.).
98. See id. at 264 ("For qualified recipients, welfare provides the means to obtain essential food, clothing, housing and medical care . . . . Thus the crucial factor in this context . . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means to live while he waits.") (emphasis and citation omitted).
99. See, e.g., 141 CONG. REC. S12,894 (daily ed. Sept. 8, 1995) (statement of Sen. Grassley) ("I would rise in support of the amendment [Amend. No. 2508 to H.R. 4 which imposed a 15% cap on the amount of allocated funds to be used for the administration of welfare benefits] . . . . I think we have an appropriate responsibility to the Federal taxpayers to make sure the money is not eaten up in excess administrative costs . . . . It seems to me that this [amendment] solves one of those major, legitimate issues that we ought to deal with here."). The amendment was approved by a vote of 87 to 5. 141 CONG. REC. S12,895 (daily ed. Sept. 8, 1995). The Senate also exhibited concern about the expense of the bureaucracy administering welfare benefits in a debate over an amendment offered by Senator Gramm, Amend. No. 2615, which proposed to reduce by 75% the number of Department of Health and Human Services employees administering the block grant program. 141 CONG. REC. S13,642 (daily ed. Sept. 15, 1995). As Senator Ashcroft stated, "One of the taxes on poor Americans, people who are truly needy, is a bureaucratic tax." 141 CONG. REC. S13,643 (daily ed. Sept. 15, 1995) (statement of Sen. Ashcroft). The Senate subsequently approved the amendment. 141 CONG. REC. S13,771-72 (daily ed. Sept. 19, 1995).
which eliminates the requirement that states maintain a system of fair hearings as a prerequisite for receiving federal funds.  

III. THE CHANGES PROPOSED BY CONGRESS

Under the welfare reform bill being debated in Congress, welfare benefits would no longer be entitlements triggering constitutional due process. Under the proposed block grant system, the federal government would end the existing system of AFDC, with all of its requirements for state participation in the program, and replace it with a simplified version with fewer restrictions. Instead, the federal government would give the money to states, in the form of block grants, to be distributed by the states. The block grant system would differ drastically from the existing AFDC system. Currently, all people who meet the eligibility requirements for welfare benefits are entitled to receive those benefits, which are administered by state agencies. In turn, the states are entitled to federal funding for every eligible recipient.

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100. H.R. 4, supra note 1, §§ 101-116. The Act also specifically ends the entitlement status of welfare benefits, stating "This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part." H.R. 4, supra note 1, § 103. The resistance of states to comply with such "strings" attached to federal funds is reflected in the decision of the Illinois State Legislature to terminate the AFDC program as of December 31, 1998. Act of Mar. 6, 1995, No. 89-6, § 25, 1995 Ill. Legis. Serv. 203, 209 (West) (to be codified at ILL. ANN. STAT. ch. 305) [hereinafter Act of Mar. 6, 1995]. The termination of the AFDC program would make Illinois no longer eligible for matching federal funds, but also would end the requirement that the state comply with federal regulations, including those requiring due process hearings that govern disbursement of those funds. But see id. at 214 (to be codified at ILL. ANN. STAT. ch. 305, para. 5/4-17) (directing Illinois Department of Public Aid to seek waivers of federal law and regulations to establish AFDC demonstration project for imposing employment and family cap requirements).

101. Current federal regulations contain detailed requirements governing the eligibility of recipients and the administration of benefits and services that the state must provide for welfare recipients. See 42 U.S.C. § 602 (1994). For example, the regulations govern the calculation of a recipient's income in minute detail, see, e.g., id. §§ 602(a)(7)-(8), (28), (31), (36); contain detailed regulations governing child support enforcement systems that states must maintain, see id. §§ 602(a)(26)-(3), 45 C.F.R. § 302 (1995), and govern the state process of administering the benefits, see 42 U.S.C. §§ 602(a)(9), (15), (17). In contrast, H.R. 4 required states to prepare and operate a program designed to provide assistance to needy families, H.R. 4, 104th Cong., 1st Sess. § 103 (1995) (as introduced), and contained some restrictions (including prohibitions on states providing assistance for legal aliens, assistance to mothers less than 18 years of age, and limiting lifetime benefits to 5 years), id. § 103, but lacked the detailed restrictions of the administrative system that it is designed to replace. The conference bill, however, contained almost as many restrictions as those in the existing system. See H.R. 4, §§ 101-116, 141 CONG. REC. H15,517-91 (daily ed. Dec. 21, 1995).

102. H.R. 4, supra note 1, § 103.

103. See 42 U.S.C. § 602(a)(10)(A) (requiring that "aid to families with dependent children shall . . . be furnished with reasonable promptness to all eligible individuals").

104. See id. § 603 (identifying computation of amount of aid from federal treasury to needy families in states).
PRESERVING DUE PROCESS

Under the block grant system, welfare benefits would no longer be entitlements for recipients. That is, a state could still refuse assistance even if a recipient meets all eligibility requirements because federal regulations would not require the state to provide the assistance. States would be free from federal regulations, but would also bear a burden because the states would not be entitled to federal funding for every eligible recipient. As a result, the states would risk running out of funding for eligible applicants whenever an economic recession and its concomitant increase in unemployment caused an increase in the number of applications.

Many state governors support the block grant system, even though it would result in decreased funding for the states. The reason for their support is that the block grant system would allow states to embark on welfare "reform" measures without obtaining federal approval in the form of a waiver of federal requirements. For example, the Illinois state legislature recently passed a welfare "reform" act that allows the state, among other things, to create a "family cap" that denies the recipient additional benefits if another child is born into the family while the family is already receiving welfare benefits. Also, Illinois' welfare reform act sets a maximum two-year time limit for recipients whose youngest child is age thirteen or older. In order for the State of Illinois to implement both programs, the State must apply for a federal waiver. Section 1315 of the U.S. Code requires public participation in the waiver pro-

105. H.R. 4, supra note 1, § 103.
106. See H.R. 4, supra note 1, § 103 (stating that for years 1996 through 2000, state would be entitled only to amount of money in state family assistance grant that it receives for current fiscal year).
108. Under the current system, states are allowed to conduct some experimentation with welfare reform if they are approved by the Department of Health and Human Services as projects to demonstrate the effectiveness of those experimental measures. See 42 U.S.C. § 1315(b)(1). Once they are approved, federal regulations governing the administration of welfare benefits are waived as to those projects. Id. The states, however, are permitted to conduct no more than three projects at one time, and each individual project must be approved by the Secretary of Health and Human Services after a 30-day period allowing for public comment. See id. § 1315(b)(1); id. § 1315(b)(3)(A) (requiring approval for waiver of federal regulations). Under the Personal Responsibility Act, states are subjected to fewer regulations and encouraged to conduct experimental projects. See H.R. 4, supra note 1, § 103 (providing that Secretary may "assist" states in developing new programs, using "experimental and control groups").
109. Act of Mar. 6, 1995, supra note 100. The Personal Responsibility Act also includes a provision requiring the states to implement such a "family cap." See H.R. 4, supra note 1, § 103 (providing no additional assistance for children born to families receiving assistance).
110. Act of Mar. 6, 1995, supra note 100.
111. See supra note 108 (outlining waiver provisions).
cess. Some welfare recipients have successfully challenged the waiver process when they were not given adequate input.

Under the block grant system, states could implement any changes to the welfare programs that they administer without having to obtain federal approval of those changes. In fact, the Personal Responsibility Act of 1995, and the subsequent welfare reform bill, do not include any provisions requiring public participation in state welfare reform initiatives. The decisions that states have made with regard to state welfare programs funded entirely with state funds are revealing in determining the potential impact of this change on welfare recipients. In recent years, states have cut back significantly on state-funded welfare programs. In September, 1991, for example, the Michigan state legislature voted to terminate its state-funded General Assistance Program for non-disabled adults without children. In 1992, the Illinois General Assembly terminated the state-funded General Assistance Program, which was a cash benefit program for employable adults, and replaced it with a limited Transitional

112. See 42 U.S.C. § 1315(b)(3)(A) (requiring Secretary of Health and Human Services to release copies of application to public).

113. See Beno v. Shalala, 30 F.3d 1057, 1073 (9th Cir. 1994) (holding that Secretary of Health and Human Services failed to consider welfare recipient's objections as to impact of decision to impose statewide reduction of benefits).

114. See H.R. 4, supra note 1, § 103 (stating purpose of act is "to increase the flexibility of States in operating a program" that provides assistance to needy families, ends dependence "by promoting job preparation, work and marriage," and discourages illegitimate births). The state plans, however, must contain the following elements: (1) provision of cash benefits and work experience, work preparation, and assistance in locating work; (2) requirement that one parent must work after receiving benefits for two years; (3) other mandatory work requirements; (4) provision for immigrants, if treated differently; (5) confidentiality provisions; (6) programs to reduce illegitimate births; and (7) programs to reduce teenage pregnancy. Id. The bill also contains the following prohibitions conditioning the use of federal funds: (1) no assistance to families without minor children; (2) no disregarding certain payments in eligibility or benefit calculations; (3) no assistance for certain aliens; (4) no assistance for illegitimate births to minors; (5) no additional assistance to mother on birth of a new child while receiving benefits; (6) a five-year maximum length of benefits; (7) no assistance for families failing to cooperate in child support or paternity establishment; (8) no support if the parent does not assign child support rights to the state; (9) no full payments if paternity is not established; and (10) no benefits for 10 years if residency is fraudulently misrepresented to the welfare program. Id. The requirement of due process hearings is notably absent from the regulations and restrictions detailed in the bill as compared to the current system, 42 U.S.C. § 602(a)(4) (1994), which requires that the state plan "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness."

115. See H.R. 4, supra note 1, §§ 101-116; see also supra note 1.

116. Rather than officially terminating the General Assistance Program, in September 1991, the Michigan State Legislature approved an appropriations bill which allocated no money for the program. See Saxon v. Department of Social Servs., 479 N.W.2d 361, 366 (1992). In Saxon, the court found that the replacement of general assistance, by a state disability assistance program, which limited eligibility to disabled adults, did not violate due process or title-object and amendment-republication clauses of the Michigan State Constitution. Id. at 366-68.
In 1995, the Illinois General Assembly abolished the Transitional Assistance Program and severely limited the eligibility of disabled adults for state-funded benefits.

The lack of an entitlement to federal funds for both states and recipients will create a double-whammy where the victims will be welfare recipients. On one hand, recipients are likely to see their benefits cut drastically, and the requirements for eligibility tightened. On the other hand, recipients will lose the due process hearings on which they rely to insure that their benefits are not denied or discontinued arbitrarily. No longer entitled to benefits even if eligible, recipients would also no longer be entitled to due process hearings to prove their eligibility. As a result, not only will many recipients lose benefits because they are no longer eligible, but many eligible applicants and recipients may have their benefits wrongly denied or discontinued, without recourse to an effective appellate procedure.

IV. GOVERNMENT INTRUSION IN RECENT REFORM MEASURES

Recent years have seen an increasing polarization of people in the United States, by race and class, as well as a dramatic increase in the number of people who are completely disenfranchised from our society, living in what Professor Charles Reich calls the "outside" of...
society. The depth of economic insecurity, in which people in the "outside" live, is the worst threat to these individuals' freedom because they become completely dependent on government benefits to survive. Welfare reform measures should be designed to end dependence on those benefits, encourage poor people to become productive members of our society, and foster their independence and dignity in the process. To the contrary, the process of welfare reform has pushed poor people further "outside," imposing increasingly intrusive measures on welfare recipients and further eroding their dignity and personal freedom. The result is an interconnected process of increasing alienation, increasing government intervention, and erosion of the basic dignity of poor people in our society. An analysis of recent welfare reform measures illustrates the heightened importance of retaining the due process rights of welfare recipients, even as they are being severely eroded.

In the 1960s, the Supreme Court struck down several state welfare measures which had been particularly intrusive on the lives of those recipients, and in Goldberg v. Kelly, the Court established a formalized process to limit the intrusion of the state on individual freedoms of welfare recipients. In recent years, the welfare reform debate has returned to a focus on regulating the behavior of welfare recipients. The title of the congressional welfare reform act, the "Per-

120. Charles A. Reich, The Individual Sector, 100 YALE L.J. 1409, 1413 (1991) (describing "inside" as "space within the organized sector, inside a corporation, government agency, or institution" and noting difficulty of self-support on "outside" such that "outside freedom" becomes homelessness and poverty).
121. Id. at 1435-36.
122. See id. at 1412-13 (noting that "outside" is zone of impaired freedom because those without economic support cannot act freely); id. at 1440 ("Both the inside and the outside partially disable the individual from being a citizen, undervalue her contribution, demean and denigrate her importance to the community.").
123. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 627 (1969) (invalidating one-year residency requirement before applicant becomes eligible for AFDC benefits); King v. Smith, 392 U.S. 309, 313-14, 333 (1968) (invalidating Alabama regulation that denied benefits to recipient mother if "substitute father" existed and that said that "substitute father" existed if parties had sexual relations somewhere between once every week and once every six months); Sherbert v. Verner, 374 U.S. 398, 410 (1963) (invalidating South Carolina provision that denied unemployment benefits to person who was unwilling to work on Saturdays, her Sabbath day).
125. See Williams, The Ideology of Division, supra note 50, at 726-41 (describing Wisconsin legislature's attempt to introduce Family Cap program and experimentation with Learnfare program that penalizes parents of tenant children for school absences only slightly in excess of norm of children of non-AFDC recipients). The Family Cap program seeks "to influence poor women's decisions about procreation," id. at 738, while Learnfare predicates assistance on family compliance with certain values or modification of "its behavior in ways deemed appropriate by policymakers." Id. at 732.
sonal Responsibility Act," illustrates the new reformers' emphasis on more intrusive measures with the alleged purpose of changing the behavior of welfare recipients so that they will no longer be dependent on welfare. This measure intrudes significantly on the liberty of welfare recipients, and may cause many of them to lose their benefits.

Some intrusive reform measures already have been enacted into law. For example, federal regulations mandate that state welfare programs require recipients of AFDC to cooperate with child support enforcement measures. These federal regulations require recipients to cooperate by assisting the state agencies in bringing court actions against the fathers of children of unmarried recipients to establish paternity, and in obtaining and enforcing child support judgments against those fathers. The regulations require unemployed individuals, and dependents age sixteen or over and not in school, to participate in job training and job search programs, if such programs are available. These measures, however well-intended,

126. For example, one of the stated goals of the Personal Responsibility Act is to "end the dependence of needy parents on government benefits by promoting job preparation, work and marriage." H.R. 4, supra note 1, § 103. This stated goal illustrates the paradox behind these welfare reform measures. While purporting to encourage the independence of the individuals who are receiving welfare, the framers of the Act also imposed a normative goal, that of encouraging marriage, on those same individuals. It remains unclear whether these measures actually will result in changing the behavior of welfare recipients, or even that the measures actually are designed to help welfare recipients rather than to save money or accomplish other normative goals. See Williams, The Ideology of Division, supra note 50, at 726-36, 743 (attributing failure of Wisconsin's Learnfare program to dependence on faulty assumptions, including assumption that AFDC children miss significantly more school days than non-AFDC children); id. at 729-30 (noting Wisconsin administrator's rejection of bill's provision for referral to social services prior to sanctions as "too costly", even though Wisconsin Department of Health and Social Services indicates some children fail to attend school because of substance abuse problems or emotional problems resulting from parents' neglect or abuse).

127. See 42 U.S.C. § 602(a)(26) (1994) (conditioning eligibility for aid on recipient's assignment to state of any rights to support recipient might have against third persons; cooperation with state in establishing paternity and obtaining support payments; and cooperation in identifying and pursuing third persons liable for payment of medical care and services).

128. See 45 C.F.R. § 232.12(a) (1995) (requiring state plan to condition eligibility on recipient's cooperation in identifying and locating parent of child, in establishing paternity, and in obtaining support or other payments due to recipient or child from third persons).

129. See id. § 232.12(b) (defining required cooperation as recipient's appearing at state or local agency offices, appearing as witness in judicial hearings, providing information or claiming lack thereof under penalty of perjury, and payment to agency of funds received after assignment of recipient's rights to state).

130. See id. § 250.30 (requiring AFDC recipients in states where resources permit and where JOBS program is operative to participate in JOBS program); id. § 250.34 (providing sanctions for failure to participate in JOBS program); see also 42 U.S.C. § 602(a)(19)(C) (1994) (listing statutory exemptions from required job program). The exemptions to the job program requirement include: (1) ill or incapacitated recipients; (2) recipients caring for ill or incapacitated persons; (3) recipients who are caretakers of children under three years old; (4) recipients who are caretakers of children under six years old for whom child care is not provided
place a great deal of power in the hands of the bureaucrats who work for the state welfare agencies, power which could be abused through malice, mistake, or simple oversight. Mistakes made by caseworkers in performing the oversight could result in recipients losing their benefits through no fault of their own. An effective appeals process is an essential component to this system because it protects recipients from unfair treatment caused by the mistakes of individual caseworkers.

In Illinois, the individual caseworker is authorized to oversee how the recipient spends money. If the caseworker has reason to believe that the recipient is not properly using the money to provide for her children, the caseworker may intervene and provide the recipient with counseling. If the caseworker has reason to believe that the caretaker has a substance abuse problem, the caseworker has more options to address the situation, including: (1) appointment of another family member as a "protective payee" to oversee the spending of the money; (2) referral of the recipient's children to the Department of Children and Family Services; or (3) referral of the recipient to substance abuse treatment. These regulations require the individual caseworkers to closely monitor the lives of welfare recipients and, at times, to make crucial decisions that could result in the recipient losing custody of the children. The liberty remaining for the individual welfare recipient exposed to this scrutiny is minimal. Again, an effective appeal process is vital.

by state; (5) recipients employed 30 hours or more per week; (6) children under 16 years old; (7) children over 16 years old but enrolled in school full-time; (8) pregnant women whose delivery dates coincide with program; and (9) recipients residing in area where programs are not offered. 

131. See ILL. ANN. STAT. ch. 305, para. 5/4-8(a) (Smith-Hurd Supp. 1996) (requiring county department to provide counseling and guidance to ensure best use of money if department has reason to believe money may not be used in best interests of child and family).

132. Id.

133. Id. para. 5/4-8(b)(i).

134. Id. para. 5/4-8(b)(ii). The Department of Children and Family Services (DCFS) is the child welfare agency in Illinois. A referral to DCFS could result in an investigation of the household, which in turn could result in the recipient's children being taken away from the recipient and placed in foster care. See ILL. ANN. STAT. ch. 325, para. 5/7.3-7.5 (Smith-Hurd 1993 & Supp. 1996) (governing DCFS investigations of reports of abused or neglected children); ILL. ANN. STAT. ch. 325, para. 5/8.2 (Smith-Hurd Supp. 1996) (providing for DCFS to assess family needs and develop service plans when the Department finds evidence that the child is abused or neglected); ILL. ANN. STAT. ch. 325, para. 5/5 (Smith-Hurd 1999) (authorizing law enforcement officer or DCFS official to take temporary protective custody on emergency basis, upon determination that there is imminent danger to the life or health of a child); ILL. ANN. STAT. ch. 705, para. 405/2-1-27 (Smith-Hurd 1992 & Supp. 1996) (governing the process for DCFS to obtain temporary or permanent custody of an abused or neglected minor).

135. Id. para. 5/4-8(b)(iii).
A review of proposed measures in the Personal Responsibility Act and of welfare reform measures recently approved by the Illinois General Assembly illustrates the dramatic increase in the power vested in the bureaucratic state and a persistent diminution of the liberty of welfare recipients. The Personal Responsibility Act would require states to enact measures designed to increase work requirements for welfare recipients, reduce out-of-wedlock births, and reduce teenage pregnancy. The Act originally prohibited states from providing benefits to unwed teenage mothers or to families in which the caretaker fails to cooperate with child enforcement measures. The Act also requires states to reduce benefits to families with a child whose paternity is not yet established. Finally, the Act allows and encourages states to enact their own measures designed to meet the goals of the Act.

In 1995, the Illinois General Assembly enacted two laws that are indicative of the measures that states would enact under the proposed block grant system. One law requires all welfare recipients to prepare and submit a "personal plan for achieving employment," and includes several measures that toughen work requirements and impose stiffer sanctions for noncompliance with those requirements. The legislature also approved a measure that requires

136. Many of these provisions would require a federal waiver by the Secretary of Health and Human Services, pursuant to 42 U.S.C. § 1315 (1994), before they can take effect because they do not provide AFDC benefits to all federally defined eligible individuals. See 42 U.S.C. § 602(a)(10)(A) (1994) ("[A]id to families with dependent children shall... be furnished with reasonable promptness to all eligible individuals"); id. § 1315 (authorizing Secretary of Health and Human Services to waive compliance with 42 U.S.C. § 602 (1994)); King v. Smith, 392 U.S. 309, 333 (1968) (invalidating state statute in conflict with Social Security Act's definition of parent).

137. H.R. 4, supra note 1, § 103.

138. H.R. 4, supra note 1, § 103 (as introduced). The provision prohibiting states from providing benefits to unwed teenage mothers was removed prior to the approval of the conference report. H.R. 4, supra note 1, § 103 (conference report), 141 CONG. REC. H15,237 (daily ed. Dec. 20, 1995).

139. H.R. 4, supra note 1, § 103. In contrast, current regulations allow states to discontinue benefits for a caretaking relative who is not cooperating with child support enforcement measures, but provide for the continuation of benefits for the children in the household. 45 C.F.R. § 232.12(d) (1995).

140. H.R. 4, supra note 1, § 103 (directing state to withhold either $50 or 15% of calculated benefit at state's election from payment to family with child whose paternity is unestablished, unless child is product of rape or incest).

141. H.R. 4, supra note 1, § 103.

142. Act of Mar. 6, 1995, supra note 100, at 209. This seemingly innocuous measure could result in unfair benefit cuts based on technicalities because it would require functionally illiterate and non-English speaking recipients to complete the form without any help. To enact this provision, the state of Illinois has applied for a § 1115 waiver. See id. at 212 (directing department to request all necessary waivers of federal law).

143. See Act of Mar. 6, 1995, supra note 100, at 210 (requiring any recipient whose youngest child is between 5 and 13 years of age to participate in job search program for first 6 months
individuals under age eighteen, who are pregnant or have a child, to live with her parents in order to receive benefits, and to attend school if she does not have a high school diploma or a G.E.D.

The Illinois General Assembly also authorized the Illinois Department of Public Aid (IDPA) to consider irregular school attendance of children of elementary school age to be evidence of lack of proper and necessary support and care, justifying IDPA intervention. Moreover, the legislature authorized the IDPA to create a "paternity establishment" program, under which an unwed mother must cooperate with the Department to establish the paternity of her

of receiving benefits). This measure forces applicants, who may not be ready to look for jobs due to lack of training and education, to conduct futile job searches and does nothing to address the real employment barriers faced by AFDC applicants. The bill authorizes the Illinois Department of Public Aid (IDPA) to establish a targeted jobs program under which recipients "whose youngest child is age 13 or older shall be required to seek and accept employment," and limits those recipients to a maximum of 2 years of benefits. See id. at 214 (mandating that recipients receiving two years of benefits become ineligible for another two years and noting that birth of child within 10 months of enrollment in program does not extend benefit expiration). Again, the bill provides no additional resources to aid these recipients to obtain employment, many of whom may have been out of the job market for over 10 years. The legislation requires the IDPA to seek a 42 U.S.C. § 1315 waiver from the Secretary of Health and Human Services for both of these measures. Act of March 6, 1995, supra note 100, at 212. Another measure would sanction recipients who volunteer for job training programs if they fail to attend those programs, whereas sanctions were previously limited to those who were required to attend the programs. Act of Aug. 11, 1995, No. 89-289, § 5, 1995 Ill. Legis. Serv. 3149, 3150 (West) (to be codified as amended at ILL. ANN. STAT. ch. 305, para. 5/9A-5). This measure creates a large disincentive for motivated welfare recipients to volunteer for job training programs.

144. Act of Mar. 6, 1995, supra note 100, at 209. The measure does allow the IDPA to waive this requirement under certain conditions, including when the IDPA determines that the requirement of the recipient living with her parents would jeopardize the physical health or safety of the individual or her child. Id. at 209-10; see also id. (exempting minor with no known living parent or legal guardian and minor who has lived apart from parent or guardian for at least one year prior to child's birth). Significantly, this measure, like others, gives sole discretion to the IDPA alone to make the determination of whether the physical health or safety of the minor would be threatened. See id at 209 (indicating that "Illinois Department may make exception" to requirement that minor live at home) (emphasis added).

It should be noted that requiring minors to remain at home may be counterproductive in that a high percentage of teen mothers studied have suffered sexual abuse, and that some minors become pregnant to avoid abuse in the home. See Teen Moms Linked to Abuse, TOLEDO BLADE (Toledo, Ohio), Sept. 11, 1995, at 3 (citing studies that found between 61% and 66% of teen mothers had been sexually abused and relating teenage mother's mistaken belief that becoming pregnant would shield her from further molestation).


146. See Act of Mar. 6, 1995, supra note 100, at 213 (requiring IDPA to establish programs encouraging school attendance, that families with attendance problems must attend under penalty of initiating protective payments and requiring department to impose further sanctions if attendance does not improve after three months under protective payment regime). The bill authorizes establishment of an experimental program to test the effectiveness of such an approach. See id. (authorizing implementation of these changes through use of emergency rules). A similar program was adopted by the State of Wisconsin several years ago, with little success. See Williams, The Ideology of Division, supra note 50, at 720-36 (describing failure of Wisconsin's Learnfare program, targeting teens and reducing benefits to recipient parent if teen misses too many classes).
child. Under the program, an unwed mother can receive AFDC benefits only for six months before the paternity of her child is established. The laws also include increased child support enforcement measures, such as giving the IDPA the power to institute professional license revocation proceedings if a non-custodial parent is in arrears on child support payments to a custodial parent who is a welfare recipient. Many of these measures are based on faulty assumptions, and will result in increased governmental intrusion without a corresponding benefit for the recipients. In fact, these "reforms" are barely justifiable as measures to improve the lives of welfare recipients, or to help them to end the cycle of dependency. For example, the Illinois General Assembly passed a measure that would prohibit the IDPA from approving a recipient's "participation in any post-secondary education program, other than full-time, short-term vocational training for a specific job, unless the individual also is employed part-time," as defined by regulation. Thus, the legislature precluded recipients from receiving support to participate in a comprehensive program.

147. Act of Mar. 6, 1995, supra note 100, at 221.
148. Id. The Act allows the Department to waive this requirement under certain circumstances, including when the custodial parent "attests under oath to fear of abuse by the putative father." Id.; see also id. (listing other exemptions from paternity established deadline such as that child is not yet born; paternity already was established; putative father is incarcerated; court proceeding to establish paternity is pending at expiration of 6 months and mother is still cooperative; child is product of rape by unknown assailant; and mother is cooperative but identity cannot be established).
149. See Act of Mar. 6, 1995, supra note 100, § 3, at 204; id. § 10, at 205. The bill also authorizes the IDPA to collect child support "in any manner authorized for the collection of a delinquent personal income tax liability." Id. § 15, at 206. This measure will help women who are welfare recipients to obtain child support from the fathers of their children, arguably creating some empowerment for them. Professor Charles A. Reich, however, cites the use of licensing as leverage to influence individual activity as an extreme example of the intrusiveness of the bureaucratic state on individual liberty. See Reich, supra note 120, at 1428 (arguing that licenses become "weapons of coercion" when used to implement policies unrelated to purposes underlying issuance of license). Criticizing a West Virginia statute that suspends the driver's licenses of high school drop-outs under the age of 18, W. VA. CODE § 18-8-11 (Supp. 1995), Reich states that "[t]hose who applaud this ingenuity are insensitive to the regulatory state's potential for tyranny." Reich, supra note 120, at 1428. The new policy of the State of Illinois, though helpful to mothers who seek child support, also creates a potential for tyranny against those who fall behind in child support payments. More significantly for the purposes of this Article, it requires welfare recipients to participate in this "tyranny," willingly or not.
150. See Williams, The Ideology of Division, supra note 50, at 727-28, 735-41 (noting empirical data does not support adoption of Learnfare and Family Cap programs and arguing that programs instead are premised on "superficial notions about the psychology of poor families" and belief in welfare recipients' "deviant values" manipulable by heavy handed economics).
151. Act of Aug. 11, 1995, No. 89-289, § 5, 1995 Ill. Laws, Serv. 3149, 3154 (West) (to be codified as amended at ILL ANN. STAT. ch. 305, para. 5/9A-9(h)). The Personal Responsibility Act contains similar restrictions on educational programs for welfare recipients. See H.R. 4, supra note 1, § 103 (defining "work activities" so as not to include any post-secondary education except on-the-job training and "training directly related to employment"); id. (conditioning federal block grant on state's attaining increasing rates of participation by recipients in work activities).
educational program provided by a college or community college. Whereas a college degree would truly enable welfare recipients to obtain jobs that would pay them enough to end their dependence on public assistance, limited vocational training will limit recipients to low-paying jobs with little possibility for advancement, making it more likely that they will require governmental assistance in the future. Moreover, the Illinois General Assembly voted to end the federally funded AFDC program, and replace it with temporary, state-funded transitional assistance, that would not have the federally imposed restrictions of the current AFDC program (including the statutory entitlement status of AFDC benefits), and would be terminated by the state at the discretion of the state government, without any due process protections for recipients while recipients search for jobs or begin to receive child support.\footnote{Act of Mar. 6, 1995, supra note 100, at 209 (ending old programs implementing AFDC and stating, "The Illinois Department shall develop an alternative program of mutual responsibility between the Illinois Department and the client to allow the family to become self-sufficient or employed as quickly as possible through (i) the provision of transitional assistance to families in the form of emergency one-time payments to prevent job loss, temporary assistance while searching for or being trained for work, or paternity establishment and child support enforcement or (ii) the provision for continued work").}

The goal of these reforms, therefore, is not to end dependence on public assistance, but to end public assistance itself, depriving recipients a means to survive without the assistance upon which they have become dependent. The result of these reforms is an increase in the power of the public aid bureaucrats, the erosion of liberty of public aid recipients, and the likely termination of benefits for many recipients who are unable to comply with all of the conditions on which eligibility for assistance is based. Advocates for low-income clients, especially clients who are women and/or people of color, must combat these restrictions by attempting to ensure that the state retain the due process system by aiding their clients in complying with restrictive measures, and by reducing the intrusion on what little liberty they have left in our society.

Leaving aside the goals of reformers, even the most well-intentioned reform measures will require the state to make difficult judgments, increasing the need for a due process system to insure that those judgments are made fairly. What about the mother who has been brutally victimized by the child's father and has just succeeded in cutting off all contact with him, who must help the caseworker to re-initiate contact in order to establish paternity and enforce child
support payments?\textsuperscript{153} What about the woman who misses scheduled appointments for job interviews or training because her car broke down, or because her child is sick at home? Impartial hearings and judicial oversight will be necessary to insure that caseworkers are fair when they make the judgments required to address these situations. States must protect due process rights to ensure that welfare recipients receive fair treatment and to protect recipients from needless intrusion into their lives, intrusion destined to result only in denial or termination of their benefits.

V. COURT RULINGS ON BENEFIT REDUCTIONS

The Personal Responsibility Act gives states wide latitude to reduce welfare programs and the administrative protections that currently exist for welfare recipients. Given the restrictions on the financial resources of states, state governments will likely cut back on both the amount of benefits and the protections to which recipients are currently entitled. An analysis of recent case law regarding the due process rights of recipients indicates that the courts also will be of little help to recipients attempting to protect their rights. Courts have found that broad-based reductions in eligibility or benefit amounts, like those proposed in the Personal Responsibility Act, do not trigger the due process rights of welfare recipients.

In \textit{Atkins v. Parker},\textsuperscript{154} the Supreme Court addressed the constitutionality of a generalized notice that Massachusetts issued to food stamp recipients.\textsuperscript{155} The notice informed recipients that their food stamp benefit levels might be decreased as a result of reductions in

\textsuperscript{153} Current federal regulations allow for an exception to the duty to cooperate with child support enforcement officials where the applicant's or recipient's cooperation would result in physical or emotional harm to the parent or child. \textit{See} 45 C.F.R. §§ 232.42(a)(1), 232.42(b) (1995) (identifying "good cause" circumstances and requiring physical or emotional harm to be "of a serious nature" and also requiring demonstration of an emotional impairment that substantially affects the individual's "functioning"); \textit{id.} § 232.42(a)(2) (allowing good cause when child is product of rape or incest, child's adoption proceeding is pending, or child's parent is considering for no longer than three months relinquishing child for adoption). The state agency may require corroborative evidence of abuse. \textit{See id.} § 232.43(b). Such determinations are made by the individual case worker. Under the existing system, the recipient has the right to appeal an unfavorable determination with the full right to a due process hearing. \textit{See} 42 U.S.C. § 602(a)(4) (1994). To the contrary, the Personal Responsibility Act appears not even to allow states to create an exception to the duty to cooperate on the basis of physical or emotional abuse. \textit{See} H.R. 4, \textit{supra} note 1, § 103 (imposing absolute prohibition on aid to families with individual not cooperating in paternity establishment or support enforcement); \textit{id.} (mandating less than full benefit payments to families including child of unknown paternity unless child is product of rape or incest).

\textsuperscript{154} 472 U.S. 115 (1985).

the federal food stamp program.\textsuperscript{156} The Court held that across-the-board cuts did not trigger the protections of the Due Process Clause and, therefore, recipients were not entitled to individualized notices.\textsuperscript{157} Significantly, the Court distinguished its ruling in \textit{Goldberg} that the state must give detailed individualized notices of adverse actions in individual cases, stating that "[t]his case, however, does not concern the procedural fairness of individual eligibility determinations" but "[r]ather, it involves a legislatively mandated substantive change in the scope of the entire program."\textsuperscript{158} The Court found that the legislative process gives recipients all the process that they are due when benefit levels are adjusted by the legislature.\textsuperscript{159}

Under \textit{Atkins}, welfare recipients would have no recourse if the state terminates their AFDC benefits on an across-the-board basis, as a result of the Personal Responsibility Act. Since \textit{Atkins}, other courts have upheld similar across-the-board actions by states. For example, in \textit{Rosas v. McMahon},\textsuperscript{160} the United States Court of Appeals for the Ninth Circuit found no due process violation when the State of California gave individual notices of benefit cuts to AFDC recipients before the cuts were implemented, but after their effective dates.\textsuperscript{161} The court held that due process did not require a "grace period,"\textsuperscript{162} which would limit Congress' ability to cut AFDC benefits.\textsuperscript{163} In \textit{Slaughter v. Levine},\textsuperscript{164} the Court of Appeals for the Eighth Circuit found no due process violation when the State of Minnesota implemented a "lump sum" rule, reducing the AFDC benefits of all recipients without any prior notice.\textsuperscript{165}

\begin{itemize}
  \item \textsuperscript{156} Id. at 120-21.
  \item \textsuperscript{157} Id. at 129-30.
  \item \textsuperscript{158} Id. at 129.
  \item \textsuperscript{159} Id. at 129-30 (reiterating Court's position that "welfare recipient is not deprived of due process when the legislature adjusts benefit levels. . . [T]he legislative determination provides all the process that is due" (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 432-33 (1982))).
  \item \textsuperscript{160} 945 F.2d 1469 (9th Cir. 1991).
  \item \textsuperscript{161} Rosas v. McMahon, 945 F.2d 1469, 1473 (9th Cir. 1991).
  \item \textsuperscript{162} Id. at 1474-75.
  \item \textsuperscript{163} Id. at 1474 (rejecting plaintiff's interpretation that grace period was required because this "would invalidate the statutory reduction in entitlements until notice was given to recipients"). \textit{But see Atkins}, 472 U.S. at 130 (noting that presumption that citizens have knowledge of law "may be overcome in cases in which the statute does not allow a sufficient 'grace period' to provide the persons affected by a change in the law with an adequate opportunity to become familiar with their obligations under it").
  \item \textsuperscript{164} 855 F.2d 553 (8th Cir. 1988) (per curiam).
  \item \textsuperscript{165} Slaughter v. Levine, 855 F.2d 553, 554 (8th Cir. 1988) (per curiam) (finding plaintiff's request for some notice indistinguishable from plaintiff's losing claim in \textit{Atkins} for better notice in that "neither argument survives the rule that the regular legislative process completely satisfies the Due Process Clause").
\end{itemize}
The rulings in Atkins, Rosas, and Slaughter illustrate the willingness of courts to uphold broad-based reductions in welfare benefits, and to limit strictly the extent to which welfare beneficiaries are entitled to Goldberg-style due process when changes are made in their benefits levels. The rulings also indicate that welfare recipients will be unable to bring successful court challenges to the termination of their entitlements by Congress.

Under the proposed system of block grants, the due process rights of recipients to appeal state actions on their individual cases also would be eliminated because welfare recipients are only entitled to due process hearings because of their statutory entitlement to benefits. As a result, the states would be free to make arbitrary decisions on a case-by-case basis. Without the means to establish an entitlement to the benefits they currently receive, welfare recipients would be unable to challenge effectively the state’s actions on their individual cases, as they are now unable to challenge changes that affect all recipients. Similarly, applicants for welfare would be unable to challenge effectively the denial of their benefits. Because court challenges based on traditional litigation strategies, particularly attacks on the lack of an effective appeals process as violative of the Due Process Clause, are likely to fail, advocates for welfare beneficiaries must be open to new approaches.

VI. PROTECTING DUE PROCESS RIGHTS

Currently, all states have a system of due process hearings for welfare recipients because they are mandated to do so by federal regulations. Meaningful due process hearing systems must be maintained by states, even if the proposed reforms and accompanying regulations do not require them as a condition of states’ receipt of federal welfare funds. I suggest three principal approaches to

166. See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576-78 (1972) (finding that due process protects property interests against deprivation and that statute created and defined welfare recipients’ protected property interest). In Roth, the Court clarified that due process protection is triggered only by an identifiable liberty or property interest. Id. at 569. Moreover, a property interest in a benefit is not simply an individual’s “unilateral expectation” of that benefit but instead requires “a legitimate claim of entitlement to it.” Id. at 577. The Court noted that its decision in Goldberg was based on the fact that welfare recipients “had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them.” Id.; see also Goldberg v. Kelly, 397 U.S. 254, 262 & n.8 (1970) (characterizing welfare benefits as statutory entitlements for those eligible and “welfare entitlements as more like ‘property’ than a ‘gratuity’”). Under Roth, therefore, welfare recipients would not be entitled to due process rights once their benefits are no longer statutory entitlements.

167. Arguably, applicants would enjoy even less protection because they have not yet established any property interest in the receipt of their benefits.

preserving due process rights in the aftermath of enactment of the Personal Responsibility Act or other legislation ending the entitlement status of welfare benefits. The first approach is to use the political process to attempt to convince state legislators to maintain the existing system. The second approach focuses on establishing an entitlement to welfare benefits under state law, which would trigger due process protections under state constitutions. The third approach is to challenge the termination of due process hearings on the ground that the Equal Protection Clause of the Fourteenth Amendment guarantees welfare recipients the same right to due process hearings as other beneficiaries of public benefits.

A. Use of the Political Process

The proposed reforms would allow states great latitude in formulating plans for the administration of welfare benefits. Advocates must use political pressure to convince state legislators to maintain due process hearings in new state welfare institutions. As a means of achieving this end, they must push for the participation of welfare recipients in the process of creating state welfare systems. If welfare recipients themselves are allowed a voice in the creation of the new state administrative systems, those systems are likely to be more responsive to their needs and include provisions for due process hearings.

Institutional conservatism weighs in favor of this approach. Due process systems have been in effect for many years, both for welfare recipients and beneficiaries of other government benefits or licenses. State legislators may be reluctant to alter drastically the states’ administrative systems by eliminating procedural protections. Fiscal conservatism, however, weighs against this approach. Given the limited resources allocated to the states in the form of block grants, states may eliminate due process hearings as one of many cost-cutting measures.

169. These approaches are not meant to be exhaustive. Rather, they are suggested means toward achieving a vital goal. An exhaustive listing and discussion of possible approaches would be an appropriate subject for another law review article.

170. See H.R. 4, supra note 1, § 103 (encouraging states to develop “innovative approaches to employing recipients” with assistance and evaluation of Secretary of Health and Human Services); see also supra note 114 and accompanying text (discussing purpose of Act to increase flexibility).
B. Use of State Law

My second suggested approach is to rely on state constitutions, which may require due process rights for welfare recipients. State constitutions may provide more extensive rights to their citizens than those enumerated in the U.S. Constitution. Moreover, the very structure of state governments means that rights explicitly mentioned in state constitutions are substantive guarantees of rights, not simply restrictions on state power like the rights listed in the U.S. Constitution. For that reason, many commentators have advocated pursuing state constitutional rights in light of recent conservative Supreme Court decisions.

Some state constitutions guarantee substantive rights to their citizens, such as health and safety, including the constitutions of New York and New Jersey. Under these state constitutions, welfare
recipients may be entitled to public benefits as a means of maintaining their health and safety. If welfare recipients are entitled to benefits under state constitutions, then they are also entitled to Goldberg-style due process protection. The constitutional entitlement to benefits would be the "property" interest protected by the Due Process Clause of the Constitution, triggering administrative appeal rights.

One example of a possible state entitlement to welfare benefits is based on the right to a minimum income as a means of achieving the constitutional guarantees of health and safety. The Supreme Court of New Jersey adopted a similar theory in Franklin v. New Jersey Department of Human Services, in which the court recognized a fundamental right to shelter based on the state's constitutional guarantee of providing for the health of its citizens. Arguably, the right to a minimum income with which to obtain food and shelter is even more essential to one's health and well-being than a right to shelter standing alone.

Currently, to receive matching federal welfare funds, a state must prepare a "standard of need" report that details the amount of money a family needs to be able to afford the necessities of life, including food, shelter, and clothing. If a family's income falls below that standard, the family is "needy" and is therefore eligible for AFDC benefits. The "standard of need" provides a quantifiable measure of what constitutes the "health" or "safety" that some state constitutions guarantee its citizens. Under this theory, the state must provide

175. N.J. Const. art. I, para. 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.")
177. Franklin v. New Jersey Dep't of Human Servs., 543 A.2d 1, 2, 8-10 (N.J. 1988).
178. 45 C.F.R. §§ 233.20(a)(2), 233.20(a)(3)(ii)(a) (1995) (requiring states to specify statewide standard for determining need and to calculate need of applicant/recipient by comparing applicant/recipient's non-exempted income and resources to statewide need standard). Under the proposed block grant system, states may no longer be required to perform this calculation. For the purposes of this argument, however, the existing reports would serve as a reliable standard for the near future. In addition, at least one state, New Jersey, is required to set its own standard of need for state-funded benefits programs. See In re Rulemaking, N.J.A.C. 10:82-1.2 and 10:85-4.1, 566 A.2d 1154, 1160-61 (N.J. 1989) (noting "that the establishment of [need] standards is a reasonably necessary exercise even if the resources of government do not allow for fulfillment of the needs"); Roisman, supra note 173, at 21-25 (discussing successful attempts to add substance to rhetoric contained in New Jersey's General Assistance and AFDC legislation).
179. 45 C.F.R. § 233.20(b). The state, however, is not required to meet that standard with its level of benefits. See Rosado v. Wyman, 397 U.S. 397, 408 (1970) (noting that Congress gives states discretion in calculating standard of need and also in declining whether or not to meet that need in benefit levels).
that its citizens meet that minimum standard of need to provide for the health and safety of its citizens, resulting in the right to a
minimum income for those citizens, which would trigger due process rights.180

On the one hand, this approach is appealing because it fits well
with a Goldberg-style approach that is based on the recipient's
entitlement to benefits. Once the courts had found an entitlement
to benefits, it is likely that they would follow the precedent of Goldberg
to establish the recipient's right to due process hearings. On the
other hand, this approach could only be successful in states that have
constitutions granting substantive rights, such as New York and New
Jersey, and of course, courts in different states are likely to interpret
those constitutions differently. Welfare beneficiaries in some states
would be eligible for due process protections, while recipients in
other states would not even be entitled to benefits. The resulting
unfairness makes this approach problematic, even if it is partially
successful.

C. Use of Equal Protection Arguments

The third approach I recommend is to challenge the elimination
due process hearings for welfare recipients as violative of the Equal
Protection Clause of the Fourteenth Amendment.181 Virtually all
recipients of government licenses and benefits have a right to a due
process hearing if those benefits are terminated.182 Beneficiaries of
licenses, such as drivers' licenses, and other government benefits, such
as unemployment insurance benefits, are similarly situated to
recipients of welfare benefits because they all derive wealth from
those governmental licenses or benefits. Denying due process rights
to welfare recipients, but not to recipients of other forms of govern-
mental wealth, would create a unique classification of beneficiaries of
governmental wealth with fewer procedural rights than other

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imposition of grant maximum despite fact that it resulted in smaller benefits per capita to large
families because statute mandated only that "some aid" be provided and not amount deemed
necessary under standard of need).
181. Section 1 of the Fourteenth Amendment provides "No State shall . . . deny to any
person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
(Rules on the Conduct of Informal Hearings in Driver's License Suspensions and Revocations);
ILL. ADMIN. CODE tit. 68, § 680.230 (1995) (Procedure for Initiation and Resolution of
Complaints Seeking Revocation or Suspension of a License of a Private Employment Agency or
Employment Counselor, Rules of Procedure in Administrative Hearings).
beneficiaries of that wealth, a classification that may violate the Equal Protection Clause.

In analyzing whether the state's regulation of governmental benefits violates the Equal Protection Clause, courts apply a rational basis analysis, upholding the regulation if it is rationally related to a legitimate state interest.183 The only legitimate purpose that the state is likely to identify in denying procedural protections to welfare recipients would be to save money by reducing administrative bureaucracy. The Supreme Court, however, generally defers to legislatures when applying rational basis review, upholding regulations based on minimal showings of legitimate purpose on the part of the legislature.184 Plaintiffs may have a difficult time convincing the Court to uphold an equal protection challenge to the denial of procedural protections to welfare recipients. Nevertheless, two factors make it more likely that an equal protection challenge to the denial of procedural rights to welfare beneficiaries will succeed. First, in several cases involving the state's administration of governmental benefits, the Court has applied a slightly higher level of scrutiny than rational basis scrutiny and struck the regulations down.185 Second, the nature of the procedural rights at issue also counsels in favor of the Court's applying a heightened standard of review. If the Court applies a slightly heightened standard of review, it might strike down the failure to provide procedural hearings to welfare recipients as violative of equal protection.

183. See Department of Agric. v. Moreno, 413 U.S. 528, 533-34 (1973); Dandridge v. Williams, 397 U.S. 471, 485 (1970), discussed supra note 64. In Dandridge, the Court found that there is no fundamental right to a minimum income, and reasoned that state rules governing the administration of welfare benefits, alone, was economic regulation that required nothing more than a rational relation to a legitimate state interest. 397 U.S. 471, 485 (1970).

184. See, e.g., Schweiker v. Wilson, 450 U.S. 221, 234 (1981) (holding that rational basis standard does not allow courts to substitute its notions of good public policy for those of Congress); Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 175 (1980) (holding that if state-drawn classification has some rational basis, court will not invalidate it simply because it is unwise or unartfully drawn); Harris v. McRae, 448 U.S. 297, 325 (1980) (upholding Hyde Amendment, which prohibited use of federal Medicaid funds for abortions, as being rationally related to "the legitimate governmental objective of protecting potential life").

185. See Zobel v. Williams, 457 U.S. 55, 65 (1982) (striking down Alaska statute under which state's distribution of dividends was proportional to amount of time that each resident had lived in state as violative of equal protection); Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (discussed infra text accompanying notes 186-88); Department of Agric. v. Murry, 413 U.S. 508, 514 (1973) (invalidating Federal Food Stamp Act's exclusion of households in which any member over 18 years of age had been claimed, during prior tax year, as dependent on federal income tax return of taxpayer not member of eligible household, on equal protection grounds); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 621 (1973) (striking down New Jersey's denial of state-funded welfare benefits to families with illegitimate children as violative of equal protection).
In *Department of Agriculture v. Moreno*, the Court applied the rational basis analysis and struck down a federal statute that denied food stamps to recipients in households containing an unrelated member, but allowed benefits in similar households without unrelated members, as violating the equal protection component of the Fifth Amendment's Due Process Clause. *Moreno* is widely recognized as applying a standard that is higher than the stated rational basis analysis, based in part on the Court's solicitude for poor plaintiffs. In recent years, the Court has been significantly less solicitous of the rights of the poor. The essential nature of welfare benefits, however, and the fact that welfare recipients stand to lose their entire means of livelihood if their benefits are wrongly denied or terminated, argue strongly in favor of the Court applying an informally higher standard of review, as it did in *Moreno*, to strike down the lack of procedural rights for welfare recipients. Arguably, it is not rational for states to provide welfare recipients fewer procedural rights than those provided, for example, to people who stand to lose only their drivers' licenses. Moreover, the Court need not accept the stated purpose at face value, but may examine the legislative scheme to determine whether the asserted purpose is

186. 413 U.S. 528 (1973).
188. See *Moreno*, 413 U.S. at 545-47 (Rehnquist, J., dissenting) (asserting that measure meets rational basis test where measure affects congressional goal of prevention of fraudulent use of food stamps); *Clerburne v. Clerburne Living Ctr., Inc.*, 473 U.S. 432, 459 n.4 (1985) (Marshall, J., concurring in part and dissenting in part) (describing *Moreno* as example of "intermediate review decisions masquerading in rational basis language" citing Laurence H. Tribe, American Constitutional Law § 16-50, 1645-46 (2d ed. 1988)).
189. See, e.g., *Lyng v. International Union, United Automobile, Aerospace & Agric. Implement Workers of Am.*, 485 U.S. 360 (1988) (upholding congressional Act denying food stamps to households of striking workers who would otherwise be eligible as not violative of equal protection); *Lyng v. Castillo*, 477 U.S. 635 (1986) (upholding federal food stamp regulations that presume that parents, children, and siblings live together as one household, but presume that unrelated persons or more distant relatives are separate households, entitling them to a higher level of benefits, unless they also customarily purchase food together, as not violative of equal protection); *Schweiker v. Wilson*, 450 U.S. 221 (1981) (upholding denial of supplemental subsistence benefits to needy aged, blind, and disabled persons in public institutions, even though, but for their institutionalization, they were otherwise eligible for benefits, as not violative of equal protection).
190. *Dandridge v. Williams*, 397 U.S. at 471, 522 (1970) (Marshall, J., dissenting) ("AFDC support to needy dependent children provides the stuff that sustains those children's lives: food, clothing, shelter."); *see Goldberg v. Kelly*, 397 U.S. 254, 264 ("For qualified recipients, welfare provides the means to obtain essential food, clothing, housing and medical care... Termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits."). That welfare benefits are the only means of livelihood for recipients has been a significant factor in some court decisions governing the administration of those benefits. *See Goldberg*, 397 U.S. at 264 (identifying as crucial factor that recipient's "situation becomes immediately desperate" upon termination of benefits).
the actual goal of the legislation. Under such scrutiny, states would be hard put to articulate a legitimate state interest on which to base such a distinction, and the likely stated purpose of reducing administrative costs would not suffice. "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" Saving money and earning political favor by reducing the rights of those who arguably need them the most, simply because those people do not have political power and are politically unpopular, should not withstand scrutiny as a legitimate state interest. "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate state interest."

Given the nature of the procedural protections at issue here, the Court also may apply a higher standard of scrutiny to the denial of those protections to a discreet classification of beneficiaries of governmental benefits. The Court has applied a higher level of scrutiny when the governmental statute restricted access to the courts, schools, or political process on the basis of income, analogous to the denial of procedural protections to welfare recipients. In Boddie v. Connecticut, for example, the Court found that the State of Connecticut violated the equal protection rights of indigent plaintiffs who wanted divorces, by refusing to waive filing fees

191. See Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975). In equal protection cases, courts need not accept legislative purpose at face value, "when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation").
192. Goldberg, 397 U.S. at 262-63 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).
193. Moreno, 413 U.S. at 534.
for those plaintiffs, effectively denying them access to the divorce courts on the basis of their income.\textsuperscript{198} Similarly, the Court may find that the legislature cannot deny welfare recipients, the recipients of governmental benefits with the lowest incomes, access to public hearings when access is accorded to other recipients of governmental benefits.

The rule expressed by the Court in \textit{Boddie} has been weakened by its subsequent rulings in \textit{United States v. Kras,\textsuperscript{199}} and \textit{Ortwein v. Schwab.}\textsuperscript{200} In \textit{Kras}, the Court found that the federal court's failure to waive bankruptcy fees did not deny equal protection rights of bankruptcy petitioners.\textsuperscript{201} The Court distinguished its ruling from that in \textit{Boddie} in part on the basis that in \textit{Boddie}, the only means for resolving the plaintiff's legal dispute (i.e., to dissolve the marriage) was to file for divorce, but the bankruptcy petitioners could resolve their disputes with their creditors in other ways, such as entering into payment plans, without resort to bankruptcy court.\textsuperscript{202} In \textit{Ortwein}, the Court found that petitioners challenging the State of Oregon's refusal to waive a $25 court fee for filing administrative review appeals of welfare benefit hearings did not violate the equal protection rights of the petitioners. Again, the Court distinguished the facts from those in \textit{Boddie}, pointing out that the petitioners already had the right to a due process hearing prior to filing their review actions.\textsuperscript{203}

The issue at hand is distinguishable, however, from both \textit{Kras} and \textit{Ortwein} due to the lack of alternatives available to welfare recipients, and the historical commitment to due process rights of welfare recipients. In \textit{Boddie}, the court reasoned that the only means for the plaintiffs to resolve their legal issues was to file for divorce in court.\textsuperscript{204} Similarly, if the state does not provide welfare recipients with procedural protections, they will have no recourse whatsoever if their benefits are wrongly denied or terminated. Like the plaintiffs in \textit{Boddie}, they would have no access to a forum in which to resolve their legal disputes, differentiating them from the plaintiffs in \textit{Kras} and \textit{Ortwein}.\textsuperscript{205} In \textit{Boddie}, the Court also recognized an historic

\begin{itemize}
  \item \textsuperscript{198} Boddie v. Connecticut, 401 U.S. 371, 375-76 (1971).
  \item \textsuperscript{199} 409 U.S. 434 (1972).
  \item \textsuperscript{200} 410 U.S. 656 (1973) (per curiam).
  \item \textsuperscript{201} United States v. Kras, 409 U.S. 434, 450 (1972).
  \item \textsuperscript{202} \textit{Id}. at 445.
  \item \textsuperscript{203} Ortwein v. Schwab, 410 U.S. 656, 659-60 (1973) (per curiam).
  \item \textsuperscript{204} \textit{Boddie}, 401 U.S. at 375-76.
  \item \textsuperscript{205} In addition, it would be particularly ironic for the Court to rely on the precedent of \textit{Ortwein} to deny procedural protections to welfare beneficiaries, because the Court emphasized the availability of due process hearings for welfare recipients as alternative forums for the plaintiffs in its \textit{Ortwein} ruling. \textit{Ortwein}, 410 U.S. at 659-60.
\end{itemize}
commitment to the rights of privacy and family rights, which militated in favor of the indigent plaintiffs’ access to divorce courts. In both *Kras* and *Ortwein*, the Court downplayed the economic interests at stake, distinguishing them from the fundamental nature of an individual’s rights regarding the family. Therefore, if the Court perceives the Equal Protection argument to be one based purely on the economic interests of the welfare recipients, it is unlikely to rule on their behalf. Given the historical commitment of the state to process, however, the Court may also find it to be “of basic importance to our society,” and apply the *Boddie* ruling in favor of the recipients.

Finally, welfare beneficiaries need not be otherwise entitled to procedural protections in order for them to successfully challenge the denial of those protections. In *Boddie*, the plaintiffs were not otherwise entitled to obtain a divorce. In *Plyler v. Doe*, the Court struck down a Texas statute prohibiting the children of illegal immigrants from attending public schools. The Court had already determined that the right to attend public school was not a fundamental right, but found that once the state had made it available to some children, it could not deny it to others based solely on the illegal immigrant status of the children’s parents. Under the system established pursuant to the new welfare reform proposals, welfare beneficiaries also would not be entitled to due process hearings, just as the plaintiffs in *Plyler* were not entitled to attend public school. Welfare beneficiaries would have an uphill battle in their equal protection challenge to the denial of due process.

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206. *Boddie*, 401 U.S. at 376 (emphasizing that “marriage involves interests of basic importance in our society”).
207. *Ortwein*, 410 U.S. at 659 (stating that appellant’s interest in increased welfare benefits, “like that in *Kras*, has far less constitutional significance than the interest of the *Boddie* applicants”); *Kras*, 409 U.S. at 443-44 (distinguishing *Boddie*, in part, on the importance of individual’s rights regarding family, as opposed to purely economic interests involved in bankruptcy case).
209. This argument speaks to the concerns of those, such as Professor Richard Saphire, who have expressed to me in conversation the view that due process hearings are so fundamental that the right to them cannot be abolished, and allows the Court an angle with which to maintain those rights in accordance with existing precedent.
210. *Plyler v. Doe*, 457 U.S. 202, 230 (1992). Although the Court specifically declined to apply heightened scrutiny based on the ethnicity of the plaintiffs, *id.* at 220-24, who were primarily of Hispanic descent, that may also have played a role creating a “quasi-suspect” class which led to the *Plyler* court’s application of a heightened level of scrutiny. Similarly, the racial composition of welfare recipients, who are almost 50% non-white, see *supra* note 7, may also support a heightened standard of scrutiny when examining the denial of due process hearings to welfare recipients.
212. *Id.*
hearings. Under the rulings of Moreno, Boddie, and Plyler, however, they might have a chance to succeed.

CONCLUSION

The goal of welfare reform should be to improve the system so that people who receive welfare can become self-actualizing human beings who are no longer dependent on welfare. If society wants welfare recipients to take personal responsibility for their actions, the government must give them a fair system that empowers these recipients to do so. Structured rights, such as due process rights, can empower recipients of public benefits, thereby helping them to break their dependence on those benefits. Due process is essential for welfare recipients, who live in the "outside" sphere in our society, and are disenfranchised due to their income level, race, and/or gender. Recent reforms, which intrude on the autonomy of recipients and may result in the termination of their benefits, make due process even more crucial for those recipients.

As courts have been unresponsive to the due process claims of welfare recipients brought under the traditional Goldberg analysis, welfare advocates must find other means to maintain due process rights. For example, they should stress advocacy for procedural rights within the political process. Rights to a minimum income may be found in state constitutions. Finally, welfare recipients may be entitled to procedural protections under an equal protection analysis.

Writing for the majority in Goldberg v. Kelly, Justice Brennan stated:

From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. . . . Public assistance . . . is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.' The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.213

Justice Brennan's words still ring true today. A welfare system that includes pre-termination due process hearings is vital to ensure that we have a society that treats people fairly and with the dignity that they deserve.
