7-1-2000

Children in Poverty: In Search of State and Federal Constitutional Protections in the Wake of Welfare Reforms

April Land
University of New Mexico - School of Law

Children in Poverty: In Search of State and Federal Constitutional Protections in the Wake of Welfare "Reforms"

April Land[*]

I. INTRODUCTION

The faces of the human suffering caused by welfare reform are faces of children. Children, along with their parents, are going without basic necessities. Hundreds of thousands of children have already lost access to welfare benefits, and thus, their basic means of subsistence, as a result of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,[1] and its implementation by the states.

While the President of the United States boasted that we had come to "the end of welfare as we know it,"[2] and governors across the country reported with pride that welfare rolls had been dramatically reduced,[3] the poorest children in America became poorer as a result of the loss of their welfare benefits.[4] Over 400,000 more children are now in extreme poverty as a result the 1996 welfare reforms.[5] The changes in the existing welfare laws have not only stripped millions of families of meager subsistence income[6] but also undermined previously afforded federal constitutional protections.

The elimination of the federal entitlement to welfare and the shifting of essential policy making to states raises serious questions about the procedural due process rights of people in poverty. It also changes the focus of the legal battleground for welfare families, bringing important state constitutional issues into focus across the nation. In New Mexico, for example, the state's initial welfare reform program was held to violate the separation of

---

[*]April Land, Assistant Professor of Law, University of New Mexico School of Law, L.L.M. Georgetown University, 1997, Staff Attorney, Neighborhood Legal Services Program, Washington D.C. 1990-1995, University of Wisconsin-Madison, J.D. 1987, Reed College, B.A. 1983. This Article is dedicated to Bob Ericson, with thanks to Brian Matise, Molly Schmidt-Nowara, Lynne Marie Paretchan, and Rob Schwartz for their assistance and support, and to Dean Robert Desiderio for the research grants that made this work possible.

[1]Pub. L. No. 104-193, 110 Stat. 2105 (relevant portions are codified as amended in scattered sections at 42 U.S.C.A. §§ 601–1307 (1991 & Supp. 2000)).

[2]President William Jefferson Clinton, Remarks by the President to Officials of Missouri and Participants of the Future Now Program, June 14, 1994, at 3, *available at* 1994 WL 258369.

[3]Merrill Matthews Jr., *Welfare Reform Shows Signs of Success*, ALBUQUERQUE J, Apr. 11, 1999, at A3.

[4]WENDELL PRIMUS ET AL., CENTER ON BUDGET AND POLICY PRIORITIES, THE INITIAL IMPACTS OF WELFARE REFORM ON THE INCOMES OF SINGLE-MOTHER FAMILIES 37 (1999).

[5]CHILDREN'S DEFENSE FUND & NATIONAL COALITION FOR THE HOMELESS, WELFARE TO WHAT: EARLY FINDINGS ON FAMILY HARDSHIP AND WELL-BEING 2 (1998) [hereinafter WELFARE TO WHAT].

[6]*See generally* Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, Mar. 1997, at 43, 46 (citing Urban Institute reports commissioned by Secretary of Health and Human Services).

powers provision of the state constitution because of the Governor's attempt to bypass the legislative process.[7] As states are swept up in the national effort to decrease the welfare rolls, advocates for people in poverty must look increasingly to state constitutions for relief. This Article will explore some of the analytical tools that may be useful in view of this major shift in the legal landscape.

Overall, the Article emphasizes that in exploring the potential constitutional protections for families in poverty, it will be important to focus on the detrimental effects that welfare reforms have on children. By emphasizing the impact that welfare cuts have on children, it may be possible to provide a framework for judicial review that minimizes the prejudices and stigmas about welfare recipients and focuses on the harm caused by the elimination of access to basic subsistence income. The focus on harm to children is important because our society does not acknowledge every person's "inevitable dependency"[8] and has, therefore, stigmatized rather than empathized with welfare recipients. The stigmatization of welfare recipients is compounded and reinforced by the history of racial discrimination in welfare policy[9] and the media coverage of welfare recipients.[10] Each of these have, in turn, led to a strong link between people's perceptions about welfare and their racial prejudices.[11] With a change in focus away from the behavior of parents to the suffering of children, it is more likely that courts will acknowledge constitutional protections for families in poverty at the state and possibly even at the federal level.[12] For example, procedural protections may be strengthened by highlighting a child's right to continuing benefits in the face of new program requirements. Equal protection claims by *illegitimate* children may be more successful now that the clearly articulated purpose of federal reforms is to prevent out-of-wedlock births.[13]

Further, in this epoch of "New Federalism" and state welfare law innovation, state courts have the exciting opportunity to develop the rich texts of their own state constitutions. State courts should develop this text to act as a check on legislative measures that are projected to plunge eight million families with children further into poverty.[14]

---

[7]New Mexico *ex rel.* Taylor v. Johnson, 961 P.2d 768, 775 (N.M. 1998).

[8]Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89, 92 (1998).

[9]Catherine R. Albiston & Laura Beth Neilson, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L. J. 473, 474 (1995); Lucy A. Williams, *Race Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L. J. 1159, 1161 (1995); Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817, 837 (1994); *see also infra* Part IVB(b) (discussing racial discrimination in development of national welfare policy).

[10]Williams, *supra* note 9, at 1161.

[11]*See generally* MARTIN GILENS, WHY AMERICANS HATE WELFARE (1999) (exploring American perspectives on welfare).

[12]Barbara Sard, *The Role of the Courts in Welfare Reform*, 22 CLEARINGHOUSE REV. 367, 375 (1988); Richard H. Fallon Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 320–22 (1993) (stating that societal consensus underlies constitutional protections).

[13]42 U.S.C.A. §§ 601(a)(3), 602(a)(1)(A)(v) (Supp. 2000). *See* discussion *infra* Part IVB(c) (discussing classifications based on *illegitimacy*).

[14]Edelman, *supra* note 6, at 46.

Part II of this Article describes the radical shift in the national public assistance program worked by the 1996 passage of the Personal Responsibility and Work Opportunity Reconciliation Act ("PRA" or the "Act"). This part explains the elimination of the previous federal program, Aid to Families with Dependent Children (AFDC) and its replacement with the block-grant program called Temporary Assistance to Needy Families (TANF). It also explains some of the stated reasons for those changes. Part III exposes the harm that these changes have already caused, and are likely to cause, to children in poverty. Part IV explores the application of federal constitutional analysis in view of the radical shift in federal welfare policy. Without constitutionally protected procedural rights, other constitutional rights can ring hollow for families in dire poverty.[15] Because the PRA, on its face, raises serious questions about whether procedural due process protections remain for welfare recipients, this issue is examined first. Part IV further discusses some of the limited opportunities for substantive due process and equal protection claims under the federal constitution, surveying some of the critiques of the federal analysis. Part V renews the call for development of protections for children under state constitutional provisions. This Part explains why state courts should develop a state constitutional jurisprudence of positive rights for children who will find themselves in dire poverty as the new welfare regime holds them accountable for the actions, and inactions, of their parents, leaving them without access to the basic necessities of life.

II. WELFARE AS WE HAVE KNOWN IT AND THE 1996 "REFORM": CHANGES TO THE LAW AND THE STATED PURPOSES

The PRA essentially changed welfare from a federal entitlement program to a system of block grants to the states. These block grants include both federal incentives and limitations on the use of federal funds. The contrast between the purposes of the former AFDC program and the new block grant system of the PRA casts light on the dramatic change in welfare policy.

The first federal entitlement program was created by the Social Security Act of 1935,[16] and it was designed to help support poor children. The initial federal program, Aid to Dependent Children,[17] was a grant program to the states created to protect widows and their children during the Great Depression. The program was expanded to include families of women widowed by World War II and expanded further, in 1962, when it took the title of Aid to Families with Dependent Children (AFDC).[18]

AFDC was created to encourage the care of dependent children in their homes or in the homes of relatives by enabling each state to furnish finan-

---

[15]Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 DENV. U. L. REV. 9, 42 (1997).

[16]Pub. L. No. 74-531, 49 Stat. 620 (codified as amended in scattered sections at 42 U.S.C.A. §§ 301–1397 (1991 & Supp. 2000)).

[17]*See, e.g.*, Pub. L. No. 78-257, 58 Stat. 277 (no currently effective U.S.C.A. sections).

[18]Pub. L. No. 87-543, 76 Stat. 172, 185 (codified as amended in scattered sections at 42 U.S.C.A. §§ 301–1397 (1991 & Supp. 2000)).

cial assistance and services to individuals caring for needy dependent children. The program was a federal safety net with the intent of helping to maintain and strengthen family life.[19] Under the program, which set national eligibility standards, states had to provide detailed and specific welfare plans to the federal government. If the plan met federal requirements, the federal government provided matching funds for all eligible participants. If potential recipients could meet the eligibility requirements set by the federal regulations and the federally approved state welfare plans, they were entitled to subsistence benefits at levels set by the states.

In contrast, the PRA creates a block grant system that is directed towards minimizing welfare dependency and which, in practice, penalizes poor children for their poverty. The Act eliminated the AFDC program and created Temporary Assistance to Needy Families (TANF).[20] The first finding in the PRA states that "[m]arriage is the foundation of a successful society."[21] Many of the other findings in support of the Act relate the detrimental impact of out-of-wedlock births.[22]

The other stated purposes of the Act are to increase the flexibility of the states in operating assistance programs and to "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage."[23] Thus, states are encouraged to develop their own welfare programs with limited federal regulation. However, under the new law, federal regulations limit the benefits that a state may award to a family under the program. So, for example, under the previous ADFC program, a family that lived in dire poverty would qualify for welfare benefits as long as they continued to meet the program requirements. However, under the new law, the states are prohibited from providing more than 60 months of cash assistance to any family. The new law also sets increasingly high rates of mandatory job participation that states must meet to receive full funding of their block grants under TANF.[24]

While the former law limited the state's right to interfere with a family's entitlement to welfare benefits, the PRA states that there is "NO INDIVIDUAL ENTITLEMENT" to benefits and that the Act "shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part."[25] Thus, on its face, the Act evinces a congressional intent to eliminate any federal entitlement and, therefore, potentially any property right to cash assistance. The entitlement to benefits had been an essential underpinning of due process protection triggering

---

[19]42 U.S.C.A. §§ 601–602 (Supp. 2000).

[20]Pub. L. No. 104-193, 110 Stat. 2113 (codified as amended at 42 U.S.C.A. § 601 (Supp. 2000)).

[21]42 U.S.C.A. § 601 (Supp. 2000).

[22]*Id.*

[23]*Id.* § 601(a)(2).

[24]The law does allow for some exceptions, however, as in Massachusetts no exceptions are being made, even in compelling circumstances. *See generally* MASSACHUSETTS LAW REFORM INSTITUTE DOCUMENTATION PROJECT AND THE FAMILY ECONOMIC INITIATIVE, SECOND REPORT: A CLOSER LOOK AT THE THOUSANDS OF FAMILIES LOSING BENEFITS UNDER THE MASSACHUSETTS TIME LIMIT (1999) (showing systemic denials of requests for exemptions from time limits) [hereinafter CLOSER LOOK].

[25]42 U.S.C.A. § 601(b) (Supp. 2000).

constitutional protection for families receiving benefits under the AFDC program and related welfare laws.[26]

III. THE PROBLEM FACING CHILDREN

While most sectors in the American economy are enjoying prosperity and mainstream headlines report the lowest poverty rates in decades,[27] more children are living in extreme poverty.[28] Extreme poverty is defined as having a household income that is below one-half the poverty line (or less than $6,401 a year for a three-person family in 1997).[29] Recent studies have tied the increase in extreme child poverty to the PRA.[30] Many of the provisions of the Act, including the mandatory work requirements and lifetime limits on welfare benefits, threaten the health and safety of children in poverty. As one commentator has concluded, "[t]he new welfare law poses substantial dangers, and is likely to exacerbate many long-standing troubles afflicting the children of low-income families."[31]

A recent study of the effects of the 1996 welfare reforms on children found that the number of children in extreme poverty grew by 400,000 between 1995 and 1997: "The total number of children in extreme poverty rose from about 6 million in 1995 to 6.3 million in 1996 and crept up to nearly 6.4 million in 1997."[32] This increase "is startling at a time of strong economic growth and a decline in overall child poverty, when extreme poverty should have been declining. It can be traced directly to the declining number of children lifted above one-half of the poverty line by government cash assistance to the poor."[33] Another study found that large numbers of families in the post-TANF welfare population sampled do not meet their families' basic needs for shelter and utilities.[34]

Poverty also directly threatens children's health and education and future earning ability. "Deep poverty—especially during the earliest years of childhood—has particularly clear, long-lasting effects on children's academic learning and school completion."[35] As adults, children raised in

---

[26]Goldberg v. Kelly, 397 U.S. 254, 261–62 (1970).

[27]Richard Wolf & Beth Belton, *Poverty at 20-year Low*, USA TODAY, Oct. 1, 1999, at 1A.

[28]WELFARE TO WHAT, *supra* note 5, at 11.

[29]*Id.*

[30]ARLOC SHERMAN, CHILDREN'S DEFENSE FUND, POVERTY MATTERS: THE COST OF CHILD POVERTY IN AMERICA 33 (1997); PRIMUS ET AL., *supra* note 4, at vi; NETWORK'S NATIONAL WELFARE REFORM WATCH PROJECT, POVERTY AMID PLENTY: THE UNFINISHED BUSINESS OF WELFARE REFORM 13–14 (1999).

[31]Mary Jo Bane & Richard Weissbourd, *Welfare Reform and Children*, 9 STAN. L. & POL'Y REV. 131, 137 (1998).

[32]WELFARE TO WHAT, *supra* note 5, at 11; *see also* Peter Edelman, *The Impact of Welfare Reform on Children: Can We Get It Right Before the Crunch Comes?*, 60 OHIO ST. L.J. 1493, 1501 (1999) (pointing out need to reweave basic safety net for families).

[33]WELFARE TO WHAT, *supra* note 5, at 2.

[34]Mary Corcoran, Colleen Heflin & Kristine Siefert, *Food Insufficiency and Material Hardship in Post-TANF Welfare Families*, 60 OHIO ST. L.J. 13, 95, 1412 (1999).

[35]WELFARE TO WHAT, *supra* note 5, at 2; *see generally* RON SUSKIND, A HOPE IN THE UNSEEN: AN AMERICAN ODYSSEY FROM THE INNER-CITY TO THE IVY LEAGUE (1998) (giving journalistic portrayal of challenges facing one boy's challenge to succeed in education).

poverty earn 25 percent lower wages than adults who were not raised in poverty.[36]

In addition to economic devastation of children in poverty, the mandatory work requirements imposed by the Act pose significant threats to children in many other ways.[37] Requiring mothers to leave their children at home or with day care providers can, and under many circumstances do, pose a danger to children. The findings of a University of California/Yale University study show that the welfare-to-work push on single mothers is placing a growing number of children in mediocre and disorganized child care settings.[38] Incidence of severe maternal depression for this group of women as well as reductions in both their employability and their children's odds of thriving are three times higher than the national average.[39] Parents should have the opportunity to be at home to discourage children from skipping school and to be present when older children come home after school, especially in neighborhoods that are plagued with gang and drug activity.[40] Two leading authors summarize these effects:

> Greater poverty combined with more poor mothers in the workforce also means that more children will drop out of school to work in an effort to take care of their own children, sick relatives or younger siblings. An increase in a child's share of family responsibilities is a prime cause of failure in school . . . More children will suffer the shame of poverty, and more children and parents will fear utter destitution and homelessness. Many parents will also suffer serious stress and depression due to their inability to provide for their families and the insecurity of unstable, low-wage jobs. This sustained parental depression can damage children in every area of development.[41]

Families leaving welfare have decreased access to food and stable housing. "One in three children . . . in families who had recently lost TANF assistance were 'eating less or skipping meals due to cost,' according to a study of families served by 60 relief agencies during late 1997."[42] One in six recipients in South Carolina reported having no way to buy food at some time since leaving TANF.[43] "The rate of food deprivation was significantly worse for former TANF families than for families still receiving TANF."[44]

---

[36]WELFARE TO WHAT, *supra* note 5, at 2.

[37]*See* Gregory Williams, *One Boy's View of the Welfare System*, 60 OHIO ST. L.J. 1177, 1177 (1999) (giving account of hunger and humiliation faced by one child in welfare system).

[38]GROWING UP IN POVERTY PROJECT 2000, REMEMBER THE CHILDREN, MOTHERS BALANCE WORK AND CHILD CARE UNDER WELFARE REFORM 71 (2000).

[39]*Id.* at 5.

[40]REBECCA M. BLANK, IT TAKES A NATION: A NEW AGENDA FOR FIGHTING POVERTY 27–30 (1997).

[41]Bane & Weissbourd, *supra* note 31, at 134 n.29 (citing S. Parker et al., *Double Jeopardy: The Impact of Poverty on Early Childhood Development*, 35 PEDIATRIC CLINICS OF N. AM. 6, 1233 (1988)); *see also* Corcoran, Heflin & Siefert, *supra* note 34, at 1413 (finding that post-TANF welfare population had disproportionately high rates of physical health problems, major depression, and domestic abuse).

[42]WELFARE TO WHAT, *supra* note 5, at 14.

[43]*Id.*

[44]*Id.*

Nine cities of the thirty-four cities responding to a survey by the U.S. Conference of Mayors reported an increase in demand for emergency food, "due mostly to welfare reform."[45] Risk of material hardship may also increase the chances of state intervention into families and impacts other child welfare programs.[46] Child protection officials in some states openly fear that welfare reform will flood their systems with children whose parents cannot afford to care for them.[47] And, as one commentator points out, "given the strong link between poverty and the juvenile court, it seems inevitable that the problems of child poverty will become the problems of the juvenile court system.[48] The new welfare regime has also resulted in significant reductions in Medicaid enrollment of children, posing further threats to their health.[49]

Further, families leaving welfare increasingly cannot pay their rent, and therefore, former recipients show signs of greater homelessness. In Atlanta, 46 percent of the 161 homeless families with children interviewed in shelters had lost TANF benefits in the last 12 months.[50] "Homelessness during childhood is associated with higher infant mortality, asthma, chronic diarrhea, delayed immunizations, family separation and missed school."[51]

In states where child poverty was already high, welfare cuts increase the rates and the depth of child poverty. For example, in New Mexico, one of the poorest states in the nation, 38.9% of children under 5 years old live in poverty.[52] Measures that would increase these poverty rates, therefore, pose a serious threat to children in New Mexico and other poor states.

In sum, children in poverty across the nation face the threat of extreme poverty, which in turn threatens their health, their education, and their access to food and shelter. The threats are compounded by welfare cuts directly traceable to welfare reform, and by the attacks on the rights of their families to seek continuing benefits while they challenge arbitrary, possibly illegal, cuts in the benefits they need to have access to the basic necessities of life.

IV. FEDERAL CONSTITUTIONAL PROTECTIONS

For any substantive constitutional protections to be meaningful for families in poverty, families must have an opportunity to challenge a reduction in their benefits prior to termination of those benefits. Therefore, it is

---

[45]*Id.* at 15.

[46]*See* Naomi Cahn, *Children's Interest in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189 (1999) (exploring impact of federal adoption and foster care policies).

[47]MIMI ABRAMOVITZ, UNDER ATTACK, FIGHTING BACK 39 (2000).

[48]Katherine Hunt Federle, *Child Welfare and the Juvenile Court*, 60 OHIO ST. L.J. 1225, 1245 (1999).

[49]Sara Rosenbaum and Kathleen Maloy, *The Law of Unintended Consequences: The 1996 Personal Responsibility and Work Opportunity Reconciliation Act and Its Impact on Medicaid for Families with Children*, 60 OHIO ST. L.J. 1442, 1471 (1999).

[50]WELFARE TO WHAT, *supra* note 5, at 16.

[51]*Id.* at 17.

[52]U.S. Census Bureau, *Model-Based Income and Poverty Estimates for New Mexico in 1995, People Under Age 5 in Poverty*, at <http://www.census.gov/hhes/www/saipe/estimate/-cty/cty35000.htm> (last revised Feb. 17, 1999) .

important to establish a federal baseline for federal procedural due process protections. It is also important to examine whether the shift in welfare law creates new opportunities for federal substantive due process and equal protection challenges on behalf of children in poverty.

A. Procedural Due Process Challenges

The Fifth and Fourteenth Amendments to the Constitution of the United States provide that neither the federal government nor a state shall "deprive any person of life, liberty, or property, without due process of law."[53] In interpreting these constitutional provisions, the Supreme Court has traditionally applied a two-part test. First, a court must determine if there is an interest in life, liberty, or property. Second, if the Court has found an interest, it must determine what procedural protections are constitutionally mandated.[54] For decades the Supreme Court has consistently held that welfare recipients had a property interest in continued receipt of federal benefits under the first prong of the two-part test. Therefore, due process was required prior to the elimination of any benefits.[55] However, the finding of a property interest was based on the entitlement to welfare benefits, thus raising questions about whether a property interest continues to exist in the face of the statutory language stating that there is no entitlement to benefits. The following discussion examines whether a property interest in benefits exists under the new welfare regime. It then addresses the question of which procedural protections are constitutionally mandated once a property interest is found.

Some of the most dramatic changes in the landscape of welfare rights in the wake of recent reforms may be in the area of due process rights.[56] Since 1969, when the Supreme Court decided *Goldberg v. Kelly*,[57] there has been no question that welfare recipients had a federally protected property interest in their benefits under the AFDC program.[58] In *Goldberg*, the Court noted that procedural due process applied to the termination of welfare benefits because "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights."[59] Thus, the Supreme Court implicitly found that welfare recipients had a constitutionally protected property interest in their benefits that guaranteed them a right to due process before their benefits could be terminated.[60]

---

[53]U.S. CONST. amend. XIV. The Fifth Amendment contains similar protections and is applied to the Federal Government and the District of Columbia. U.S. CONST. amend. V.

[54]LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 694–768 (1988).

[55]Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

[56]*See generally* Laura C. Conway, *Will Procedural Due Process Survive After Aid to Families with Dependent Children is Gone?*, 4 GEO. J. ON FIGHTING POVERTY 209, 217 (1996) (discussing impact of PRA on procedural due process protections). The denials will also include members of classes of individuals alleging harm from state actions.

[57]397 U.S. 254 (1969).

[58]*Id.* at 262 n.8.

[59]*Id.* at 262.

[60]*Id.* at 265.

1. Is There a Property Interest in Welfare Benefits Under the PRA?

Now that Congress has specifically attempted to eliminate a statutory entitlement to benefits under the new welfare regime, the question arises as to whether recipients have a federally protected property interest in continued welfare benefits that would entitle them to due process. In other words, can they meet the first prong of the due process analysis: Is there a property interest? Because the PRA, on its face, asserts that there is no statutory entitlement, the issue of whether there is a property interest must be examined according to constitutional principles.

(a) Supreme Court Analysis; Rules or Mutually Explicit Understandings

As the Supreme Court explained in *Board of Regents v. Roth,*[61]

> [t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
>
> . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[62]

Thus, a property interest must be rooted in the statute defining eligibility for the benefit. A person's interest in a benefit is a property interest for due process purposes if there are such rules or mutually explicit understandings that support the claim of entitlement to the benefit that he may assert.[63] In *Roth*, the Supreme Court held that the terms of Roth's employment secured absolutely no interest in re-employment.[64] However, in a later case, the Supreme Court found that workers had protected interests in continued work where the worker had relied on guidelines promulgated by the employer and generally understood by state officials.[65] In *Perry v. Sinderman*, a non-tenured professor challenged his dismissal on due process (and other)

---

[61]408 U.S. 564 (1972).

[62]*Id.* at 577.

[63]Nancy Morawetz, *A Due Process Primer: Litigating Government Benefit Cases in the Block Grant Era*, 30 CLEARINGHOUSE REV. 98, 99 (June 1996); *see also* Goss v. Lopez, 419 U.S. 565, 586 (1975) (Powell, J., dissenting) ("Property interests are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits."); Memphis Light v. Craft, 436 U.S. 1, 9 (1978) ("Although the underlying substantive interest is created by 'an independent source such as state law', federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause.").

[64]*Roth*, 408 U.S. at 576; *see also* Bishop v. Wood, 426 U.S. 341, 346–47 (1976) (holding that dismissal of police officer did not deprive him of property interest protected by Fourteenth Amendment where he was an employee at will under state law).

[65]Perry v. Sinderman, 408 U.S. 593, 602–03 (1972).

grounds.[66] The Court held that "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."[67]

Under this reasoning, the state's plans and regulations under the PRA setting forth objective eligibility criteria for assistance create a property interest in those benefits and therefore create a right to due process.

(b) The Process Cannot Define the Property Interest

Moreover, the nature of the property interest is not defined by the processes for adjudicating those interests. In *Cleveland Board of Education v. Loudermill*,[68] the Supreme Court found that a public employee, who could only be terminated for cause, had a property interest in continued employment despite the limited procedures the state provided for challenging terminations.[69] The Court overruled its previous holding that "[where] the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet."[70] In rejecting the notion that litigants must "take the bitter with the sweet," the Court explained that:

> [t]he categories of substance and procedure are distinct. Were the rule otherwise, the [Due Process] Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."[71]

Accordingly, if the no entitlement language of PRA serves no other purpose than to limit procedural rights, it may be constitutionally suspect under the ruling in *Loudermill*.[72] Nor can states rely on the procedures set forth in state laws to define the nature or extent of constitutionally protected procedural due process.

---

[66] *Id.* at 595.

[67] *Id.* at 601.

[68] 470 U.S. 532 (1984).

[69] *Id.* at 541.

[70] *Loudermill*, 470 U.S. at 540 (citing Arnett v. Kennedy, 416 U.S. 134, 153–54 (1974)).

[71] *Id.* at 532, 541 (quoting *Arnett*, 416 U.S at 167) (Powell, J., con-curring in part and concurring in result).

[72] *But see* Jackson v. Jackson, 857 F.2d 951, 956 (4th Cir. 1988) (allowing short eligibility period without discussing *Loudermill*); Holman v. Block, 823 F.2d 56, 59 (4th Cir. 1987) (same).

(c) Recent Supreme Court Analysis of Property Interest in Worker's Compensation Scheme

A 1999 due process case analyzing the existence of a property right under a state workers' compensation scheme should also be noted. The Court held in *American Manufacturers Mutual Insurance Co. v. Sullivan*[73] that employees seeking payment of worker's compensation medical expenses had no property interest in the payment of disputed medical expenses before a hearing board determined whether the expenses were reasonable and necessary.[74] Because there was no property interest in the disputed medical expenses prior to a hearing board determination, the statutory scheme did not violate due process.[75] The majority opinion by Chief Justice Rehnquist stated,

> [f]or an employee's property interest in the payment of medical benefits to attach under state law, the employee must clear two hurdles: First, he must prove that an employer is liable for a work-related injury, and second, he must establish that the particular medical treatment at issue is reasonable and necessary. Only then does the employee's interest parallel that of the beneficiary of welfare assistance in *Goldberg* and the recipient of disability benefits in *Mathews*. [76]

The majority opinion, thus, could be construed as suggesting that the property interest in welfare benefits would not attach until a right to benefits had been established. It is somewhat difficult to square this opinion with the holding in *Goldberg* that the existence of the statutory scheme created the entitlement, and where the Court at least acknowledges a property interest under the worker's compensation scheme once eligibility has been established.[77]

Four of the Justices, Justice Ginsburg, Justice Breyer, Justice Souter, and Justice Stevens, either wrote or joined concurring opinions. However, each indicates concern about its potential impact on procedural due process in cases where there is a failure to provide benefits. Justice Ginsburg wrote that "due process requires fair procedures for the adjudication of respondents' claims."[78] Justice Breyer and Justice Souter conclude that "there may be individual circumstances in which the receipt of earlier payments leads an injured person reasonably to expect their continuation, in which case that person may well possess a constitutionally protected 'property' interest."[79] Justice Stevens found that the employees' right to have their employers, or the employers' insurers, pay for whatever is reasonable and necessary is "unquestionably a species of property protected by the Due Process Clause

---

[73]526 U.S. 40 (1999).
[74]*Id.* at 61.
[75]*Id.*
[76]*Id.*
[77]*Goldberg*, 397 U.S. at 266.
[78]*Sullivan*, 526 U.S. at 61.
[79]*Id.* (Breyer, J., and Souter, J., concurring).

of the Fourteenth Amendment."[80] Thus, four of the nine Justices on the current Supreme Court found that employees have some type of property interest in medical care where a statutory scheme provides for payment. Even the majority opinion states that once eligibility is established for payment of certain bills, then an employee would have a property right in the payment.[81]

The majority opinion may not significantly change the Court's holding in *Goldberg*. In any event, it should not be construed as undermining the right of families' children, to establish a constitutionally protected property interest in continuing benefits once benefits have been awarded.

(d) Administrative Discretion as a Factor in Determining a Property Interest

Analysis of federal circuit court decisions on procedural due process rights in the context of welfare, housing, and shelter cases also assist in formulating effective arguments for welfare families. However, the circuit courts differ in their approach to this issue. Some have held that applicants and recipients have a sufficiently legitimate expectation of benefits to create a property interest, while others have found no property interest existed because of the extent of administrative discretion in determining qualifications for benefits.

For example, in *Washington Legal Clinic for the Homeless v. Barry*,[82] the District of Columbia Circuit found that applicants for emergency shelter had no property right.[83] The court distinguished the right to shelter benefits in the District of Columbia from the right to benefits under the AFDC statute in *Goldberg*, stating that "because persons meeting state AFDC eligibility standards automatically qualified for benefits, eligible individuals had a protected property interest in the receipt of the benefits. Where, however, the legislature leaves final determination of which eligible individuals receive benefits to 'unfettered discretion' of administrators, no constitutionally protected property interest exists."[84]

The court explained that

> although D.C. law establishes objective eligibility criteria for homeless families seeking shelter . . . we hold that homeless families lack an expectation of shelter sufficient to create a property right: the city does not provide enough shelter to meet the needs of all eligible families, it leaves allocation of limited shelter space among eligible families to the unfettered discretion of city administrators, and nothing in District law prohibits its administrators from allocating space in such a way that not all eligible families receive shelter."[85] It is the "uncertainty of shelter due

---

[80] *Id.* (Stevens, J., concurring).
[81] *Id.* at 990.
[82] 107 F.3d 32 (D.C. Cir. 1997).
[83] *Id.* at 39.
[84] *Id.* at 36.
[85] *Id.* at 33.

> to . . . administrative discretion which prevents the creation of a constitutionally protected entitlement.[86]

Notably, the District of Columbia Code includes "no entitlement" language in its shelter provision.[87] However, the court found the underlying administrative discretion, rather than the "no entitlement" language, controlling. While the court considers the "no entitlement language" in reaching its decision, it specifically expressed "doubt that 'no blanket entitlement disclaimers can by themselves strip entitlements from individuals in the face of statutes or regulations . . . conferring them."[88] Thus, under this reasoning, the PRA's provision of no entitlement would not be controlling. Rather, courts would have to look at the underlying regulations and the amount of administrative discretion.

In a Seventh Circuit case challenging the procedures for allocating subsidized housing, the court held that applicants for Section 8 housing provided by private landlords had no property interest in housing because, under the program, landlords could apply their own judgment to accept or deny housing.[89] The court stated that the important inquiry is whether the applicants "would be able to establish at a due process hearing facts which would entitle them to Section 8 benefits."[90] In reaching its decision, the court looked to a dissent in a similar case that developed the idea "that a legitimate claim of entitlement is created only when the statutes or regulations in question establish a framework of factual conditions delimiting entitlements which are capable of being explored at a due process hearing."[91] Because, in the view of the Seventh Circuit, this program gives landlords discretion regarding which tenants they will accept, potential tenants have no property interest based on the grounds that applicants would not be able to demonstrate entitlement to housing even if a hearing were held.

In contrast, the Ninth Circuit, looking at the same Section 8 housing program, found a protected property interest. In *Ressler v. Pierce*,[92] the court found that "the regulations and guidelines promulgated pursuant to the statute closely circumscribe an owner's discretion."[93] The court also found a constitutionally protected property interest in Section 8 housing benefits "by virtue of her membership in a class of individuals whom the Section 8 Program was intended to benefit."[94]

Thus, the extent to which administrative discretion undermines protected property interests is far from settled. Even in *Eidson*, where the Seventh Circuit found no property interest in housing benefits, the court did

---

[86]*Id.* at 37.

[87]*Id.* at 38 ("Nothing in this chapter shall be construed to create an entitlement in any homeless person or family to emergency shelter.").

[88]*Id.*

[89]Eidson v. Pierce, 745 F.2d 453, 462–64 (7th Cir. 1984).

[90]*Id.* at 459.

[91]*Id.* (citing Geneva Towers Tenants Org. v. Federated Mortgage Investors, 504 F.2d 483, 494-95 (9th Cir. 1974) (Hufstedler, J., dissenting)).

[92]692 F.2d 1212 (9th Cir. 1974).

[93]*Id.* at 1215.

[94]*Id.*

go on to state, "[i]f the allocation of these scarce public benefits were utterly uncontrolled, it is possible that the program would offend the 'concepts of fairness and nonarbitrariness which are at the heart of the constitutional requirement of due process of the law.'"[95] Thus, if the programs are too discretionary, they might be challenged on those grounds for lack of standards, not only under the PRA requirements that the state set forth "objective criteria" but under the constitutional requirements of due process.

The existence of a constitutionally recognized property interest in welfare benefits appears to turn on the amount of discretion welfare administrators have in whether or not to award benefits. The PRA limits the discretion permissible in state welfare programs. The Act specifically provides that the state plan must "set forth *objective criteria* for the delivery of benefits and the determination of eligibility and for fair and equitable treatment, including an explanation of how the state will provide opportunities for adversely affected recipients to be heard in a State administrative or appeal process."[96] Thus, it will be important to explore the objective criteria created by each state to determine whether they create a legitimate expectation among welfare applicants and recipients that they will receive benefits fairly. And, by focusing on a state's objective criteria, it may be possible for advocates to prove a property interest in TANF benefits.

Alternatively, the failure to set forth objective criteria can be challenged on statutory grounds for failing to comply with the federal requirements and, on constitutional grounds, as lacking the basic elements of fairness and non-arbitrariness required by due process. It is also possible that by focusing on the harm that arbitrary actions would have on the children in a family, courts might be more willing to find a lack of constitutionally mandated fairness.

(e) Importance of the Benefits as a Factor

In a recent case where advocates challenged New York's implementation of its welfare plan, a federal district court judge, faced with evidence of families—including a woman pregnant with twins—going hungry for days after applying for benefits and an 84% denial rate in a job center created by the state to administer TANF fund, found that

> [p]laintiffs also have an overarching property interest in their continued receipt of food stamps, Medicaid and cash assistance . . . Plaintiff's allegations concerning various practices at job centers, such as providing false or misleading information to applicants about their eligibility, arbitrarily denying benefits to eligible individuals, and failing to provide

---

[95]*Eidson*, 745 F.2d at 464 (citing Holbrook v. Pitt, 643 F.2d 1261,1279 (7th Cir. 1981)); *see also* Fallon, *supra* note 12, at 310 ("In its commonest form, substantive due process doctrine reflects the simple but far-reaching principle—also embodied in the Equal Protection Clause—that government cannot be arbitrary.").

[96]Pub. L. No. 104-193, 110 Stat. 2114 (relevant portions are codified as amended 42 U.S.C.A. § 602(a)(1)(B) (Supp. 2000)) (emphasis added).

> notice of hearing rights, state a viable due process claim under Sec. 1983.[97]

In Massachusetts, a state court judge found that "[t]here is no more compelling statutory policy in need of enforcement than protecting families from homelessness—a phenomenon increasing in severity and frequency, largely due to inadequate public assistance."[98] Thus, faced with systemic denials of benefits and the human suffering of women and children, courts have found a protected property interest in benefits.

The finding of a protected property interest is also supported by some commentators who contend that "the Court should incorporate the importance of the benefit at issue when deciding whether it is 'property' for the purposes of Due Process,"[99] and that "[d]ue process scrutiny should not disappear simply because states afford discretion to their welfare administrators. One of the functions of due process should be to protect individuals from arbitrary government decisions when those decisions affect the interests that are vital to the individual's survival."[100] "Any time a procedural challenge is made to a government benefit program, the Court should consider both the degree of the entitlement to the benefit and the interest of the people in receiving the benefit and in receiving procedural protections."[101]

Moreover, there is concern that states will avoid developing sufficient welfare eligibility criteria in order to forestall the creation of property rights. The incentives for states to avoid regulation will be lessened only when the Court recognizes that the importance of the benefits themselves can implicate the Due Process Clause.[102]

---

[97]Reynolds v. Guiliani, 35 F. Supp. 2d 331, 341 (S.D.N.Y. 1999), *aff'd* 198 F.3d 234 (2nd Cir. 1999).

[98]Sard, *supra* note 12, at 385 (citing Massachusetts Coalition for the Homeless v. Secretary of Human Serv., 511 N.E.2d 603 (Mass. 1987)).

[99]Arlo Chase, *Maintaining Procedural Protections for Welfare Recipients: Defining Property for the Due Process Clause*, 27 N.Y.U. REV. L. & SOC. CHANGE 571, 572 (1997) (analyzing due process protections in context of Wisconsin's W-2 (Welfare to Work) program). Wisconsin has eliminated the right to pre-deprivation hearings. A claim of protected property interest may be made if the Wisconsin Department of Workforce Development unfairly changes the eligibility criteria for the W-2 program, for which it apparently has state permission. *Id.*

[100]*Id.* at 585.

[101]*Id.* at 594.

[102]Zietlow, *supra* note 15, at 59. Zietlow argues that the Court should adopt a communitarian theory of process in which the

> Court would recognize that if welfare recipients did not have pre-termination hearings, the state could act arbitrarily in denying them benefits, and find that the danger of that arbitrary action alone is enough to violate the constitutional provision of due process. Second the Court would find it constitutionally impermissible for welfare recipients to have fewer procedural rights than other, more affluent recipients of government benefits, such as holders of medical licenses and members of the legal bar. Finally, the Court also would find that the dire consequences of disenfranchising the poorest of the poor by subjecting them to a system that is completely arbitrary and would violate the fundamental notion of fairness which is essential to a communitarian notion of process.

Id.

A relatively recent Supreme Court case raises questions about the analysis of the importance of a right in the determination of whether there is a protected property interest, and concerns about the potential chilling effect on a state's development of regulations. In *Sandin v. Connor*,[103] the Court found that state regulations regarding the conduct of disciplinary proceedings in a Hawaiian penitentiary did not create a liberty interest that would entitle an inmate to due process.[104] The Court found that the prisoner's right to be free from segregation was not sufficiently important to create a liberty interest.[105] Thus, some commentators are concerned that this may signal an additional requirement in establishing a property interest: a showing of the importance of the benefit.[106] While this additional requirement has limited prisoners' rights to due process, in the welfare context, particularly in cases where children are involved, it should be easier to demonstrate the importance of the benefit.

(f) Transitional Due Process

A developing concept of 'transitional due process'[107] will become increasingly important as states innovate new approaches to welfare and make adjustments to their existing welfare programs. Additionally, transitional due process will become increasingly important as Congress makes adjustments to the current welfare law that is now set to expire in 2002. In the Seventh Circuit case, *Youakim v. McDonald*,[108] the court found that where welfare recipients would qualify for benefits under a new state program, recipients have a sufficient property interest in continued benefits to require that the state give them notice of the program changes that would allow them to qualify for uninterrupted benefits.[109] In that case, the state legislature changed the licensing requirements for families to qualify as foster parents.[110] Many of the foster parents would have qualified as licensed placements under the new requirements if they had been given sufficient notice of the proposed changes.[111] Because the foster parents failed to meet the timelines, they did not qualify for continuing benefits. However, by defining the property interest as a continuing right of children to receive benefits rather than the right of the foster parents, the court in *Youakim* provided additional procedural protections to the foster children in that state.[112]

One of the main reasons for the plaintiffs' success in this case was their choice to assert that the property right in the benefits belonged to the children.[113] Therefore, examining welfare reductions and terminations from the

---

[103]515 U.S. 472 (1995).
[104]*Id.* at 487.
[105]*Id.* at 486.
[106]Morawetz, *supra* note 63, at 102.
[107]John Bouman, *Due Process for Welfare Recipients Subject to Changing Program Rules: An Illinois Case Study*, 30 CLEARINGHOUSE REV. 109, 117 (1996).
[108]71 F.3d 1274 (7th Cir. 1995).
[109]*Id.* at 1293.
[110]*Id.* at 1291.
[111]*Id.*
[112]*Id.* at 1288–99.
[113]Bouman, *supra* note 107, at 117.

children's perspective may strengthen claims of transitional due process. This is especially true in cases where the children would qualify for benefits un-der the state plan's objective criteria or when the plans are otherwise arbitrary.[114]

2. Once a Property Interest Has Been Established, What Process is Due?

> While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards . . . the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.[115]

The 1996 PRA raises difficult questions about whether there is a statutory entitlement to process. However, once it has been established that there is a protected property interest, existing law should still govern the types of constitutionally required procedural protections. The Supreme Court has found that welfare recipients are entitled to different kinds of procedural protections depending on the type of welfare cuts they face. The following discussion will lay out the federal constitutional due process analysis in two situations: first, where the government makes across-the-board cuts in programs and, second, where individuals seek redress for improper application or termination procedures.

(a) Across-the-Board Cuts

In determining the amount of process that is due to recipients in challenging across-the-board cuts, the Supreme Court has found that the legislative process is "all the process that is due."[116] In the case of an across-the-board elimination or reduction in benefits, the Court held in *Atkins v. Parker*[117] that "it must be assumed that Congress had plenary power to define the scope and duration of the entitlement to food-stamp benefits to increase, decrease, or terminate those benefits based on its appraisal of the relative importance of the recipients' needs and the resources available to fund the program. The procedural component of the Due Process Clause does not 'impose a limitation on the power of Congress to make substantive

---

[114]It might also be possible to argue that the federal and state laws requiring due process hearings create a protected interest in those hearings. So, at least, applicants or recipients of TANF would have a constitutionally protected right to fair procedures. This might mitigate the fear and humiliation of workers who are subject to the arbitrary whims of supervisors and also protect children from losing their basic means of subsistence without their parents even getting a chance to contest the arbitrary action prior to the family losing its basic means of support.

[115]Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982) (internal quotations omitted); *see also* Memphis Light, Gas & Water v. Craft, 436 U.S. 1, 14 (1975) (holding that notice is required under Due Process Clause to inform individuals of hearing to determine property interest).

[116]Atkins v. Parker, 472 U.S. 115, 129–30 (1984). *But see* U.S.D.A. v. Murry, 413 U.S. 508, 514 (1973) (finding substantive due process violations where sections of Food Stamp Act were not rationally related to purposes of statute).

[117]472 U.S. 115 (1984).

changes in the law of entitlement to public benefits.'"[118] The *Atkins* Court noted that "a welfare recipient is not deprived of due process when the legislature adjusts benefit levels[;] . . . the legislative determination provides all the process that is due."[119]

This reasoning may suggest that even where welfare recipients have a property interest in continuing benefits, they are not entitled to any procedural protections once Congress has passed a law authorizing across-the-board cuts. However, as discussed above, as Congress and the states make changes in welfare programs, it may be possible to challenge some of the across-the-board cuts by establishing transitional due process rights, which were found in the case of *Youakim v. McDonald*, as discussed above.[120]

As Congress and the states change the eligibility requirements for welfare, it will be essential to view the changes from the perspective of the children who may have a right to continuing benefits under the new eligibility rules. So, for example, if a state imposes new across-the-board work requirements with which the parents are not able to comply, and the family is effectively terminated, it may be possible to argue that children have transitional due process rights to continuing benefits if the children would qualify for benefits under the new provisions. It will be vital to focus on whether it is possible to prove that children have individual rights to benefits under the new requirements if they or their parents had an adequate notice and opportunity to comply with the new requirements. In other words, if children would have qualified for benefits under the new requirements, they should have an individual right to a hearing, even though the change appears to be an across-the-board change.

(b) Individual Reductions or Terminations

Once an individual property interest is established, the language of *Goldberg v. Kelly* should still dictate the process that is due.[121] In *Goldberg*, the Supreme Court held that "[t]he crucial factor in this context . . . is that the 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. Since he lacks independent resources, his situation becomes immediately desperate."[122] Because TANF is a needs-based program and recipients face the same brutal need as the welfare recipients in *Goldberg*, the same *Goldberg* reasoning should apply to TANF recipients once a property interest in this program is established, and therefore, a full-scale

---

[118]*Id.* at 128 (quoting Richardson v. Belcher, 404 U.S. 78, 81 (1971)).

[119]*Id.* at 129–30 (quoting Logan v. Zimmerman Brush Co. 455 U.S. 422, 432–33 (1982)); Rosas v. McMahon, 945 F.2d 1469,1475 (1991).

[120]*See infra* Part IV (discussing substantive due process analysis for violation of children's rights).

[121]397 U.S. 254, 254 (1970).

[122]*Goldberg*, 397 U.S. at 264.

pre-deprivation hearing should be protected by the Constitution. It should not be necessary to do any further analysis.[123]

Since the funds for hearings come out of block grants, clients as a whole will be decreasing the amount of available funds in order to support their right to a hearing.[124] Additionally, the right to a hearing prior to termination of benefits may not appear to be much of a consolation for people who have no means to eat or support their families.[125] However, appeals of terminations or reductions can be successful. For example, one early study of benefit terminations found that forty-four percent of benefit termination notices in one county were subsequently reversed.[126]

Moreover, "[p]reventing the wrongful termination of benefits is . . . even more important as decisions about welfare recipients are taking on an increasingly moral and punitive tone."[127] As states increasingly delegate authority to terminate benefits to employers and other private contractors, due process rights will be increasingly important to protect TANF recipients and their children from arbitrary and untimely termination of their benefits. Without access to a hearing prior to the termination of their benefits, participants in welfare-to-work programs would be at the mercy of private employers who may sexually harass them or expose them to dangerous working conditions, while threatening to terminate their subsistence benefits.

For example, an affidavit of one of the workers in the New York city jobs program gives graphic details on abuses by the city employer and demonstrates the importance of protecting workers from termination of their benefits without hearings prior to benefit termination.

---

[123]If *Goldberg* were not binding, the amount of constitutionally protected process would be determined by analyzing four factors: (1) the private interest that will be affected by the government action; (2) the risk of an erroneous deprivation of such interest though the procedures used, (3) the probable value, if any, of additional or substitute procedural safeguards; and (4) the government's interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural safeguards would entail. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). It is unclear how these factors are actually measured or valued against each other. *See generally* Jerry Mashaw, *The Supreme Court's Due Process Calculus for Administrative in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) (discussing difficulties in application of Supreme Court's analysis). However, TANF recipients would have strong arguments—at least on the first two factors—because of the brutal need for the benefits and the significant risk of erroneous deprivation without pre-deprivation hearings. As to the third factor, see Nancy Morawetz, *A Due Process Primer: Litigating Government Benefit Cases in the Block Grant Era*, 30(2) CLEARINGHOUSE REV., 97, 101 (1996) (arguing that under this framework recipients and state "share an interest in directing . . . resources toward those who are eligible for a program"). Thus, the administrative "burden" also serves the agencies in determining whether services are delivered to eligible people.

[124]Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.A.).

[125]*Id.*

[126]WELFARE REFORM—STATES EARLY EXPERIENCE WITH BENEFIT TERMINATION, US GENERAL ACCOUNTING OFFICE REPORT TO COMMITTEE ON FINANCE, 7, U.S. Senate May 15, 1997 (recognizing that "[i]n Milwaukee County, 44 % of benefit termination notices . . . were subsequently reversed because county officials determined that program requirements had been met or the sanctions had been based on inaccurate data").

[127]Chase, *supra* note 99, at 589.

> [W]hile riding in the van, we came across two dead cats and two dead dogs. They had been dumped by the side of the road. Because I had no gloves, I had to pick them up with my bare hands. The animals had been run over by automobiles and were oozing blood and entrails. When I picked up the animals with my bare hands to throw them into the garbage truck, the guts splattered on my shoes and pants . . . . My supervisor, sitting in the van said nothing. I have seen other people who were terminated by my supervisor for refusing to pick up things, and I was afraid that if I refused to leave the van or left the carcasses in the gutter I would be terminated also.[128]

In another example, again in New York, welfare recipients under the new welfare program who had been found able to work with limitations failed to receive adequate notice of their rights to receive benefits and the right to challenge their work assignments.[129] One example of this was a woman who died of a heart attack while performing work duties that were incompatible with her documented medical history. Another woman was hospitalized and others lost their basic means of subsistence because of the failure to provide adequate notice and appeal procedures.[130]

In sum, the "no entitlement" language of the PRA indicating that no state TANF program can create an entitlement does not mean that there is no constitutionally protected property interest in welfare benefits. Rather, it means that a particular person is not entitled to welfare benefits based on federally mandated qualifications. Federal constitutional protections for TANF recipients will not turn solely on the "no entitlement" language. Rather, courts are likely to focus on the objective eligibility criteria and whether the contested actions were arbitrary in determining whether an individual has a protected property interest. By examining these issues from the perspective of the children who face termination of their benefits, courts may be more likely to find a protected property interest. Once a property interest is established, *Goldberg v. Kelly* entitles recipients of need based programs to due process because "[the] 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."[131]

B. Other Potential Federal Constitutional Protections

This section will focus on the substantive Due Process and Equal Protection Clauses of the United States Constitution as the analysis under these provisions may be useful in developing interpretations of parallel state constitutional provisions. This section does not attempt to specifically address all of the provisions of the 1996 reforms or the many attempts that states will make to deprive people of their very means of subsistence, either under the state plans or by imposing individual sanctions and terminations. Rather, it sets forth a framework for arguing that many state plans and in-

---

[128]Tamika Capers, *Welfare as They Know It*, HARPER'S MAG., Nov. 1997, at 24, 26.
[129]Mitchell v. Barrios-Paoli, 687 N.Y.S.2d 319, 321 (N.Y. App. Div. 1999).
[130]*Id.* at 323.
[131]*Goldberg*, 397 U.S. at. 264.

dividual state actions will not withstand scrutiny by the courts because of the many false assumptions underlying the current welfare laws.

In reviewing alleged violations of substantive due process, the United States Supreme Court has applied three different levels of scrutiny: (1) rational basis, which requires only that there be a rational relationship to a legitimate state interest;[132] (2) intermediate scrutiny, which requires "substantial relation to the object of the legislation;"[133] and (3) strict scrutiny, which requires that measures be narrowly tailored to meet a compelling government interest.[134]

The 1996 welfare reforms are based on myths and prejudices about unwed mothers and *illegitimate* children and, therefore, may be subject to challenge under the federal substantive due process analysis. For example, as discussed more fully below, the work requirements imposed by the PRA are based on assumptions about the character of welfare recipients rather than the realities of the job market. Accordingly, the sanctions applied to welfare recipients who fail to work may be challenged as irrational.

1. Substantive Due Process Challenges

(a) Analysis of Substantive Due Process Jurisprudence

Under substantive due process analysis, measures that infringe on fundamental rights are reviewed with strict scrutiny. Although the Supreme Court secured due process rights for welfare recipients in *Goldberg*, noting that their poverty was often caused by circumstances not within their control,[135] the Court refused to acknowledge a substantive right to due process in *Dandridge v. Williams*.[136] In the absence of a fundamental right, measures that regulate economic interests are reviewed under the rational basis test. Advocates have therefore attempted to lay the framework for the finding of a fundamental right to survival or subsistence income so that laws threatening basic survival income would be viewed with heightened scrutiny. Professor Peter Edelman is one of the leaders in the call for the acknowledgment of a fundamental right to subsistence income based on the power of the state to protect individual citizens from economic exploitation.[137] He explains "if there are certain fundamental rights with which the government cannot interfere, and if these rights are guaranteed under Due Process Clauses, then, if the right to subsist is fundamental and if failure to assure subsistence constitutes interference with the right, the right to governmental assistance in order to 'survive' can properly be termed one of substantive due process."[138] After reviewing the moral and philosophical underpinnings

---

[132]*See generally* Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (adopting deferential rational basis test for reviewing economic legislation).

[133]Craig v. Boren, 429 U.S. 190, 197 (1976)

[134]Roe v. Wade, 410 U.S. 113, 155 (1973).

[135]*Goldberg*, 397 U.S. at 264.

[136]397 U.S. 471 (1970).

[137]Peter Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 6 (1987).

[138]*Id.* at 25.

of the right to subsistence income and the Supreme Court precedents of the *Lochner v. New York*[139] and post-*Lochner* era, he asserts that "[t]he framework and structure of our Constitution implicitly create affirmative obligations for government in a democratic society, among them an obligation to provide basic food and shelter."[140] He explains that the "strongest strand" of precedent for a right to subsistence income can be found in the education cases that indicate that "some identifiable quantum of education" might be required.[141] Despite the actual holdings of the education cases, he infers that the Supreme Court may consider education to be a fundamental right and that the state has an affirmative duty to provide education to its citizens.

This supports his theory that some rights are so fundamental that the state has an affirmative duty to fund them for poor people. It also supports the contention of this Article that courts may be more likely to find an affirmative duty on the part of the government where children are faced with total deprivation of what mainstream American society considers to be necessities of contemporary life. While acknowledging but attempting to distinguish decisions by the Supreme Court including *Dandridge*, which specifically rejected the strict scrutiny argument, and *Harris v. McRae*,[142] which denied the state's affirmative duty to fund abortions for poor women, he concluded in 1987 that the Supreme Court was unlikely to leap forward to establish a fundamental right to subsistence income.[143] However, Professor Edelman called upon advocates to continue to pursue his line of reasoning in state courts in the hopes of increasing the Supreme Court's receptivity to addressing the problem of survival.[144] Professor Rebecca Zietlow has recently renewed the call for the creation of a substantive due process right to subsistence income.[145] She points out that while the Supreme Court has refused to intervene to protect the rights of the poor, "it has

---

[139]198 U.S. 45 (1905) (finding economic substantive due process rights under Fourteenth Amendment Due Process Clause and applying strict scrutiny to legislation interfering with economic and social rights). *Lochner* and economic substantive due process were rejected by the Court in the New Deal Era. The Court later recognized non-economic substantive due process rights under the Fourteenth Amendment in the later part of the century. *See generally* Roe v. Wade, 410 U.S. 113 (1973) (finding that substantive due process encompasses woman's right to choose abortion).

[140]*Edelman*, *supra* note 137, at 32.

[141]*Id.* at 33 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973)); *see also* Plyler v. Doe, 457 U.S. 202, 221–22 (1982) (finding Texas statute prohibiting illegal immigrant children from attending public schools violated Equal Protection Clause).

[142]448 U.S. 297 (1980).

[143]Edelman, *supra* note 137, at 3. In fact, Edelman quotes then Judge Antonin Scalia stating that

> the moral precepts of distributive justice . . . surely fall within the broad middle range of moral values that may be embodied in law but need not be. It is impossible to say that our constitutional traditions mandate the legal imposition of even so basic a precept of distributive justice as providing food to the destitute.

Id. at 23 (citing *Scalia Speaks*, WASH. POST, June 22, 1986, at C2).

[144]Edelman, *supra* note 137, at 55.

[145]*See generally* Rebecca E. Zietlow, *Exploring a Substantive Approach to Equal Justice Under Law*, 28 N.M. L. REV. 411 (1998) (arguing that "equal justice as a substantive concept mandates that substantive resources, particularly economic resources, be distributed equitably").

recently taken an activist stance towards those of the more affluent in our society through its regulatory takings doctrine."[146] She points to the re-cent takings cases *Phillips v. Washington Legal Foundation*[147] and *Eastern Enterprises v. Apfel*[148] and contends, based on the Supreme Court's return to substantive due process reasoning in recent takings cases on behalf of the affluent, there is no principled reason why the Court cannot return to substantive due process reasoning to favor the interest of the poor people in our society. Arguing that since "judicial restraint is at least as activist as judicial 'activism' because it is based on the value judgment that the *status quo* does not need to be changed,"[149] and the "right to basic subsistence [is] essential to . . . citizenship of people in our country,"[150] this right, therefore, should be affirmatively protected by the courts.[151]

Another recent commentator, attempting to reconcile the history of Supreme Court cases regarding welfare rights and substantive due process, suggests that the apparent inconsistency in cases from *Lochner* to *Harris* can be explained by focusing on "whether or not the poor possess economic opportunity and are free to make employment choices."[152] Professor Hirsch contends that Supreme Court cases have consistently turned on the Court's assumptions about the economic opportunities available to the poor, and that by focusing on the liberty of pursuit, rather than the pursuit of liberty, the Supreme Court cases can be reconciled. He suggests that advocates may be successful in establishing a right to economic opportunity by showing that forces beyond individual control cause poverty.[153] He contends that focusing on the creation of a factual record demonstrating the forces beyond the control of poor people may lead to success in establishing an affirmative right to economic opportunity.[154]

If the Supreme Court acknowledges a fundamental right to subsistence income or economic opportunity, as these commentators suggest, measures that infringe on the fundamental right to subsistence would be viewed with strict scrutiny. Given the Court's history of blindness to the plight of poor people, it is unlikely that a fundamental right will be acknowledged at the federal level.[155] However, this analysis should be useful in interpreting state constitutional provisions, especially as the numbers of children in extreme poverty continue to rise and human suffering becomes increasingly and painfully apparent in many states.

---

[146] *Id.* at 427.

[147] 524 U.S. 156 (1998) (finding that Interest on Lawyers' Trust Accounts (IOLTA) constitute 'takings').

[148] 524 U.S. 498 (1998) (finding that Coal Act constituted an unconstitutional 'taking').

[149] *Zietlow*, *supra* note 145, at 431.

[150] *Id.* at 449.

[151] ABRAMOVITZ, *supra* note 47, at 24 (pointing out that in 1995 total welfare spending fell far below approximately $104 billion devoted to tax subsidies and tax breaks for U.S. corporations).

[152] Dennis D. Hirsch, *The Right to Economic Opportunity: Making Sense of the Supreme Court's Welfare Rights Decisions*, 58 U. PITT. L. REV. 109, 131 (1996).

[153] *Id.* at 129–30.

[154] *Id.* at 131.

[155] *See generally* Hirsh, *supra* note 152.

Moreover, the finding of an affirmative constitutional right to subsistence income may not be necessary to sustain an effective challenge to some of the more punitive and irrational provisions of the 1996 Act. The Supreme Court has already applied informal heightened scrutiny to food stamp provisions that limited children's access to food stamps. For example, in *Department of Agriculture v. Moreno,*[156] the Court struck down a food stamp statute that differentiated between households with related and un-related members in it. The Court noted that the legislative history behind the statute indicated that Congress was motivated by an animus against a certain group—hippies—to pass the statute.[157] Thus, exposure and analysis of the animus towards poor people that motivated the 1996 reforms may be effective in creating an informal heightened scrutiny of proposed state welfare plans or individual sanctions. This suggests that due process arguments may be most successful when coupled with the equal protection arguments discussed below, which demonstrate a history of animus towards African Americans—and poor people—in the development of current welfare policy.

Even if the Supreme Court fails to acknowledge a federal constitutional right to subsistence income or an illegal animus towards minorities and the poor, there is support in the jurisprudence of the Supreme Court for finding that certain provisions of welfare plans do not meet even the lowest level of scrutiny. For example, in *U.S.D.A. v. Murry,*[158] the Supreme Court struck down a provision of the Food Stamp Act that denied applications for food stamps when the parent who applied had not taken a tax deduction for the child in the previous year. While the Court claimed to analyze the provisions under a rational basis test, it struck down the provision. The Court held that "the deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives and rests on an irrebuttable presumption often contrary to fact. It therefore lacks critical ingredients of due process."[159] Thus, faced with children in poverty who lacked access to food stamp benefits, the Court struck down the provision as irrational.

In sum, analysis of Supreme Court law in the area of substantive due process lays the framework for the finding of a federal constitutional right to subsistence income at some point in the distant future, and can inform state constitutional discourse. Even in the absence of the finding of a fundamental right, the Court may strike down provisions of welfare laws that are not rationally related to a legitimate state interest, especially where they can be shown to be the product of animus towards African Americans or where children are threatened with deprivation of basic necessities, such as food. Under either level of scrutiny, it will be important to focus on the flaws in the assumptions underlying current welfare policy, the inefficiency of many of its provisions, and the human suffering caused by these irrational policies.

---

[156]413 U.S. 528 (1973).
[157]*Id.* at 534.
[158]413 U.S. 508 (1973).
[159]*Id.* at 514.

(b) Application of Substantive Due Process Analysis to the PRA

Applying substantive due process analysis to the work requirements and lifelong time restrictions of the PRA demonstrates a potential method for challenging the provisions of the PRA, which are based on false assumptions about welfare recipients. For example, the 1996 welfare re-forms are based on the common myth that welfare recipients are lazy and do not want to work. The PRA, therefore, requires the state to show high levels of employment in their welfare caseloads (only 20% of the caseload can be exempt from work activities). It also imposes lifelong time limits for all household members in an effort to induce welfare recipients into the job market. However, many people on welfare do work. In fact "all of the growth in extreme child poverty from 1995 to 1997 involved female headed families who had some work experience during the year."[160] Some, however, are not able to find or keep work not because of recipients' moral culpability, but due to circumstances beyond their control, including lack of education, job training, transportation, and childcare. As Julia Henley of the University of Chicago School of Social Science Administration explains,

> [t]he 'welfare debate' has been largely individually focused, centering around the values of welfare recipients, on the one hand, and their human capital deficiencies on the other . . . Despite the popularity of the value argument, there is, in fact, little evidence that would suggest welfare recipients are less oriented toward work or prefer welfare over employment. . . . Overall, the human capital hypothesis has received more empirical support. Recipients with higher skill-levels have shorter average stays on welfare and are less likely to return after a welfare exit. Moreover, there is an extensive literature documenting the increased importance of post secondary education and training for jobs that pay above the poverty line.[161]

Among adult recipients of welfare at a point in time, approximately fifty-one percent have less than twelve years of education, forty percent have no recent work experience, and nineteen percent have a disability that limits work.[162] These factors create formidable barriers in the job market that are not likely to be altered by termination of welfare benefits. This finding is supported by recent findings by nine state studies compiled by the National Governors' Association (NGA) and other organizations, which found that 40 to 50 percent of families who left TANF did not have a job.[163] A New York State study reported that 71 percent of former recipients who

---

[160]WELFARE TO WHAT, *supra* note 5, at 11.

[161]JULIA HENLY, THE LOW WAGE LABOR MARKET HARD LABOR; WOMEN AND WORK IN THE POST-WELFARE ERA 63 (Joel Handler & Lucie White, eds., 1999) (citations omitted).

[162]COMM. ON WAYS & MEANS, 104TH CONG. 1996 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 508 (table 8-49) [hereinafter 1996 GREEN BOOK].

[163]WELFARE TO WHAT, *supra* note 5, at 8.

last received TANF in March 1997 did not have employer-reported earnings.[164]

Without extensive efforts to create sufficient jobs that are appropriate to the skill level of the current welfare caseloads, more people will simply find themselves without access to a basic means of subsistence. As Professor Martha Minnow states, "requiring mothers of young children to participate in job training and counseling programs and to seek work is simply unlikely to alter the current . . . state of affairs. Neither tough work requirements nor more money for training and services promise to work. Perhaps a massive public jobs program could make a difference but that does not seem to be realistically on the policy agenda in the near future."[165] In fact, the Congressional Budget Office estimates that the PRA falls 12 billion dollars short of providing enough funding over the next six years for the states to meet the work requirements.[166]

Lack of childcare and transportation are also serious barriers to work participation. Even the highly publicized child care funding falls more than one billion dollars short of providing enough funding for all who would have to work in order to meet the work requirements.[167] Anecdotal reports of mothers trying to comply with work requirements bring these failings to life. For example, a New York mother reported that faced with termination of her benefits for failure to cooperate with work requirements, she had to leave her toddler with a woman who kept her strapped in a dirty stroller all day. Another reported begging her caseworker to help her find child-care because the only babysitter she knew had slapped her child. When the caseworker refused, the mother was left without child-care and lost $50 out of her $260 in cash aid for failing to meet the work requirements.[168]

Studies of the application of sanctions show that many families are denied cash assistance for reasons beyond their control. For example, in a state-funded study of Utah families who were denied assistance for failing to participate in required activities, 23 percent said that they failed to participate due to lack of transportation, 18 percent due to lack of child care, 43 percent due to a health condition, and 20 percent due to mental health issues.[169] The provisions allowing 20 percent of the caseload to be exempt from work activities are not sufficient to accommodate all of the people who will be unable to engage in work given the lack of available jobs and the barriers that poor people face in sustaining employment.

Given these findings, it is difficult to see how the work requirement would withstand scrutiny, even under a rational basis standard. If the pur-

---

[164]WELFARE TO WHAT, *supra* note 5, at 5; Martha Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89, 95 (1998).

[165]Minow, *supra* note 9, at 834.

[166]Edelman, *supra* note 6, at 43, 50.

[167]*Id.*

[168]WELFARE TO WHAT, *supra* note 5, at 29; *see also* Alan Finder, *Is Workfare Working? A Panel Discussion Sponsored by the Association of the Bar of the City of New York*, 7 J.L. & POL'Y 121, 126 (1999) (finding severe shortage of licensed childcare in New York City and that workfare participants have impression that their welfare benefits would be cut if they could not secure childcare.)

[169]WELFARE TO WHAT, *supra* note 5, at 23.

pose of the work requirements are to induce work, and the evidence shows that the welfare recipients are unable to work because jobs are unavailable, or because they lack childcare, transportation or basic health, then the work requirements cannot be sustained as rationally related to legitimate state interests.

The lifelong time limitations on welfare suffer the same flaws. The PRA attempts to get people off of welfare and into jobs by requiring states to limit the length of time a family can receive TANF benefits to no more than five years.[170] Estimates indicate that three-quarters of current AFDC recipients are expected to require welfare assistance for a period extending beyond five years. Half of the current caseload has already accumulated more than five years of time on welfare.[171] If these patterns were to continue, beginning in 2002, millions of families would have their benefits eliminated.[172] And, as set forth above, it is not hopeful that those millions of parents will find adequate jobs.

Some states have imposed lifelong limits even shorter than the federally mandated five years.[173] Massachusetts, for example, has imposed a two-year limit.[174] Families are reaching this limit now. The findings of a recent report demonstrate that the limits have not been successful in increasing job participation rates and have caused significant hardship even though the law has provisions allowing extensions. Over 8,400 children have already lost benefits under the Massachusetts TAFDC time limit.[175] Of these 8400 children, "5,400 are in families where the parent is working but earning so little that the family qualified for a small supplemental welfare grant before the time limit hit."[176] Most of the rest of the families have no income at all. These children were poor before the time limit; they are even poorer now.

The report also profiles several of the families, including a 42-year-old mother from central Massachusetts who was denied a three-month extension of TAFDC benefits she needed to support herself and her one son until she graduated from a community college in May, 1999.[177] The Department administering TANF (or TAFDC in Massachusetts) issued regulations that no family will be allowed an extension of their TAFDC benefits to complete an education or training program. This mother worked in the furniture industry from the time she was 16 until she developed an eye disease from the chemicals used. Her illness was exacerbated by the stress of divorcing an abusive husband, the death of her father and sister, and the loss of her home—all within a short period of time. She concluded that her only option was to return to school and has used her time on TAFDC for the past two years to do this. Although she was also working 20 hours per week, she did not make enough to cover even her rent and utilities. She needed the sup-

---

[170]Except for applicants who received welfare as children.
[171]1996 GREEN BOOK, *supra* note 162, at 506.
[172]*Id.*
[173]STATE POLICY DOCUMENTATION PROJECT, *available at* <http://www.clasp.org>.
[174]CLOSER LOOK, *supra* note 24, at 1.
[175]*Id.*
[176]*Id.*
[177]*Id.* at 2.

plemental TAFDC grant to finish school and recuperate from eye surgery in the spring of 1999.[178] This benefit was denied.

This profile demonstrates how the implementation of a law designed to promote self-sufficiency and work results in termination of benefits for recipients who are engaged in the very activities that are likely to lead to realistic job opportunities in today's job market. Given the significant barriers to work, the rationality of work requirements and time limitations to induce work is even further strained when viewed from the children's perspective.

Even if welfare recipients could be blamed for their failure to participate in the job market, the work requirements in most states and the federally mandated time limitations penalize children for their parents failures, further undermining a rational basis for these welfare reforms. The irrationality of these reforms are demonstrated by the devastating effects that they are having on poor children the Act is designed, in part, to protect.[179]

The hunger and hardships children face strengthens the constitutional challenge to welfare reforms by demonstrating the irrationality and shortsightedness of penalizing children for actions and inactions of their parents, often beyond the control of their parents, and are almost always beyond the control of the child. Focusing on the suffering of children also increases the chances of building societal consensus that is vital to constitutional change.[180]

As Professor Martha Albertson Fineman effectively articulates in her article, *The Inevitability of Dependency and the Politics of Subsidy*, our society fails to recognize dependency as an inevitable result of the human condition and relegates caretaking of dependent people (mostly children and elderly) to the family where caretaking has been traditionally performed for free.[181] Policymakers, therefore, perceive marriage as the solution to dependency because it effectively hides the costs of caretaking and perpetuates the myth of independence and the stigma of dependence. They call for marriage and child support as solutions to the problem, blaming single mothers for their failure to cover the costs of caretaking with marriage to, and dependence on, a male wage earner.

The failure to acknowledge and value the importance of caretaking children is not rational. And, as Mimi Abramowitz points out "TANF's time limits, stiff work rules and heavy sanctions devalue women's caretaking work."[182] However, as long as our culture refuses to value the work of caretakers, it will be important to focus on constitutional arguments that highlight the suffering of children who are recognized as dependent but without being stigmatized.

This section has focused on work requirements and time limits, but the same framework may be used to challenge some of the other punitive provi-

---

[178] *Id.* at 6.

[179] 42 U.S.C. § 601(1)(a) (Supp. 2000).

[180] Sard, *supra* note 12, at 367; Fallon Jr., *supra* note 12, at 320–22 (asserting that societal consensus underlies constitutional protections).

[181] Fineman, *supra* note 8, at 92.

[182] ABRAMOWITZ, *supra* note 47, at 53.

sions of the Act that seek to modify behavior based on inaccurate, oversimplified attitudes towards people in poverty.[183] For example, Professor Lucy Williams demonstrates the irrationality of a Wisconsin pro-gram called Learnfare,
the predecessor to the current regulations, which requires states to sanction parents when their children fail to attend school.[184]

> Learnfare makes a series of remarkable assumptions about the maturity and sophistication of teenagers, especially given behavior problems already evident through truancy. For Learnfare to succeed, teens must understand that their nonattendance at school jeopardizes their family's economic stability. They must care about family finances more than their reasons for not attending school, and they must be willing to change their behavior to retain approximately seventy-five dollars per month for Mom. Next, they must not be tempted to use their ability to trigger a sanction as a means to threaten and control their mothers.[185]

While these observations and the empirical studies of the results of this program suggest that Learnfare would not and did not deter truancy, the current federal law in effect perpetuates this policy of imposing sanctions on families of children not attending school.[186]

Many states have also adopted caps on the amount of welfare a family can receive for children born into families on welfare[187] based on the false assumptions that mothers on welfare have many children, that they have free access to medical options for family planning, and that they get pregnant in order to receive additional benefits. These assumptions are false. Families on welfare have fewer children on average than non-welfare families.[188] While a federal constitutional challenge to family caps was unsuccessful in *Dandrige,* the research demonstrating the lack of correlation between the receipt of AFDC and the child-bearing decisions of unmarried women, may provide additional support for the argument that these caps are not rationally related to the government purpose of deterring out-of-wedlock births.[189] And, as discussed below, the clear intention of the Act—to prevent out-of-wedlock births—may strengthen the challenge.[190]

In sum, many of the provisions of the PRA may not even be rationally related to a legitimate state interest because they are based on false assumptions about welfare recipients and the job market. Even if the Court does not find a fundamental right to subsistence income, it may be possible to chal-

---

[183]*See* Miriam Wilson & Charles Adams Jr., *Welfare Reform: Ohio's Response*, 60 OHIO ST. L.J. 1357, 1361 (1999) (listing federal provisions that affect children and citing Urban Institute Report Series A-23, NEW FEDERALISM: ISSUES AND OPTIONS FOR STATES.)

[184]Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L. J. 719, 726 (1992).

[185]*Id.* at 731.

[186]Pub. L. No. 104-193, 110 Stat. 2105 (codified at U.S.C.A. § 404(I)(J) (Supp. 2000)).

[187]The General Temporary Assistance for needy families provision, 64 Fed. Reg. 17,878 (1999).

[188]1996 GREEN BOOK, *supra* note 162, at 1212–13 app. g (tables 31, 32).

[189]Williams, *supra* note 184, at 739.

[190]Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1433–42 (1989).

lenge many of the most draconian provisions of the PRA on the grounds that they are irrational, especially when the arguments focus on the harm that welfare cuts pose to children already in poverty.

On a practical note, the factual basis for the allegations underlying the legal arguments for the right to fundamental subsistence income, as well as the allegations that policies are irrational, should be demonstrated by facts at the trial level. To overcome the blindness of courts to the plight of people in poverty, trial lawyers must bring to life the barriers that poor people face. It will be important to elicit testimony of welfare clients about their difficulty in finding work or day care or their inability to force their children to go to school. The constitutional theories advanced here provide an opportunity to present facts that demonstrate the irrationality of these reforms. And, in turn, these factual underpinnings, along with other social science data, can be compelling and may strengthen these legal arguments at the federal and state level.

The importance of attempting to educate courts about life in extreme poverty is demonstrated by a Supreme Court ruling on a case where a man seeking a discharge of his debts in bankruptcy challenged the filing fee.[191] The Court found that the $50 filing fee "should be within his able-bodied reach."[192] Justice Marshall in his dissent explained:

> It may be easy for some people to think that weekly savings of less than $2 dollars are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating any sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely . . . They have more important things to do with what little money they have—like attempting to provide some comforts for gravely ill child, as Kras must do.[193]

Justice Marshall concluded in this opinion that "[i]t is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live."[194] Justice Marshall thus demonstrates how important it is to create an accurate picture of how people live and the barriers they face in securing transportation, childcare, and basic necessities of life.

The inclusion of constitutional claims for relief, even if unsuccessful, provide the legal basis for the introduction of evidence that accurately depicts the challenges poor people face and will help undermine many of the current myths about welfare recipients.[195] This will increase the sensitivity and receptivity of the courts to the plight of the poor. The accurate depiction

---

[191]United States v. Kras, 409 U.S. 434, 435 (1973).
[192]*Id.* at 449.
[193]*Id.* at 460 (Marshall, J., dissenting).
[194]*Id.*
[195]Hirsch, *supra*, note 152, at 125–27.

of life in poverty, the complex causes of unemployment, and the suffering of children will be essential in securing relief from the draconian welfare reforms under due process type claims.

2. Equal Protection Challenges

An equal protection analysis under the federal constitution prohibits "invidious discrimination."[196] The Court applies strict scrutiny to state actions that discriminate against "discrete and insular"[197] minorities who (1) have immutable characteristics that are not readily subject to change, (2) have been historically subject to discrimination, and (3) are politically disenfranchised. Generally, this strict scrutiny has been applied to African Americans, other ethnic minorities, and aliens.[198]
Laws treading on women's rights and the rights of children born out-of-wedlock are generally viewed with heightened scrutiny. Economic regulations, however, have been reviewed under a rational basis test.

(a) Classification Based on Poverty

While the Supreme Court has rejected the notion that people in poverty constitute a suspect class,[199] advocates continue to lay the framework for their constitutional protection—frameworks that may be useful in articulating arguments under state constitutions. For example, Professor Peter Edelman has argued that "the entire economic structure of American society and a series of specific governmental policy decisions over time have contributed to the existence, scope, depth and perpetuation of poverty" thus creating a suspect class of people in poverty and a justification for heightened scrutiny of laws affecting the poor.[200] Laws regulating property, contracts, corporations, and criminal laws shape wealth and poverty. Decades of governmental actions, including massive jobs programs in large cities, racially based economic policies that left many poor people isolated in inner cities, and a failure to provide appropriate education have created severe poverty and, therefore, he argues, violates due process, regardless of the

---

[196]Katzenbach v. Morgan, 384 U.S. 641, 654 (1966).

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

[198]Korematsu v. United States, 323 U.S. 214, 216 (1944). There are many draconian provisions of the 1996 "reforms" directed at "aliens." Those provisions and the potential equal protection challenges to those provisions are beyond the scope of this article. *See generally* Elizabeth Landry, *States as International Law-Breakers: Discrimination Against Immigrants and Welfare Reform*, 71 WASH. L. REV. 1095 (1996) (arguing that legislators must consider international law when creating proposals that would allow discrimination on basis of alienage); Liza Cristol-Deman & Richard Edwards, *Closing the Door on the Immigrant Poor*, 9 STAN. L. POL'Y REV. 141 (1998) (discussing effects that Title IV of the PRA will have on immigrants); *Welfare Reform—Treatment of Legal Immigrants—Congress Authorizes States to Deny Benefits to Non Citizens and Excludes Legal Immigrants from Federal Aid Programs*, 110 HARV. L. REV. 1191 (1997) (arguing that Congress should not be given deference regarding discriminatory effects of PRA on immigrants when principal effect of law is to regulate welfare policy and not immigration policy).

[199]*See* San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973).

[200]Edelman, *supra* note 137, at 43.

level of scrutiny.[201] While he points to the Supreme Court's Peonage Cases[202] in which a conservative court struck down laws permitting forced labor under the Thirteenth Amendment, he acknowledges that the Supreme Court has refused to invalidate facially neutral laws that have a disparate impact on minorities.[203] He argues that it is time, however, to rethink these policies.[204] As more poor and homeless children appear on our city streets, courts may eventually become more critical of laws that perpetuate their poverty, and deny them access to the basic necessities of life.

In the meantime, people in poverty may benefit from alleging violations of equal protection because it will provide an opportunity to challenge the myths underlying the policies that hold them accountable for their own poverty. It may also provide evidence of the "animus towards certain groups of people" upon which the court relied in striking down certain food stamp violations on due process grounds.

(b) Classification Based on Race

Equal protection arguments and allegations of "animus towards a certain group of people" apply with more force in cases involving African-Americans who are specifically recognized as members of a 'suspect class.'[205] The history of welfare in this country, the tenor of the recent welfare debates, and recent social science studies suggest that welfare policy has been in large part motivated by racism against African-Americans.

"Aid to Dependent Children," the predecessor to AFDC and TANF, was a "small program that assisted the children of women who were white, widowed, and had been connected to men for a substantial period of their lives."[206] The beneficiaries where characterized as the worthy poor. The initial program allowed the states to condition eligibility upon the sexual morality of women, which was used as a method of excluding African American women from receiving benefits.[207] As widows and orphans were removed from the rolls into the Social Security system and the welfare movement of the 1960's led to the inclusion of more African American women on the welfare rolls, the program became racialized[208] and, efforts increased to stigmatize welfare recipients as undeserving poor. Or as Lucy Williams puts it, "the image of welfare mothers changed from worthy white

---

[201] *Id.* at 47.

[202] Bailey v. Alabama, 219 U.S. 219, 238 (1911) (striking down statute making it criminal to leave job without repaying an advance); United States v. Reynolds, 235 U.S. 133, 149 (1914) (upholding federal conviction for peonage of employers who, as permitted by state law, employed convicted people on coerced basis in lieu of imprisonment and fines); ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., 9 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 820 (1984).

[203] Edelman, *supra* note 137, at 46.

[204] *Id.*

[205] Korematsu v. United States, 323 U.S. 214, 216 (1944).

[206] Williams, *supra* note 184, at 723.

[207] Williams, *supra* note 9, at 1176 n.87.

[208] ABRAMOWITZ, *supra* note 47, at 25.

widow to lazy African-American breeder."[209] Thus, in 1967, programs began to include work requirements.[210]

By the 1980s, Ronald Reagan began popularizing the myth of the welfare queen in a series of speeches about a woman who was alleged to have collected dozens of welfare checks under several different aliases to support her and her large family consisting of several children of different fathers.[211] The image, however, is inaccurate. Most women on welfare are white.[212] Welfare families are, on average, smaller than non-welfare families.[213] And, while incidents of abuse do occur, the welfare queen image has been overplayed in the national dialogue.

The inaccuracy of the image skews the legislative debate. As Lucy Williams concludes in her article documenting the role of the media in the public discourse on welfare, the "media's reductionist, race-conscious imagery selectively and misleadingly defines welfare . . . . Thus it is the exclusion of the diversity of poor women and the complexity and contexts of their experience which creates the deviant image perpetuating the concept of individual moral fault and driving legal debate."[214]

Whether due to media imagery or other factors, social science research demonstrates that public perceptions about welfare are linked to their racial attitudes. In his recent book, *Why Americans Hate Welfare*,[215] Martin Gilens, summarizing his empirical research on the attitudes towards welfare, explains:

> Americans hate welfare because they view it as a program that rewards the undeserving poor . . . . The American public thinks that most people who receive welfare are black, and . . . the public thinks that blacks are less committed to the work ethic than are other Americans . . . . Despite the fact that African Americans constitute only 36 percent of welfare recipients and only 27 percent of poor Americans, whites attitudes toward poverty are dominated by their beliefs about blacks.[216]

Thus, the perpetuation of the myth of the welfare queen and other inaccurate assumptions based on race are at the root of many of the current welfare reforms. Highlighting these inaccuracies may lay the framework for equal protection challenges even at the federal level or at least provide evidence of an animus towards African Americans that will strengthen due process arguments.

Moreover, "[e]ven though blacks do not constitute the majority of public welfare recipients, welfare has a disproportionate effect on the Afr-

---

[209]Williams, *supra* note 9, at 1178; *see also* ABRAMOWITZ, *supra* note 47, at 36.

[210]Joel F. Handler, *"Ending Welfare as We Know It"—Wrong For Welfare, Wrong for Poverty*, 2 GEO. J. ON FIGHTING POVERTY 3, 6 (1994).

[211]Roger Wilkins, *Family Values, The Welfare Act, and My Uncle Sam*, 5 GEO. J. ON FIGHTING POVERTY 51 (1997); Michael Lind, *The Southern Coup*, NEW REPUBLIC, June 19, 1995, at 20.

[212]1996 GREEN BOOK, *supra* note 162.

[213]*Id.*

[214]Williams, *supra* note 9, at 1196.

[215]GILENS, *supra* note 11.

[216]*Id.* at 3–5.

ican-American community."[217] While disparate impact analysis at the federal level has been essentially eliminated,[218] some states may choose to apply a disparate impact analysis at the state level, thus providing compelling arguments that many of the welfare reforms constitute racial discrimination.

Racial discrimination against African Americans in the job market, which results in unemployment rates for African Americans at rates almost double those of white job seekers, also strains the rationality of work requirements and job requirements and skews the debate over moral culpability.[219] As a practical matter, it is also important to recognize that whites do not oppose welfare because they think it primarily benefits blacks but because they think that it benefits blacks who prefer to live off the government rather than work.[220] Thus, in equal protection challenges as well as due process challenges, it will be vital to demonstrate not only the hard-ships that uneducated, low-skilled workers face in securing jobs, transportation, and childcare, but also to point out the added challenges for African Americans in the job market and to shatter the myth of the welfare queen that fuels current misperceptions about race, welfare recipients, and work.[221]

(c) Classification Based on Illegitimacy

The PRA may also be challenged for infringing on the rights of *illegitimate* children. The PRA is, by its own terms, intended to alleviate the so-called national crisis created by of out-of-wedlock births.[222] Measures that discriminate on the basis of *illegitimacy* are viewed with intermediate scrutiny. While the Supreme Court rejected an equal protection challenge to family caps on AFDC benefits in *Dandridge*,[223] the Court rationalized that the policy was not designed to discriminate against *illegitimate* children but was otherwise justified by the state's duty to regulate benefits to the poor and simply reduced the benefits to the entire family. Given the clear intention of Congress to effect the lives and choices regarding children born out-of-wedlock and the empirical evidence showing that assumptions underlying the family cap provisions are not accurate, family caps may not withstand heightened scrutiny.[224]

---

[217]Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 967 (1997); *see also* U.S.D.A. v. Moreno, 413 U.S. 528, 537 (1973) (using disparate impact analysis to prove equal protection violation).

[218]Washington v. Davis, 426 U.S. 229, 239 (1976).

[219]GILENS, *supra* note 11.

[220]*Id.*

[221]*See generally* DAVID ZUCCINO, MYTH OF THE WELFARE QUEEN: A PULITZER PRIZE-WINNING JOURNALIST'S PORTRAIT OF WOMEN ON THE LINE (1999) (providing journalistic description of lives of women on welfare in Philadelphia).

[222]42 U.S.C. § 601 (Supp. 2000).

[223]397 U.S. 471, 485–87 (1970).

[224]Family caps may also be subject to scrutiny under the "unconstitutional conditions" doctrine. "The unconstitutional conditions doctrine holds that if the government could not constitutionally compel compliance with this requirement absent an especially strong justification, it cannot undermine constitutional protections by requiring compliance in exchange for welfare benefits—effectively buying those rights from individuals who rely on public

As Justice Marshall argued in his dissent in *Dandridge*, "government discrimination between children on the basis of a factor over which they have no control—the number of their brothers and sisters—bears some resemblance to the classification between legitimate and illegitimate children which we condemned as a violation of the Equal Protection Clause."[225] Focusing on Congressional intent to impact families with out-of-wedlock children, the law, which was described by Senator Edward Kennedy in the floor debates as "legislative child abuse,"[226] may subject some of its more punitive measures to heightened scrutiny.

As in the due process jurisprudence, some children have been successful in securing relief even under the rational basis level of scrutiny. In *Plyer v. Doe*,[227] the Supreme Court struck down a law denying free public education to undocumented alien children on the grounds that it violated the Equal Protection Clause.[228] The Court considered the "innocent children . . . are [the law's] victims" and noted that the law created a "lifetime hardship on a discrete class of children not accountable for their disabling status."[229] This equal protection argument may strengthen the due process arguments set forth above and may be used to challenge many of the provisions of the PRA, which was expected to push more than 1 million children into poverty[230] and has already pushed over 400,000 into extreme poverty.[231] Federal constitutional protections have the advantage of creating a baseline of rights for children in poverty across the nation. Advocates

---

assistance." Catherine Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L. J. 473, 498 (1995).

> [T]he PRA conceives of AFDC benefits as a means to impose conditions of receipt in order to induce the parents of needy children to alter their behavior. In particular, the PRA is intended to influence personal behavior in areas of autonomy protected by the Constitution, and, perhaps, by the unconstitutional conditions doctrine.

Jonothan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 FORDHAM URB. L.J. 1051, 1059 (1995); Julie A Nice, *Making Conditions Constitutional by Attaching Them to Welfare: The Dangers of Selective Contextual Ignorance of the Unconstitutional Conditions Doctrine* 72 DENV. U. L. REV. 971, 981 (1995).

[225] *Dandridge*, 397 U.S. at 523 (Marshall, J., dissenting).

[226] Edelman, *supra* note 6, at 45.

[227] 457 U.S. 202 (1982).

[228] *Id.* at 202.

[229] *Id.* at 224; *see* Sarah Ramsey & Daan Braveman, *"Let Them Starve": Government's Obligation to Children in Poverty*, 68 TEMP. L. REV. 1607, 1621 (1995); *see also* San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (providing definitions of "suspect" classifications).

[230] Edelman, *supra* note 6, at 45.

[231] WELFARE TO WHAT, *supra* note 5, at 2. Professor Zietlow suggests that equal protection arguments may be effective in challenging the denial of a right to due process hearings on the grounds that "virtually all recipients of government licenses and benefits have a right to due process hearing if those benefits are terminated." Rebecca Zietlow, *Two Wrongs Don't Add Up To Rights: The Importance of Preserving Due Measures Process in Light of Recent Welfare Reform*, 45 AM. U. L. REV. 1111, 1143 (1996). She points out that recipients of drivers licenses, unemployment insurance, and other government benefits are similarly situated to recipients of welfare, and therefore, cannot rationally be denied similar procedural protections. *Id.*

should continue to look to federal courts for procedural protections, even in the wake of the PRA.[232] However, given the current makeup of the Supreme Court, the pervasive myths about poor families, and the lack of national consensus in support of welfare recipients, efforts to expand substantive constitutional protections should focus on a state constitutional analysis.[233] Many legal scholars have called upon advocates to seek redress under state constitutional provisions.[234]

V. STATE CONSTITUTIONAL PROTECTIONS

State constitutions

> are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.[235]

Justice Brennan, speaking at Harvard University in 1977 and again at New York University in 1986, called upon advocates and courts to seek the development of new rights and remedies under state constitutions.[236] In his view, the Supreme Court's "contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach."[237]

Critics of independent state constitutional jurisprudence argue that "Americans are now a people who are so alike from state to state, and whose identity is so much associated with national values and institutions,

---

[232]The new welfare regime raises federal constitutional issues on many fronts. The United States Supreme Court recently struck down the California welfare scheme on the grounds that it interferes with the right to travel and the Privileges and Immunities Clause by limiting welfare benefits to new state residents at the level they received in their former state. Other federal constitutional issues are raised by the provisions of the Act that appear to infringe on constitutional rights to bear children, the right to freedom of religion, and other rights and liberties that have already been upheld by the Court in an established body of constitutional law. It has been suggested that Congress exceeded its powers under the Spending Power, as informed by the Tenth Amendment values, in both limiting a state's authority to develop its own welfare policies and promulgating the draconian measures preventing "aliens" from collecting benefits and, therefore, will be subject to strict scrutiny. *But see* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (raising fundamental questions about whether individuals will continue to be able to sue states); Saenz v. Roe, 119 S. Ct. 1518 (1999) (determining whether Article IV Privileges and Immunities Clause of the United States Constitution may provide avenues for asserting rights of welfare beneficiaries).

[233]*See generally* Helen Hershkoff, *Rights and Freedoms Under the State Constitution: A New Deal For Welfare Rights,* 13 TOURO L. REV. 631 (1997) (exploring effect of New Deal on state constitutions, looking mainly at New York's constitution).

[234]Edelman, *supra* note 137, at 4–8; Rebecca E. Zietlow, *Exploring a Substantive Approach to Equal Justice Under Law,* 28 N.M. L. REV. 411, 449 (1998).

[235]William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 491 (1977).

[236]*Id.* at 502–03; William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights,* 61 N.Y.U. L. REV. 535, 548 (1986).

[237]Brennan, *supra* note 235, at 502–03.

that the notion of significant local variations in character and identity is just too implausible to take seriously as the basis for a distinct constitutional dis--course."[238] This concern is compounded by the uncomfortable notion that legal concepts could have as many different definitions as there are states,[239] and the failure of state courts to develop a coherent discourse of state constitutional law.[240]

However, each state has its own constitution. While "[s]ocial values may not differ much among states . . . political decisions to give value constitutional stature often have differed."[241] Interpretation of the different political decisions made by the states provides an opportunity to develop a coherent state constitutional discourse.[242] Different interpretation of similar clauses can add to the development of the discourse. As Paul Kahn explains:

> Equality does not have a single, definite meaning in any community prior to the process of interpretation. It is not a thing waiting to be discovered by a judge. It only has an identifiable shape after the judge articulates the conclusion of an interpretive inquiry. . . . The inquiry might turn to any number of texts, precedents, or historical events, as well as moral intuitions and principled arguments. The best interpretation is that which achieves the greatest harmony among these diverse sources. We distort this process if we conceive of it as an effort to put into place a local community's unique concept of equality, instead of the constitutional goal of equality that is a common aspiration of American life. The same can be said of liberty, due process, and the other broad values of our constitutionalism.[243]

---

[238]James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 779 (1992); Daan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L. J. 577, 593–94 (1989) (citing arguments that "the recent state constitutional law movement is a pragmatic, result-oriented, and unprincipled attempt to expand rights and liberties"); *see also* Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1022–23 (1985) (asserting that desirability of enhanced role for state courts remains unproven); Peter R. Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13, 34 (1988) (stating that history does not justify judicial creation of new rights and liberties under state constitutions).

[239]Justice Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 229 (1992).

[240]Gardner, *supra* note 238, at 763–64. Gardner asserts that state constitutional law today is a vast wasteland of confusing, conflicting and essentially unintelligible pronouncements. "[T]he fundamental defect responsible for this state of affairs is the failure of state courts to develop a coherent discourse of state constitutional law—that is, a language in which it is possible for participants in the legal system to make intelligible claims about the meaning of state constitutions." *Id.* at 762–64.

[241]Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 199 (1984).

[242] Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1168 (1993).

[243]*Id.* at 1161. "Agreement is not more to be expected of courts than of individuals. Conflict over the meaning of common values, however, does not imply that each community has hold of a unique or separate constitutional truth. . . . Differences reflect the rich possibilities of [constitutional] interpretation." *Id.*

Independent state constitutional analysis is particularly appropriate in the area of welfare rights. One of the stated purposes of the PRA is to give the states maximum flexibility in designing programs for their own citizens.[244] Just as welfare reforms were enacted to provide over fifty laboratories for innovative, experimental solutions to welfare dependency, the state constitutions and state court systems provide multiple laboratories for challenges to the PRA based on unique local jurisprudence and rights analysis. It is inconsistent to assert that states need flexibility to develop different approaches to welfare but that the constitutions of each state should not differ in their approach to welfare and entitlement issues.

To the extent that state constitutional discourse allows states to develop or define the "identity and character of the polity itself,"[245] the development of state constitutional protections for children in poverty may be an avenue for demonstrating the concern of the polity about whether its children have access to the basic means of subsistence. To the extent that a state constitution "enshrines the moral goals for society"[246] or serves as an "important moral restriction"[247] on government action, advocates for children in poverty can challenge the morality of legislative decisions that states make in enacting welfare reform measures that deprive children of the basic necessities of life.

The development of state constitutional protections for children in poverty provides an important opportunity to explore the limits of state constitutional provisions that go to the essence of the social contracts in society[248] and cut to the core of our definitions of, and commitment to, equality and fairness.

A. In General

States should provide additional protections to children in poverty, even when interpreting clauses that are similar or identical to federal constitutional provisions.[249] As Professor Helen Hershkoff explains in her recent article on positive rights and state constitutions,[250] federal courts are constrained by separation of powers, federalism, and democratic legitimacy.[251]

---

[244]Bane & Weissbourd, *supra* note 31, at 131. *But see* Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 STAN. L. & POL'Y REV. 115, 122–23 (1998) (arguing that many federal restrictions significantly limit state autonomy).

[245]Gardner, *supra* note 238, at 816.

[246]Christian Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth Century West*, 25 RUTGERS L. J. 945, 965 (1994).

[247]*Id.* at 966.

[248]Hershkoff, *supra* note 233, at 646.

[249]Each state must decide its own method for determining whether and how to apply independent state analysis of constitutional claims. For an organized analysis of these methods, see Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 206–20 (1998).

[250]Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1131 (1999).

[251]*Id.* at 1167–68. Professor Hershkoff includes separation of powers as another constraint.

Federal courts contend that it is institutionally improper for unelected federal judges to second- guess the policy making judgments of democratically elected state officials who theoretically have more expertise on issues of welfare policy.[252] Additionally, our federal system requires the federal government to be "sensitive to the interests of the state governments and avoids undue interference with the legitimate activities of those governments."[253] These concerns are compounded by the "long-standing principles requiring deference to state sovereignty in issuing any orders that would have the effect of requiring increased state expenditures."[254]

State courts should not face those constraints.[255] The development of state constitutional protections for children should not require state courts to legislate beyond providing remedies similar to those that they regularly impose on parties in disputes. State courts are the local entity to which our federalist system defers in defining states rights. Most state court judges are accountable through state political systems, elections,[256] and state constitutional amendments.[257]

In the area of constitutional protections for children against terminations or reductions in welfare benefits, differences between state and federal constitutional text and the special responsibilities that the state has in caring for its children, create a duty to depart from federal analysis which does not adequately protect children in poverty.[258] As the human suffering—especially the suffering of children—caused by welfare reform becomes more visible, state courts may be more willing to construe their own state constitutions as mandating relief.

The following discussion does not attempt to provide in-depth analysis of the many possible grounds for state constitutional protections for children. Rather, the discussion will explore some state constitution provisions and the analytical tools that should be explored further by advocates and scholars concerned with constitutional protections for children in poverty.

---

[252] *Id.*

[253] Braveman, *supra* note 238, at 612 (citing Younger v. Harris, 401 U.S. 37, 44 (1971)).

[254] Sard, *supra* note 12, at 380.

[255] Hershkoff, *supra* note 250, at 1170–71.

[256] This political accountability may pose a challenge to advocates for children in poverty. Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L. REV. 881, 883 (1989) ("When as now, the bulk of the population appears satisfied by the *status quo*, democracy and negative rights may no longer be effective vehicles for dealing with the structural needs of a chronically weak and permanently outvoted underclass."); *see also* Braveman, *supra* note 238, at 609–13 (stating "it is hopeful, however, that the focus on the suffering of children and the costs of that suffering will provide some political cover").

[257] Braveman, *supra* note 238, at 610–11.

[258] *Id.* at 593–94.

B. Due Process and Open Courts Clauses

Many state constitutions have clauses similar to the federal Due Process Clause. These clauses include provisions requiring *open courts*, which are the source of both procedural and substantive rights.[259]

1. Procedural Protections[260]

State procedural due process provisions may be an important source of procedural rights for children in poverty as federal courts become less responsive to claims of protected property interests. While federal courts may reject the concepts of transitional due process or significantly limit the definition of property interests, state courts will play an important role in defining the standards and limits of this developing concept. As the federal doctrine of sovereign immunity expands,[261] it will be increasingly important to define the protected property interest as an interest protected by the state statutes and constitutions.

State court jurisprudence regarding children's rights in tort claim cases may also support claims for additional procedural protections for children under state constitutions.[262] New Mexico's Court of Appeals held that the application of short statutes of limitations can infringe on children's due process rights because of "a long tradition of interpreting laws carefully to safeguard minors."[263]

Procedural protections will be important as state courts implement changes in programs, or as sanctions are initiated under federally mandated welfare plans. For example, in New Mexico during the implementation of welfare reforms between mid-1996 and the end of 1997, welfare caseloads dropped precipitously from approximately 32,000 families to under 16,000.[264] It is difficult to imagine that the state could demonstrate that these

---

[259]For example, the Connecticut Constitution provides that "[a]ll courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law and right and justice administered without sale, denial or delay." CONN. CONST. art. 1, § 10.

[260]This section addresses only the constitutional baseline for procedural protections. It does not analyze the statutory rights that exist under individual state plans implementing TANF.

[261]*See, e.g.*, Kimel v. Florida Board of Regents, 120 S. Ct. 631, 650 (2000) (finding abrogation of states' Eleventh Amendment immunity from suit by private individuals exceeds Congress' authority under Section 5 of Fourteenth Amendment).

[262]*See, e.g.*, Rider v. Albuquerque Pub. Sch., 923 P.2d 604, 608 (N.M. Ct. App. 1996) (finding child of tender years is not bound by New Mexico Tort Claims Act 90-day notice provision); Grubaugh v. City of St. Johns, 180 N.W.2d 778, 784 (1970) (striking down 60-day notice provision as violative of an incompetent's right of due process). *But see* Goncalves v. San Francisco Unified Sch. Dist., 332 P.2d 713, 715 (1959) (holding that 90-day notice provision does not violate minor's due process); Harold D. Gordon, *Notice of Claim Provisions: An Equal Protection Perspective*, 60 CORNELL L. REV. 417, 426 (1975) (discussing constitutional issues arising from application of notice of claim provisions to minors).

[263]*Rider*, 923 P.2d at 607.

[264]Monthly Statistical Report, State of New Mexico Human Services Department, 15 April 1999.

dramatic cuts were implemented without treading on the procedural due process rights of children, especially where caseloads returned to over 24,000[265] once the state's current welfare plan was implemented. The lack of benefits, and the uncertainty as to process, caused considerable hardship for welfare recipients in the state.[266] Immediate and dramatic reductions such as these should be challenged under both the state due process and open court provisions with support from the torts claims jurisprudence.

2. Substantive Due Process and Open Court Protections

State courts should carefully scrutinize state welfare programs that threaten children's access to the basic means of subsistence under Due Process and Open Courts provisions. State courts should engage in their own analysis of the federal court decisions in this area, and are free, if not compelled,[267] to avoid the confusing and problematic federal substantive due process analysis.[268] The interpretation of these clauses will play an important role in the discourse on the constitutional goal of due process "that is a common aspiration of American life," as Professor Kahn noted above.[269]

Defining the contours and limits of due process will be challenging. However, there are some basic rights for children that are secured in most states that provide a textual basis for the formulation of a state's duty to children under due process and open courts provisions. As Professor Bravemen suggests in urging states to develop a constitutional analysis that protects impoverished children, one potential doctrine for defining the contours of the duty is the doctrine regarding the role of the state as *parens patriae*.[270]

The common law concept of *parens patriae* has been used to protect children who are victims of abuse and neglect.[271]

> The state often performs that responsibility by removing the children from their homes and placing them in foster care. It is no mere coincidence that most of these children come from impoverished families. The stresses of poverty often produce the kind of family dysfunction that eventually leads to state intervention. The state, however, could perform its obligation in a less intrusive manner by dealing with the underlying

---

[265] *Id.*

[266] Interview with Bob Ericson, Director, New Mexico Center on Law and Poverty, Albuquerque, N.M. (Oct. 7, 1997).

[267] Committee to Defend Reprod. Rights v. Beverlee Myers, 625 P.2d 779, 784 (Cal. 1981) (stating "we cannot properly relegate our task to the judicial guardians of the federal Constitution, but instead must recognize our personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions").

[268] Fallon, *supra* note 12, at 320–22; *see, e.g.*, Women of the State of Minnesota v. Gomez, 542 N.W.2d 17, 29–31 (Minn. 1995) (rejecting federal due process analysis and adopting reasoning of Justice Brennan's dissent in *Harris v. McRae*, 448 U.S. 297 (1980), stating that Minnesota Supreme Court's holding was "better law" and that "Minnesota has an interest in assuring those within its borders that their disputes will be resolved in accordance with the states own concepts of justice").

[269] Kahn, *supra* note 242, at 1161.

[270] Braveman, *supra* note 238, at 606–08; Wasson v. Wasson, 584 P.2d 713, 714 (N.M. Ct. App. 1978)

[271] Braveman, *supra* note 238, at 606–08.

> poverty . . . . [T]he state will not succeed in performing its protective obligation unless it is willing to reduce poverty.[272]

State law articulations of the *parens patriae* doctrine provide strong doctrinal support for the protection of children against cuts in their basic subsistence income, or at least some level of heightened scrutiny.[273]

Under any level of scrutiny, the lack of jobs, transportation, childcare and other factors in a particular community will provide the factual basis for the challenge to welfare cuts and sanctions that are intended to protect children by requiring parents to work. For example, again in New Mexico, where more than one in three children live in poverty, and 38.9% of children under five live in poverty,[274] work requirements and lifelong time limits are irrational in many communities and pose a threat to the children already in poverty. The New Mexico Department of Commerce estimates that there will not be sufficient jobs to employ over 23,000 of the people who will be looking for work in the next five years.[275] It will also be possible to show, again based on the state's own estimates, a severe shortage of age-appropriate child care and transportation. Under these circumstances, irrationality of sanctions and further welfare cuts should become obvious. These facts could, of course, be effective in proving both state and federal constitutional claims.

While efforts to assert similar rights in other states have not always been effective, it is important to learn from the innovations and perhaps, the mistakes that advocates made in those cases. For example, advocates in Connecticut challenged reductions in the state welfare program that could limit or terminate cash assistance for three months of every year.[276] They lost the challenge because they failed to demonstrate the injury that the plaintiffs would suffer as a result of the cuts, but not until hearing the challenge based on state constitutional grounds.[277] The claim was based,[278] in part, on the open courts provision of Connecticut's state constitution which provides that "[a]ll courts shall be open, and every person, for an injury done to him in his person, property, or reputation shall have remedy by due course of law and right, and justice administered without sale, denial, or delay."[279] The provision has been interpreted by the Connecticut Supreme Court to require plaintiff to "bear the heavy burden of establishing that

---

[272]*Id.* at 608; *see also* Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1775 (1987) (asserting that states should limit intervention to "least drastic alternatives" to protect child from real, imminent harm).

[273]Braveman, *supra* note 238, at 608.

[274]U.S. Census Bureau, *supra* note 52.

[275]Report of the Bernallilo-Sandoval County Community Council, N.M. April 1999.

[276]Moore v. Ganim, 660 A.2d 742, 744 (Conn. 1995).

[277]*Id.* at 750–70.

[278]James M. Scott III, *Positive Rights—Right to Subsistence Under the Connecticut Constitution*, 27 RUTGERS L. J. 970, 986 (1996) (explaining claim methodology and other factors considered in *Moore*).

[279]*Moore*, 660 A.2d at 750.

'redress was available for the type of injury at issue . . . prior to 1818,'" when the state constitution was adopted.[280]

In an innovative approach to the claim, advocates called a legal historian as an expert witness on Connecticut's history of providing aid to the poor and called recipients who faced a three month termination of their cash assistance in an effort to show the human suffering caused by the reductions.[281] However, they failed to paint a clear enough picture of the human suffering caused by the cuts.

The court specifically noted that there had been no testimony regarding non-governmental sources such as churches, synagogues, private shelters and soup kitchens, friends or family.[282] The court also pointed out that each of the testifying recipients who had been terminated, indicated that some support system other than the government would help them to survive the months during which they received no cash assistance.[283] This supports the contention that vivid proof of the hardships endured by families who lose their basic means of support will be essential to successful constitutional challenges, even at the state level. It also demonstrates that what often appears to advocates to be compelling evidence of the harm suffered by those without access to the basic necessities of life is not as compelling to judges, who for the most part, do not have as much contact with the hardship and uncertainty that is caused when people lose their basic means of subsistence.[284]

C. Equal Protection

As Professor Williams explains in his article on state equality provisions, most state constitutions do not include an Equal Protection Clause, but they do contain equality provisions.[285] In interpreting these state constitutional provisions, state courts should avoid the analytical constructs of the federal constitutional analysis and focus more on the underlying meaning of equality. Moreover, state courts should consider some of the dissenting voices in the federal jurisprudence. For example, in *Dandridge v Williams,*[286] welfare advocates challenged family cap provisions by focusing on the needs of impoverished children.[287] The United States Supreme Court upheld the provision applying rational basis scrutiny.[288] In his dissent, Jus-

---

[280]*Id.* at 751 (quoting Sanzone v. Board of Police Comm'r, 592 A.2d 912, 912 (Conn. 1991)).

[281]*Id.* at 752–54.

[282]*Id.* at 750.

[283]*Id.*

[284]It also suggests that advocates might work on developing innovative ways to demonstrate some of the realities of life in poverty by requesting, for example, visits to homeless shelters during non-business hours, admission of videotapes of life on the street, or requesting that the court attempt to create a budget for a family of four at the current poverty level.

[285]Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196 (1985).

[286]397 U.S. 471 (1970).

[287]*Id.*

[288]*Id.* at 486–88.

tice Marshall stated that welfare claims involve "the most basic economic needs of impoverished human beings," and that therefore, there is a "dramatically real factual difference" between [welfare cases] and the other cases that the Supreme Court has reviewed under rational basis standard."[289] State courts should recognize this difference in developing their own standards for evaluating claims under their equality provisions.

Some state courts have adopted a framework different from the federal framework.[290] Under one method of interpretation state courts have adopted the federal frame of analysis but "applie[d] those constructs independently."[291] In those cases, the state courts reach results that directly conflict with the federal analysis.[292] State courts that adopt the federal framework, but choose to apply it differently, should be encouraged to review measures that effect children in poverty with strict scrutiny. While children are not a "discrete and insular minority,"[293] state courts should recognize their needs and their "position of political powerlessness as to command extraordinary protection from the majoritarian political process"[294] and strictly scrutinize measures that threaten their opportunities to be equal participants in public life by depriving them of their means to a basic subsistence income.

In developing independent frameworks for equality review, courts should recognize that measures which limit a child's access to the basic means of subsistence also interfere with that child's ability to achieve equality in many spheres of public life, including schooling and employment.[295] The social science literature is replete with studies of how child poverty interferes with schooling and employment.[296]

State constitutional provisions regarding the states' duty to provide free public education, which are included in every state constitution,[297] create a duty to protect children against measures that threaten children's rights to basic subsistence income. Studies show that impoverished children are more likely to fail or drop out of school.[298] As discussed in Part II, "[d]eep poverty—especially during the earliest years of childhood—has particularly clear, long-lasting effects on children's academic learning and school completion."[299] Thus, children in deep poverty are deprived of their state constitutional right to public education. Welfare cuts that force children into deep poverty should be challenged as violating children's state constitutional rights to education.[300] Again, defining the contours of the class of protected

---

[289] *Id.* at 508 (Marshall, J., dissenting).
[290] Williams, *supra* note 285, at 1219.
[291] *Id.*
[292] *Id.*
[293] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
[294] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).
[295] *See* Part III *supra* (discussing problems facing children of welfare recipients).
[296] WELFARE TO WHAT, *supra* note 5, at 12.
[297] Hershkoff, *supra* note 250, at 1138.
[298] *See generally supra* Part III (discussing problems facing children of welfare recipients).
[299] WELFARE TO WHAT, *supra* note 5, at 12.
[300] Robinson v. Cahill, 287 A.2d 187, 189 (N.J. Super. Ct. Law. Div. 1972); Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971). *But see* San Antonio Indep. Sch. Dist. v. Rodriguez 411 U.S. 1, 55 (1973) (holding public school financially dependent on local property taxes

children may be challenging, but state courts can look to federal definitions of extreme poverty as well as emerging international standards.[301]

Sanctioning children whose parents have not complied with work requirements also raises equality concerns. It discriminates against certain children based on a classification over which they have no control—their parents' ability to find or keep employment. Similarly, the termination of a child's benefits where the parent has reached a lifetime limit of 60 months should be challenged under equality review, especially where children were not even born at the time their parents received TANF benefits. If courts apply strict scrutiny to these measures, it is unlikely states will be able to prove that program-wide restrictions of this nature are the least restrictive means of reducing the welfare rolls, as explained in analyzing the abortion funding cases below.[302]

State constitutional decisions in the tort law area support the rejection of rational basis scrutiny for measures effecting the well-being of children. Several courts have held that the rights infringed upon by limitations on the time to file tort claims are sufficiently important and substantive, and the class of persons affected sufficiently sensitive to justify invoking an intermediate standard of review to invalidate the statutes.[303] A child's rights to the basic means of subsistence are as sensitive and important as an injured person's right to sue. The reasoning of these cases, therefore, supports the rejection of rationality review where children's access to basic necessities is threatened.

While the Supreme Court of the United States has rejected disparate impact analysis,[304] state courts have the opportunity to reconsider that decision. Some states have already done so. For example, California required busing in the absence of intentional discrimination.[305] Similarly, states should be encouraged to apply disparate impact analysis to welfare reform measures that disproportionately impact women or children. These arguments may be especially successful where the state has an Equal Rights Amendment.

D. Equal Rights Amendment

Some successes for women have already been achieved under state equal rights amendments. For example, in New Mexico, which is in the vanguard of those states creating an independent constitutional jurispru-

---

does not violate Equal Protection Clause).

[301] *See generally* SHARON DETRICK & PAUL VLAARDINGERBROEK, GLOBALIZATION OF CHILD LAW: THE ROLE OF THE HAGUE CONVENTIONS 7 (1999) (emphasizing increasing impact of treaties on state sovereignty).

[302] *See* Part V.D *infra* (discussing Equal Rights Amendment).

[303] Richardson v. Carnegie Library Rest., 763 P.2d 1153, 1159–60 (N.M. 1988) (citing Coburn v. Agustin, 627 F. Supp. 983, 995 (D. Kan. 1985)); Jones v. State Bd. Of Med., 555 P.2d 399, 411 (Idaho 1976), *cert. denied*, 431 U.S. 914 (1977); Farley v. Engelken, 740 P.2d 1058, 1064 (Kan. 1987); Sibley v. Board of Supervisors of La. State Univ., 477 So.2d 1094, 1107 (La. 1985); Carson v. Maurer, 424 A.2d. 825, 833–34 (N.H. 1980); Arneson v. Olson, 270 N.W.2d 125, 133–35 (N.D. 1978).

[304] Washington v. Davis, 426 U.S. 229, 248 (1976).

[305] Crawford v. Board of Educ., 551 P.2d 28, 48 (Cal. 1976).

dence based on its state constitution,[306] advocates for women successfully challenged restrictions on publicly funded abortions relying on the New Mexico Constitution.[307]

In striking down the limits on abortion funding under the New Mexico Medicaid program, the New Mexico Supreme Court relied on the Equal Rights Amendment of the New Mexico Constitution.[308] The Court declared that the program discriminated against women by denying certain medically necessary services to women when there were no similar limitations on medically necessary medical services for men.[309] The New Mexico Supreme Court applied strict scrutiny to the provision[310] and the Court found that once the department elects to provide medically necessary services it cannot do so in a way that discriminates against some recipients on account of their gender.[311]

The state defended the provision as a legitimate cost saving measure.[312] However, the court, applying strict scrutiny, found that the costs of providing health coverage during pregnancy would be greater than the costs of providing abortions.[313] Therefore, the state failed to show that the provision was the least restrictive means of reducing costs.[314]

Similarly, if strict scrutiny were applied to welfare measures, states would have to prove that they have chosen the least restrictive means of achieving the goal of reducing welfare costs. Application of this level of scrutiny to welfare measures could afford some relief to children, as social scientists develop information on the increased public costs of providing remedial education and other services to children who are not able to participate in education or employment as a result of a childhood in extreme poverty.

This may be an area where state discourse leads to formulation of national policy. As an American Bar Association cover story on women's

---

[306]Michael B. Browde, State v. Gomez *and the Continuing Conversation Over New Mexico's State Constitutional Rights Jurisprudence*, 28 N.M. L. REV. 387, 387 n.5 (1998); *see also* State v. Gomez, 932 P.2d 1, 13 (N.M. 1997) (adopting interstitial approach often diverges from federal result).

[307]New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841, 844 (N.M. 1998).

[308]*Id.* at 853–54; State of New Mexico *ex rel.* Serna v. Hodges, 552 P.2d 787, 792 (N.M. 1976). As the Supreme Court of New Mexico explained in reviewing the claims under the state constitution,

> [w]e do so as the ultimate arbiters of the law of New Mexico. We are not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution, even in construing provisions having wording that is identical, or substantially so, "unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter."

Id.; *see also* State v. Gutierrez, 863 P.2d 1052, 1067 (N.M. 1993) (finding good faith exception does not apply to New Mexico Constitution and that framers of constitution "made it imperative upon the judiciary to give meaning to those rights through judicial review of the conduct of the separate governmental bodies").

[309]*Johnson*, 975 P.2d at 856.

[310]*Id.* at 854.

[311]*Id.* at 856.

[312]*Id.*

[313]*Id.* at 857.

[314]*Id.*

rights questioned whether it is "time for an Equal Rights Amendment push,"[315] successes on behalf of welfare beneficiaries under state equal rights amendments may foster doctrinal support for the creation of a federal right.

E. The Right to Happiness and Safety

"The initial reaction of people to the idea of a constitutional right to happiness (or safety) is, typically laughter followed (if at all) by dismissal of the constitutional language as the relic."[316] However, many constitutions include these rights as inalienable.[317] Justice Burnett of the California Supreme Court, in striking down an act infringing on private property rights, stated, "for the Constitution to declare a right inalienable, and at the same time leave the Legislature unlimited power over it, would be a contradiction in terms, an idle provision, proving that the Constitution was a mere parchment barrier, insufficient to protect the citizen."[318]

The right to adequate food, clothing and shelter are essential elements of the rights to happiness and safety. This language should not be overlooked in attempting to support and develop constitutional protections for people in poverty.[319] These clauses provide strong support for heightened scrutiny of measures that will clearly deprive citizens of the right to happiness and safety.[320] The Supreme Court of New Jersey, striking down restrictions on publicly funded abortions found that a woman's right to an abortion is protected based on the Article I of the New Jersey Constitution."[321] The court held that by "declaring the right to life, liberty and the pursuit of . . . happiness," the state constitution "protects the right of privacy."[322] The court then followed the framework of federal equal protection analysis, applying strict scrutiny to the limitation on state funded abortions.[323] While the court did not specify which words created the right to privacy, the clause

---

[315]Debra Baker, *The Fight Ain't Over*, ABA J., Aug. 1999, at 52, 54.

[316]Joseph Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, HASTINGS CONST. L. Q., Fall 1997, at 1, 34.

[317]According to Professor Grodin, the Iowa Constitution is typical in this regard. It provides that "[a]ll men are, by nature free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." *Id.* at 3; IOWA CONST. art. I, § 1.

[318]Billings v. Hall, 7 Cal. 1, 17 (1857) (Burnett, J., concurring).

[319]It should be noted, however, that the Ohio Court of Appeals has rejected the notion of an affirmative duty to provide subsistence income under the safety clause of the Ohio State Constitution. The New Jersey Supreme Court, however, has left that question open. Daugherty v. Wallace, 621 N.E.2d 1374, 1380 (Ohio Ct. App. 1993); L.T. v. New Jersey Dep't of Human Servs., 633 A.2d 964, 974 (N.J. 1993).

[320]Grodin, *supra* note 316, at 27. Grodin also contends that these phrases provide a textual, principled basis for the application of heightened scrutiny under state constitutions, which is lacking in some federal substantive due process analysis. *Id.* at 28.

[321]Right to Choose v. Byrne, 450 A.2d 925, 949 (N.J. 1982) (refusing to fund indigent women's abortions violated New Jersey Constitution).

[322]*Id.* at 933.

[323]*Id.*

securing the right to life, liberty, and the pursuit of happiness gave real substantive rights to women in New Jersey.[324]

It will be a challenge to define the contours of these rights. Again, courts may look to federal definitions of poverty, or developing international standards to define these inalienable rights. And, again, the development of the factual basis for the right to subsistence income should provide a compelling background that may assist in persuading judges to grant relief on other grounds.

F. Specific State Constitutional Provisions Addressing Poverty

Many state constitutions contain provisions addressing the needs of the poor.[325] They range from general statements to directives. For example, the Hawaii Constitution provides that government should have "an understanding and compassionate heart toward all people of the earth."[326] The North Carolina Constitution provides that "[b]eneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian state."[327] The Nevada Constitution provides that the state has a duty to support such "other benevolent institutions as the public good may require."[328] Massachusetts guarantees "food and . . . shelter in time of emergency."[329] Many of these provisions do not appear to have been tested by advocates.[330] Other states have rejected the notion that there is a state constitutional right to a subsistence income.[331]

New York, however, has been aggressive in developing an independent constitutional analysis of welfare issues.[332] The New York Constitution specifically declares that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."[333] This section creates a judicially enforceable right to public assistance that is "a fundamental part of the social contract."[334] The goal of the New York constitutional provision was to meet "the threat to freedom that comes from another source—from poverty and insecurity, from sickness and the slum, from social and economic conditions in which human beings cannot be free."[335]

---

[324] *Id.*

[325] *Id.*

[326] HAW. CONST. Preamble; art. IX, § 3.

[327] N.C. CONST. art. XI, § 4.

[328] NEV. CONST. art. XIII, § 1.

[329] MASS. CONST. amend. XLVII.

[330] Hershkoff, *supra* note 250, at 1153.

[331] Moore v. Ganim, 660 A.2d 742, 744 (Conn. 1994); Bullock v. Whiteman, 865 P.2d 197, 206–07 (Kan. 1993).

[332] Ramsey & Braveman, *supra* note 229, at 1624.

[333] N.Y. CONST. art. XVII, § 1.

[334] Tucker v. Toia, 371 N.E. 449, 451–52 (1977).

[335] VERNON A. O'ROURKE & DOUGLAS W. CAMPBELL, CONSTITUTION-MAKING IN A DEMOCRACY: THEORY AND PRACTICE IN NEW YORK STATE 117 (1943) (quoting speeches of Senator Robert F. Wagner Jr. at Constitutional Convention).

This constitutional provision was the stated grounds for a successful claim by children's welfare advocates challenging a statutory provision that required children to obtain a disposition against parents to be eligible for state welfare benefits.[336] The New York Court of Appeals found that this section of the constitution was "intended as an expression . . . of the existence of a positive duty upon the state to aid the needy."[337] While the court has not expanded this reasoning to require a minimum subsistence income, the court prohibits simply refusing to aid those whom it has classified as needy. The state "[c]onstitution is a source of positive law, not merely a set of limitations on government."[338] This is significant, not only in that it provides an affirmative right to public benefits, but because it demonstrates how these constitutional provisions may be effective in securing relief for children in poverty.

State constitutional provisions mandating relief for poor people strongly support heightened scrutiny of legislative actions effecting the poor. Professor Neuborne, explains that

> the very existence of a set of substantive state constitutional provisions dealing with poverty concerns should transform the approach to state due process and equality provisions. One can understand the reluctance of a federal judge to use the federal Equal Protection and Due Process Clauses to generate substantive floors in areas that are wholly foreign to the federal text. Where, however, the constitutional text demonstrates an intense substantive interest in the plight of the poor, a judge's willingness to use the state's Equal Protection and Due Process Clauses to reinforce the substantive concerns already present in the constitution's text should be much greater.[339]

Professor Hershkoff, in her recent article on positive rights, suggests that a "court faced with a state constitutional welfare challenge ought to subject a legislative classification to rigorous scrutiny to determine whether the provision is likely to effectuate the constitutional goal. . . . [T]he proposed approach would shift the burden of proof, imposing a duty on the state to justify its legislative choices as a well-grounded means of moving toward a prescribed constitutional goal."[340] The state would, therefore, have to prove that a legislature's decision to reduce welfare benefits below minimum subsistence levels meets the legitimate needs of the poor. "The fact that the legislature has discretion to design a welfare plan, plaintiffs would argue, does not give the legislature discretion to design a plan that does not actually effectuate Article XVII's mandate."[341]

Specific state constitutional provisions addressing poverty are important sources of affirmative rights. At least they provide persuasive support

---

[336]*Tucker*, 371 N.E.2d at 451.

[337]*Id.*

[338]Brown v. New York, 674 N.E.2d 1129, 1137 (1996)

[339]Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L. REV. 881, 895 (1989).

[340]Hershkoff, *supra* note 250, at 1184.

[341]Helen Hershkoff, *Rights and Freedoms Under the State Constitution: A New Deal For Welfare Rights*, 13 TOURO L. REV. 631, 649 (1997).

for strict scrutiny of measures that threaten access to basic means of subsistence.

G. Separation of Powers

Advocates may also look to other provisions that may be found in state constitutions, such as the separation of powers clause. In New Mexico, advocates for women and children in poverty successfully challenged the Governor's welfare plan as violating the separation of powers clause of the New Mexico Constitution.[342] Following the passage of the federal PRA, the Governor of New Mexico vetoed the welfare legislation passed by the state legislature and imposed his own, more merciless program, ironically titled "PROGRESS."[343] As discussed above, over fifteen thousand families—half of the welfare caseload—were terminated from the welfare rolls. As months passed, the Governor explored new ways of reducing welfare rolls which included: redefining income to include housing subsidies; redefining households to include landlords in some cases; and redefining work requirements and terms of eligibility. Families often discovered that their benefits had been terminated when they went to collect their benefits.

Advocates successfully challenged the Governor's actions as a violation of the Separation of Powers Clause of the New Mexico Constitution.[344] The Governor still refused to comply with the New Mexico Supreme Court's ruling and was held in contempt.[345] The showdown between the Governor and the New Mexico Supreme Court threatened a constitutional crisis when the Governor declared that he did not have to comply with the New Mexico Supreme Court based on his own interpretation of the separation of powers doctrine in which he was not obligated to obey a separate coequal branch of the state government.[346] Consequently, massive confusion in the administration of the welfare plan reined for months.[347] The Governor backed down and a public confrontation and a constitutional crisis was narrowly averted. This experience, however, provides insight into how state constitutional law may lead to unanticipated legal interpretations and state power dynamics.

State constitutional challenges also raise significant questions about federal and state power relations. While the federal courts can invalidate state and federal provisions based on violations of the federal constitution, and it is easy to conceive that a state court could invalidate an individual sanction based on state court constitutional provisions, it is far more complex where those sanctions are federally mandated. What happens when a

---

[342]State of New Mexico, *ex rel.* Taylor v. Johnson, 961 P.2d 768, 773–75 (N.M. 1998).
[343]*Id.* at 772.
[344]*Id.* at 773–75.
[345]*Id.*
[346]*Id.*
[347]A clinical law student representing a client whose benefits had been terminated without notice was told by one caseworker that if she wanted to know what her client was entitled to she should read that day's newspaper. Interview with Shari Caton, Clinical Law Student, University of New Mexico School of Law, Law Clinic in Albuquerque, N.M. (October 15, 1997).

state supreme court invalidates local program requirements mandated by federal law that are the source of federal funds for state welfare programs?

The state court could require state funding to offset the state constitutional violation.[348] It could also prohibit the state from some actions that may be encouraged, but not mandated by federal law. For example, "[t]he general fungability of money available may tempt states to transfer both federal and state funds into programs formerly funded by the state or programs that are more politically popular than benefits to marginally employed or unemployed recipients."[349] A state court could prohibit this activity. It could also prohibit cuts in child welfare programs that may be motivated by PRA incentives and the block grant system.

Successful efforts to assert a state constitutional right to subsistence can also result in a constitutional amendment. For example, efforts to secure protections for subsistence income were temporarily successful in Montana where the constitution (prior to amendment) provided that "the legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for the aid of society."[350] However, following a ruling in favor of welfare families, on this language, Montana amended this constitutional provision.[351] The PRA anticipates that some states may have to modify their constitutions to qualify for funds under the Act by including and extending grace periods for states that must amend their state constitutions to comply with the PRA provisions.[352]

In spite of complexities in formulating relief, state constitutional provisions provide an opportunity to seek constitutional redress in states where the federal courts have refused to find constitutional violations. State courts are not constrained by the federalist concerns of the federal courts, and many state constitutions include specific provisions addressing poverty, or securing basic rights as inalienable.

VI. CONCLUSION

According to the House Report that urged adoption of the Personal Responsibility and Work Opportunity Reconciliation Act, commenting on the predecessor to the current welfare system, the Report noted the "greatest tragedy of the welfare system is how it harms the Nation's children."[353] Under the Personal Responsibility and Work Opportunity Reconciliation Act in support of which the Report was written, it is now anticipated that 1.3 million additional children will join the children already living in poverty

---

[348]*See, e.g.*, New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841, 844 (N.M. 1998) (allowing state funding to pay for medically necessary abortions).

[349]Bane & Weissbourd, *supra* note 31, at 132.

[350]MONT. CONST. art. XII, § 3(3).

[351]Butte Cmty. Union v. Lewis, 712 P.2d 1309, 1314 (Mont. 1986), *overruled by* Zempl v. Uninsured Employer's Fund, 938 P.2d 658, 662 (Mont. 1998) (holding that 1998 amendment of Article XII, § 3(3) overruled *Butte Community Union*).

[352]Pub. L. No. 104-193, 110 Stat. 2259 (codified as amended at 42 U.S.C.A. § 603 (Supp. 2000)).

[353]H.R. REP. NO. 104-651, at 4 (1996).

in this country. There are more children in inadequate daycare and housing and more children are hungry. As the number of people finding themselves without the basic necessities of life increases, advocates will be looking to our federal and state constitutions for protections. While the PRA, on its face, threatens procedural protections, analysis of federal constitutional precedent suggests that procedural due process protections may remain. Many state constitutions are rich with text that may provide a basis for additional procedural and substantive protections for children in poverty. The development of federal and state constitutional protections for children in poverty will play an important role in the new federalist revolution, and hopefully, will assist in the prevention of human suffering.