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BRIDGING THE FEDERALISM GAP: PROCEDURAL DUE PROCESS AND RACE DISCRIMINATION IN A DEVOLVED WELFARE SYSTEM

RISA E. KAUFMAN*

Introduction

What does the current federalism mean for poor and low-income people of color? Recent Supreme Court decisions limit the power of the federal government to legislate and the federal courts to provide redress, particularly in the area of civil rights. For example, the Court has invalidated federal legislation allowing individuals to seek monetary damages from states for employment discrimination based on age and disability, and from private

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2. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (invalidating private suits for money damages under Title I of the Americans with Disabilities Act (ADA)). The Court made clear, however, that Title I of the ADA is enforceable against the states in suits for prospective injunctive relief against a state official in his or her official capacity, under the doctrine of Ex parte Young, 209 U.S. 123. Garrett, 531 U.S. at 374 n.9. See also Tennessee v. Lane, 541 U.S. 509 (2004) (allowing private suits for money damages under Title II of the ADA, so much as it requires states to provide a reasonable accommodation to allow individuals access to the courts).

The Court stopped short of invalidating the Family Medical Leave Act (FMLA). Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003). In Hibbs, the Court relied heavily on evidence that Congress was responding to evidence of state discrimination in finding that Congress validly enacted the FMLA to safeguard the right to be free from gender discrimination in the workplace, based on the significant impact and reinforcing
individuals for gender-motivated violence. In addition, the Court has prohibited private lawsuits challenging race discrimination by recipients of federal funding under a disparate impact theory. While these decisions impact the enforcement of federal rights generally, they may pose special difficulties for people who are poor and low-income, who in many instances must rely upon the government for subsistence benefits, yet have little political, social or financial power to protect their interests.

This impact is compounded by devolution. As the Court limits the ability of individuals to bring states (and, in some cases, local governments) into federal court, Congress is devolving significant power to states and localities to create and implement poverty-related programs. Through block grants, Congress is deregulating a significant portion of the safety net and giving states and localities more flexibility and discretion over social welfare programs. This discretion and authority, when further devolved to local workers and administrators, can be tainted with racial bias, raising the risk of and resulting in a disparate impact on people of color. As a result, individuals may face a greater risk of race discrimination within the welfare system, with fewer statutory protections available to challenge such discrimination. With limited federal constitutional

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3. United States v. Morrison, 529 U.S. 598, 625-27 (2000) (invalidating civil damages provision of the Violence Against Women Act (VAWA), 42 U.S.C. § 13981, based on the theory that section 5 of the Fourteenth Amendment cannot be used to regulate private conduct). Morrison also limited Congress' authority to enact legislation pursuant to its Commerce Clause powers, holding that Congress may not regulate non-economic acts based on a cumulative impact on interstate commerce. Id. at 617-19. This ruling relied heavily on the Court's previous decision in United States v. Lopez, in which the Court held that Congress was not authorized under the Commerce Clause to enact the Gun Free Zones Act of 1990, as it "neither regulates a commercial activity nor contains a requirement that the [gun] possession be connected in any way to interstate commerce." 514 U.S. 549, 551 (1995). For a discussion of the federalism implications of the Morrison ruling, see Julie Goldscheid, United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism, 86 CORNELL L. REV. 109 (2000).

4. Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that § 602 of Title VI of the Civil Rights Act contains no private right of action to challenge race discrimination under a disparate impact theory). The Court's ruling in Alexander, discussed more fully in Section II, infra, in fact has implications beyond the ability of individuals to bring suit against states, as it precludes disparate impact discrimination suits under Title VI against public and private recipients of federal funds.

5. Significantly, the Personal Responsibility and Work Reconciliation Act of 1996, 42 U.S.C. §§ 601-08 (1996), replaced the former federal entitlement program with a block grant welfare program whereby the states have broad flexibility and discretion to design and implement their own welfare programs and further devolve authorities to localities. The block grant program is discussed more fully in Section I, infra.

6. See infra Section III(B)(2)(b).
protections against class and race discrimination, poor and low-income people, especially poor and low-income people of color, thus may become caught in the federalism gap.

This article explores whether, in this context, procedural due process protections, which historically have been used to protect against the unfair administration of government benefits, may

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7. Courts review classifications based on wealth under a deferential "rational basis" standard. The touchstone of the Court's treatment of poverty issues under the Equal Protection Clause is Dandridge v. Williams, 397 U.S. 471 (1970). In that case, plaintiffs challenged Maryland's Family Cap provision, which placed a ceiling on the amount of welfare benefits that a family could receive, regardless of its size. In upholding the family cap under an Equal Protection analysis, the Court stated:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematic nicety or because in practice it results in some inequality." Id. at 485 (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

The Court has consistently applied this rational basis review when analyzing other social welfare legislation. See Sullivan v. Stroop, 496 U.S. 478, 485 (1990) (applying rational basis review to statutory interpretations that exclude child health insurance from the definition of child support for purposes of determining a family's eligibility for public assistance); Bowen v. Gilliard, 483 U.S. 587, 598-01 (1987) (upholding statute authorizing public assistance eligibility determinations to take into account the income of all parents and siblings living in the same household on grounds that such a statute does not violate the Equal Protection Clause "if any state of facts reasonably may be conceived to justify it" (quoting McGowen v. Maryland, 366 U.S. 420, 426 (1961))); Jefferson v. Hackney, 406 U.S. 535, 546 (1972) ("[s]o long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straightjacket"). See also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) ("at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages"). The Court has never granted poverty "suspect class" status, and it has never established a fundamental right to subsistence benefits. For a recounting of the effort to establish a federal constitutional right to subsistence benefits, see MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, 56-145 (1993).

Thus, the Court will not apply heightened scrutiny to Equal Protection challenges involving the rights of the poor unless a fundamental right or recognized suspect classification is implicated. See, e.g., Saenz v. Roe, 526 U.S. 489 (1999) (applying heightened scrutiny to a state policy of paying lower welfare benefits to new residents during their first year in the state because it burdened the fundamental right to travel); Califano v. Westcott, 443 U.S. 76 (1979) (applying heightened scrutiny to Social Security Act's provision of benefits to dependent children of unemployed fathers but not to those of unemployed mothers because of discrimination on the basis of sex).

provide a shield against discretionary actions resulting in a disparate impact on people of color. A growing body of scholarship examines the continuing viability and importance of procedural due process protections for the poor. This article explores how, in the absence of strong statutory protections, such constitutional protections may be utilized to stem race discrimination within a devolved welfare system, thus bridging the federalism gap.

Section One of this article discusses how the devolution of social welfare programs (through block granting) results in fewer federal protections and uniformity and more state and local discretion over poverty programs. This section examines the effect of devolution on poor and low-income people of color who often find themselves in contact with government entities and actors, thus subject to state and local discretion and, potentially, racial bias.

Section Two examines how the Court’s holding in *Alexander v. Sandoval*—that individual litigants have no private right of action to enforce the disparate impact regulations of Title VI of the Civil Rights Act—in combination with devolution in the welfare context, affect the ability of poor and low-income people of color to protect their rights in federal court.

Section Three suggests that in this context, procedural due process protections may provide an effective tool to curb race discrimination in the welfare system. This section explores a procedural due process argument whereby plaintiffs challenge standardless, discretionary decision making by welfare caseworkers by showing that a lack of appropriate procedures has an adverse disparate impact on poor people of color, and that certain procedural safeguards would ameliorate the problem. The article concludes by suggesting that stemming race discrimination in the


welfare system (and, potentially, other poverty programs that could soon be block-granted, including Food Stamps, Medicaid and Section 8 housing programs) through the use of procedural due process protections is not only consistent with federalism, but critical to its functioning.

I. Federalism and Devolution of the Welfare System

Congress has actively participated in the current federalism, as illustrated by the Personal Responsibility and Work Reconciliation Act (PRWORA) of 1996. The 1996 federal welfare law resulted in a monumental shift in power over welfare policy from federal to state and local governments by eliminating a federal “entitlement” program, Aid to Families with Dependent Children (AFDC), and replacing it with Temporary Assistance for Needy Families (TANF), a state-run block grant program. The impetus behind the 1996 law was to devolve authority and responsibility for poverty policy to the individual states, which could then further devolve responsibility to counties. Devolution was premised on the theory that states, and not the federal government, have the greatest understanding of the needs of the poor and thus should have primary responsibility for crafting and implementing poverty policies. The result is a kaleidoscope of welfare systems throughout the country.

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14. The former AFDC was a cooperative federal-state welfare program established by Title IV of the Social Security Act as the basic federal need-based income transfer program for dependent children and their caretaker relatives. See 42 U.S.C. §§ 601-17 (1988). In exchange for administering AFDC in compliance with federal law, the states were reimbursed by the federal government for a portion of the benefits provided to recipients. Although not required to do so, all fifty states participated in the program.

TANF, AFDC’s replacement, expired in October 2002, and has been extended by a series of Congressional resolutions until December 31, 2005. Plans for reauthorizing the federal welfare law are currently being debated in Congress. At publication, the law had not yet been reauthorized. Nevertheless, none of the plans being considered would change the basic premise of the 1996 law: that states should be given broad flexibility with minimum oversight and accountability for designing and implementing programs for the poor.

16. As Professor Peter Edelman states: “To know what the rights of poor are around the country, we would need to read fifty-one statute books and, given the variations among counties, thousands of pages of implementing regulations and local laws.” Peter Edelman, Responding to the Wake-Up Call: A New Agenda for Poverty Lawyers, 24 N.Y.U. REV. L. & SOC. CHANGE 547, 549 (1998) (citing to studies describing the variations in state welfare laws and policies). See also Matthew Diller, The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government, 75 N.Y.U. L.
Devolution has changed the landscape of welfare. Under AFDC, states were required to provide assistance to all families who applied for it and met federal and state eligibility criteria. The 1996 welfare law replaced this system with block grant funding to the states, which the states may use "in any manner reasonably calculated to accomplish the purposes" of the law. Under TANF, states define their own "objective criteria" for deciding who may receive assistance, subject to constitutional limitations and the requirement that states be "fair and equitable" in establishing these criteria, and so long as they do not provide benefits to certain identified classes of individuals. Provided they meet the minimum requirements of the federal law, states may also set their own time limits on welfare benefits, establish their own work

18. 42 U.S.C. § 604(a)(1) (2005). These purposes are: (1) to provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy families on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families. 42 U.S.C. §§ 601(a)(1)-(4) (2005).
19. "The term 'assistance' includes cash payments, vouchers, and other forms of benefits designed to meet a family's ongoing basic needs (i.e., for food, clothing, shelter, utilities, household goods, personal care items, and general incidental expenses)." 45 C.F.R. § 260.31(a)(1) (2005).
21. For example, states are prohibited from providing welfare benefits to teenage parents who do not attend high school or training programs, 42 U.S.C. § 608 (2005), and those not living in adult-supervised settings. Certain legal immigrants are also barred from receiving benefits. 8 U.S.C. §§ 1612-46 (2005).
22. The federal law limits receipt of federal benefits to sixty months in a lifetime,
participation and compliance requirements, and determine what type of assistance to provide. States do not have to provide cash assistance with their TANF funds; they may also use their funds for education and job training, child care, transportation, services addressing barriers to employment (including mental health and domestic violence), and a wide range of other services to meet the purposes of TANF. Finally, language in the 1996 law purports to eliminate the entitlement to federal assistance that existed under AFDC. The significance of this language will be discussed, infra.

Devolution under the PRWORA also allows for considerable privatization of the welfare system. The 1996 welfare law contains a provision allowing states to operate their welfare programs "through contract with charitable, religious or private organizations." Many states have since turned to large national and sometimes multinational private corporations to conduct case management, employment services, support services, and other specialized services, including mental health and substance abuse treatment, for their welfare applicants and recipients. Nearly all of but states may set stricter time limits. 42 U.S.C § 608(a)(7). States may choose to use their state maintenance of effort money to provide benefits to people who have already exceeded the federal limit. Id.

23. TANF establishes certain work participation requirements, but as with time limits, states are free to set more stringent requirements. 42 U.S.C. §§ 602(a)(1)(A)(ii), 607; 45 C.F.R. § 261 (2005).


25. See 42 U.S.C. §§ 601(a), 609(a)(7)(B)(i)(IV); 45 C.F.R. §§ 263.2(b), 263.11(a) (2000). States may also transfer up to 30 percent of their TANF funds into the Child Care and Development Block Grant Program and/or Title XX, the Social Services Block Grant Program. 42 U.S.C. § 604(d). TANF funds must be used to serve needy families with children. 42 U.S.C. § 602(a)(1)(A)(i) (2005).

Among the other options open to states are the Family Violence Option, which allows states to exempt domestic violence victims from certain welfare requirements that make it more difficult to escape their abuser and keep themselves and their families safe, id. § 602(a)(7); 45 C.F.R. §§ 260.50-57, and the affirmative "opt out" of the ban on TANF assistance for persons with felony drug convictions. 21 U.S.C. § 826a(d)(1) (2002). For a comprehensive description of the choices available to states under TANF, see Wendy Pollack, An Introduction to the Temporary Assistance for Needy Families Program, 36 CLEARINGHOUSE REV. 449 (2003), available at http://www.povertylaw.org/legalresearch/articles/index.cfm?action=articles_by_date &date=15-Jan-03.

26. Section 103(a)(I) of the PRWORA states that "this part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part." 42 U.S.C. § 601(b).


the states and the District of Columbia have contracted with a nongovernmental entity for the provision of some welfare-related function at the state and/or local level.29 Privatization of the welfare system raises a number of concerns, including the ability of recipients to hold corporate entities accountable for their actions, and the ability of recipients to enforce their rights in a privatized, as opposed to state-administered, system.30

Finally, devolution allows states to delegate significant discretion to individual caseworkers and local welfare administrators, resulting in what Professor Matthew Diller describes as "the concentration of power in the hands of ground-level administrators."31 Thus, not only do state and county welfare programs exercise their own discretion to set certain standards and requirements, such as time limits and work participation,32 they also call on front-line welfare caseworkers to make a number of critical judgments, such as whether an applicant is excused from work, what type of work he or she is capable of, whether the individual has access to suitable child care, and whether the applicant has a good excuse for missing an assignment or appointment.33 In many cases, front line workers decide what types of programs and services applicants and recipients are eligible and suitable for, and whether they should be referred to a particular training or educational program.34 Given the already overwhelming nature of organizations to administer welfare-related functions. Id. at 13-14.


32. See supra notes 15-21 and accompanying text.

33. See Diller, supra note 16, at 1148-50 (citing examples).

34. New York City's welfare system provides a strong example of how caseworkers exercise discretion. In New York City, throughout the welfare application process and while an individual receives public assistance, he or she must meet with a series of workers who determine eligibility for benefits. For example, once a welfare application is filed, applicants must keep daily appointments throughout the City to comply with work requirements and complete verification interviews, including reporting to the City's office of Eligibility Verification Review in Brooklyn. Ass'n of the Bar of the City of N.Y., Welfare Reform in New York City: The Measure of Success, Committee on Social Welfare Law, 56 THE REC. 322, 330 (Summer 2001), available at
their work, welfare workers often do not have the time to fully explain the options available to claimants or to assist them in making the best choices for their individual circumstances.\(^\text{35}\)

Thus, welfare reform and devolution mean little uniformity, with welfare workers playing a significant role in their clients' lives. And, as will be discussed more fully in Section III B, \textit{infra}, there is growing evidence that this increased discretion given to ground level workers introduces a significant risk of racial bias and discrimination influencing their individual determinations, particularly with regard to sanctioning and access to support services. With fewer federal guidelines to standardize these decisions and fewer avenues for legal redress, however, poor people have fewer ways to challenge such discrimination.\(^\text{36}\)

http://www.abcny.org/Publications/record/summer01.pdf. Individuals with conditions that might limit their ability to work must attend multiple appointments for medical or psychiatric evaluations with a private agency which contracts with the city to do such evaluations. \textit{Id.} Welfare workers determine whether individuals are in compliance at each step of the way and assign welfare applicants and recipients to job search activities, job training, or work assignments. See Reynolds v. Giuliani, 35 F. Supp. 2d 331, 335-36 (S.D.N.Y. 1999) (describing the public assistance application process in the early days of welfare reform in New York City).

35. See Evelyn Brodkin, \textit{Inside the Welfare Contract: Discretion and Accountability in State Welfare Administration}, 71 SOC. SERV. REV. 1, 12-17 (1997) (discussing how discretion vested in "street-level workers" to allocate services such as job skills and training may result in inadequate and inappropriate assessments and placements, due to the fact that caseworkers ration the information they provide and do not have the resources and ability to elicit and respond to all of a client's needs). See also Diller, supra note 16, at 1164-65 (discussing resistance of caseworkers to increased demands, including the requirement that they make more evaluative, discretionary decisions).

36. At the same time, welfare reform is resulting in a dramatic change in the racial composition of the welfare rolls. Whites are leaving the welfare rolls faster and more minorities are remaining, with Latinos becoming the fastest growing population receiving welfare. Elizabeth Lower-Basch, "\textit{Leavers}" and Diversion Studies: Preliminary Analysis of Racial Differences, Office of the Assistant Sec'\z y for Planning and Evaluation, U.S. Dep't of Health & Human Servs., at http://aspe.os.dhhs.gov/hsp/leavers99/race.htm (updated Sept. 15, 2003); Jason DeParle, Shrinking Welfare Rolls Leave Record High Share of Minorities, \textit{N.Y. TIMES}, July 27, 1998, at A1. Specifically, while overall state TANF caseloads declined approximately 44\% between August 1996 and September 1999, from fiscal year 1996 to fiscal year 1998, the white percentage of the caseload fell about 8\%, while the black percentage rose by almost 5\%, and the Hispanic percentage rose by over 7\%. Steve Savner, \textit{Welfare Reform and Racial/Ethnic Minorities: The Questions to Ask}, 9 POVERTY AND RACE, POVERTY AND RACE RESEARCH ACTION COUNCIL 3 (July/August 2000). Moreover, black and Latino families who leave the welfare system have a much greater likelihood of returning than white families. According to a recent study, overall, one in five families leaving welfare return. Yet among African American families leaving welfare, 32\% return, compared with 24\% of Latino families and just 13\% of white families. Pamela J. Loprest, \textit{Who Returns to Welfare}, Urban Institute, at http://www.urban.org/url.cfm?ID=310548 (Sept. 1, 2002). The result is a change in the overall racial demographics of the welfare population. Prior to federal welfare reform, in 1995, the welfare caseload was 35.6\%
II. Challenging Race Discrimination Within the Welfare System Post-Sandoval

Minorities, and especially poor people of color, have long been limited in their ability to challenge governmental actions that disparately impact them. In Jefferson v. Hackney, the Supreme Court rejected a claim brought by welfare recipients in Texas challenging that state’s formula for calculating public assistance benefits as racially discriminatory because of its disparate impact on blacks. In upholding the state’s method under the Equal Protection Clause, the Court held that a “naked statistical argument” does not suffice for showing racial discrimination by welfare procedures that have a disproportionate adverse impact on minorities. Four years later, in Washington v. Davis, the Supreme Court made explicit the requirement that all challenges to state action based on the Equal Protection Clause must show an intent to discriminate on the basis of an invidious classification. Although the Court stated that it is not necessary for the discriminatory purpose to be express or appear on the face of a statute, proof of disparate impact alone was insufficient to trigger strict scrutiny under the Equal Protection Clause.

The Court’s intent requirement has been criticized on grounds that it misses the often subtle, or “unconscious,” ways in which racism operates in society. As Professor Charles Lawrence notes, requiring proof of conscious and intentional discrimination “disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious.” In addition, Professor Kenneth Karst argues that the intent doctrine places a burden of proof on plaintiffs that is extremely difficult to overcome, since improper motives can

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White, 37.2% African American, and 20.7% Latino. Lower-Basch, supra. By 1999, the population shifted to 30.5% White, 38.3% African American, and 24.5% Latino. Id. at 548. 37. 406 U.S. 535 (1972). 38. Id. 39. 426 U.S. 229 (1976). 40. Id. at 239. 41. Id. at 241. See also Fee, 442 U.S. at 274 (applying the intentional discrimination requirement to Equal Protection challenges involving gender-based discrimination). Later, in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the Court explained that proof of discriminatory intent could include clear patterns that emerge from the challenged action that cannot be explained on any grounds other than race, a historical background of the decision revealing an invidious purpose, and the legislative or administrative history of the action. Id. at 252. 42. Charles R. Lawrence Ill, The Id, the Ego and the Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 322 (1987). 43. Id. at 323.
easily be hidden. Thus, while on very rare occasions courts have found that welfare laws intentionally discriminate against people of color in violation of the Equal Protection Clause, intentional race discrimination in the context of welfare is difficult to prove, particularly where caseworkers exercise significant discretion in how they assess recipients and connect them with critical services.

Unlike the Equal Protection Clause, civil rights statutes can be used to challenge discrimination based on a disparate impact theory. Title VI of the Civil Rights Act of 1964 bars discrimination on the basis of race, color, or national origin in any program receiving federal financial assistance. While the text of the statute, specifically § 601, prohibits intentional discrimination, § 602 of the law authorizes federal agencies to enact regulations that prohibit actions having a disproportionate, adverse impact on racial minorities. Pursuant to this provision, the Department of Health and Human Services has promulgated such regulations relating to

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44. See Kenneth Karst, Belonging to America: Equal Citizenship and the Constitution 154 (1989) ("When the discriminatory purpose doctrine is applied rigorously, its practical result is to convert the burden of proof of improper motive into a substitute rule for upholding governmental action.").

45. See Whitfield v. Oliver, 399 F. Supp. 348 (M.D. Ala. 1975), aff'd, Whitfield v. Burns, 431 U.S. 910 (1977). Whitfield was brought by Alabama AFDC recipients challenging racial discrimination in the administration of the state's welfare program. The plaintiffs claimed that the disparities in the allocation and payment by the Alabama Department of Pensions and Securities of AFDC (Alabama Department), which was received by a predominantly black population, and Old Age Insurance, which was received by a predominantly white population, were racially discriminatory. Recognizing that discriminatory purpose and effect must be proven by more than a "naked statistical argument," the United States District Court nevertheless found sufficient evidence of intentional race discrimination. This evidence included statistical disparities between the populations serviced by the two forms of public assistance, an increasing percentage of black AFDC recipients in conjunction with the increasingly preferential treatment of Old Age Insurance recipients, an awareness of Alabama officials of AFDC's racial composition, testimony by the former commissioner of the Alabama Department, the previous record of the Alabama Department with respect to racial matters, and the lack of an adequate official explanation for the disparities. Id. at 352-57. Significantly, the Court examined the long history of Alabama's discrimination against blacks, particularly through political disenfranchisement, and ruled that any explanation given for the disparity in funding of the AFDC and Old Age Insurance programs was insufficient. Id. at 357.

46. See Lawrence, supra note 42, at 322 (stating that "[t]raditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional...nor unintentional...").


welfare.\textsuperscript{50} The 1996 welfare law requires that states comply with the civil rights laws,\textsuperscript{51} and the Office for Civil Rights within the Department of Health and Human Services, which has enforcement powers under Title VI, receives, investigates and prosecutes complaints of Title VI violations in the welfare context.\textsuperscript{52} Until recently, individuals have been able to sue to enforce such violations as well.

In 2001, however, the Supreme Court curtailed the ability of individuals to enforce this civil rights protection. In \textit{Alexander v. Sandoval}, the Court rejected a challenge brought pursuant to the implementing regulations of Title VI and predicated on a disparate impact discrimination theory.\textsuperscript{53} The case challenged Alabama’s official policy of issuing the state driver’s license test in English only, alleging that the policy had a disparate impact on non-English speakers, thus discriminating against them based on their national origin.\textsuperscript{54} The plaintiff sued under regulations issued by the Departments of Justice and Transportation, pursuant to § 602 of Title VI, prohibiting recipients of federal funding from “utilizing criteria or methods of administration which have the effect of

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\item \textsuperscript{50} 45 C.F.R. § 80.3(b)(2) (2005). The Department of Health and Human Services regulations state, in pertinent part:

A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

\textit{Id.}

\item \textsuperscript{51} 42 U.S.C. § 608(d) (2005). That provision states, in relevant part:

The following [nondiscrimination] provisions of law shall apply to any program or activity which receives funds provided under this part:

(4) Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000(d) et seq.).

\textit{Id.}

\item \textsuperscript{52} See Letter of Findings, Docket No. 02-99-3130 (Office of Civil Rights, Region II, U.S. Dep’t of Health and Human Servs., Oct. 21, 1999) (finding that welfare agencies in New York City and two suburban counties routinely discriminated against persons of limited English proficiency and with hearing impairments, and offering the local agencies the opportunity to develop plans to serve such clients).

\item \textsuperscript{53} 532 U.S. 275.

\item \textsuperscript{54} \textit{Id.} at 278.
subjecting individuals to discrimination because of race, color, or national origin.  

No explicit private right of action exists under Title VI or its regulations, but the Court had previously approved of a lower court decision allowing for a private right of action to enforce § 601's prohibition on purposeful discrimination. Yet in Sandoval, the Court held that individuals may not bring private suits to enforce Title VI's disparate regulations, as authorized by § 602 of the law. Specifically, the Court held that neither the text nor the structure of § 602 evince an intent to create a private right of action, and that the regulations alone do not create such a right.

In his dissent, Justice Stevens suggested an alternate route for enforcing the regulations: an enforcement action through 42 U.S.C. § 1983. It is well-settled that certain rights created under federal law are enforceable through § 1983. Yet, § 1983 claims to enforce Title VI's disparate impact regulations have been rejected by at least two U.S. Courts of Appeals, and in its 2002 term, the Supreme Court appeared to issue the death knell for such claims as well.

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57. Sandoval, 532 U.S. at 293 (stating that "[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602").
58. Id. at 302 (Stevens, J., dissenting).
59. Maine v. Thiboutot, 448 U.S. 1, 6-8 (1980) (holding that causes of action under § 1983 are not limited to claims based on constitutional or equal rights violations, but rather certain rights created by federal statute are enforceable through § 1983 as well).
60. The Third Circuit, in South Camden Citizens in Action v. New Jersey Department of Environmental Protection, 274 F.3d 771 (3d Cir. 2001), considered a challenge by a community group in South Camden, New Jersey, to a state agency's decision to issue an air permit to a cement processing facility. The plaintiff community group alleged that the agency engaged in discrimination because of the disparate racial impact that the decision would have on the community. Having lost a private right of action to enforce
Thus, plaintiffs attempting to challenge race discrimination in the administration of federally funded programs are limited in their ability to hold states and other recipients of federal funds accountable for such discrimination under a disparate impact theory. Enforcement of Title VI’s implementing regulations now rests with federal agencies, including the Office for Civil Rights within the Department of Health and Human Services, leaving individuals dependent upon the government to challenge such discrimination. Underenforcement of Title VI by the federal government is a concern, however, particularly in the welfare context, where the federal government, via devolution, has ceded control to states and localities on the theory that they are best positioned to act in this area. As one commentator notes, Sandoval has “disarmed private attorneys general,” by precluding individuals from ensuring the full enforcement of Congress’ civil rights laws.61

Title VI’s implementing regulations after the Supreme Court’s decision in Sandoval, the plaintiff amended its complaint to bring a cause of action to enforce the regulations under § 1983. Id. at 776. The Third Circuit rejected the § 1983 claim, however, stating that because the disparate impact regulations create an interest that is not implicit in Title VI, which only prohibits intentional discrimination, they are not enforceable through § 1983 either. Id. at 788-89. The touchstone of the court’s analysis was that the regulations attempted to create a federal right beyond that intended by Congress in enacting Title VI. Id. at 783-84. The court held that “a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute.” Id. at 790.

The Supreme Court’s decision in Gonzaga University v. Doe, 536 U.S. 273 (2002), appears to ratify this limitation on plaintiffs’ ability to enforce Title VI disparate impact regulations through section 1983. In Gonzaga, the Court explained that the threshold inquiry in determining whether there lies a right enforceable through § 1983 rests on whether “Congress intended to create a federal right.” Id. at 283. The Court reaffirmed that “for a statute to create such federal rights, its text must be ‘phrased in terms of the persons benefited.’” Id. at 284 (quoting Cannon, 441 U.S. at 692 n.13). The Court noted that, for example, both the statutory provisions of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 “create individual rights because those statutes are phrased ‘with an unmistakable focus on the benefited class.’” Id. (quoting Cannon, 441 U.S. at 691). The Court’s finding in Sandoval that neither the text nor the structure of § 602 of Title VI evinces an intent to create a private right of action, 532 U.S. at 293, likely precludes § 1983 actions to enforce the disparate impact regulations as well. Indeed, in the wake of Gonzaga, the Ninth Circuit has so held. See Save Our Valley v. Sound Transit, 335 F.3d 932, 938 (9th Cir. 2003) (basing its decision that Department of Transportation’s disparate impact regulation, promulgated pursuant to Title VI, does not create an individual right enforceable through § 1983 on the Supreme Court’s decisions in Sandoval and Gonzaga). See also LeChuga v. Crosley, 228 F. Supp. 2d 1150, 1155 (D. Or. 2002) (no § 1983 claim to enforce regulations adopted by Department of Labor pursuant to 42 U.S.C. § 602); Ceaser v. Pataki, No. 98 Civ. 8532 (S.D.N.Y. Mar. 26, 2002) (no § 1983 claim to enforce disparate impact regulations adopted by the former New York State Department of Housing, Education and Welfare pursuant to 42 U.S.C. § 602).

III. Procedural Due Process Protections and Closing the Federalism Gap

As described previously, poor and low-income people of color may fall into the gap where devolution intersects with diminished protection against discrimination. Poor people come into frequent contact with the government, relying on government workers and offices to provide critical benefits, as well as coming under greater scrutiny for alleged infractions. Indeed, as Judge Patricia Wald states, "[t]he neediest of our citizens are most conspicuously dependent on government largesse for the satisfaction of their most basic needs." Devolution means that welfare workers play an even greater role in the lives of their clients. They connect recipients with support services, which are critical for recipients to transition successfully from welfare into the workforce, and help recipients identify appropriate training and education programs, job placement programs and other services that help them to move off of welfare. Yet, recent studies, discussed in greater detail below, suggest that devolution puts recipients at greater risk of being discriminated against because of personal and institutional race bias. To cite one example, a study of Wisconsin’s welfare system found “a consistent pattern of racial and ethnic disparities in the use of sanctions” against participants in the state’s welfare program.

Though devolution and caseworker discretion may in fact have significant adverse effects on poor people of color, it is difficult to prove that such effect is the result of intentional discrimination. And after Sandoval, private individuals are precluded from challenging, under Title VI, policies and practices based on their disparate and adverse impact on persons of color. These limitations suggest the need for additional protections against race discrimination in the welfare system.

62. For example, there is a strong association between receipt of welfare benefits and the involvement of the child welfare system in a family’s life. Indeed, children who receive welfare are at greater risk for involvement with the child welfare system. Morgan B. Ward Doran & Dorothy E. Roberts, Welfare Reform Ends in 2002: What’s Ahead for Low-Income and No-Income Families? Welfare Reform and Families in the Child Welfare System, 61 MD. L. REV. 386, 410 (2002) (citing research estimating that approximately 50 percent of the families referred to the child welfare system received welfare at the time of the referral).
64. Kathleen Mulligan-Hansel & Pamela S. Fendt, Unfair Sanctions: Does W-2 Punish People of Color?, 2002 INSTITUTE FOR WISCONSIN’S FUTURE 1, 3 (Oct. 2002). This and additional studies will be discussed more fully in Section III B, infra.
Since the 1970s, the Supreme Court has recognized that the procedural due process guarantees of the 14th Amendment provide essential protections for poor people. This section will examine courts' continuing recognition of procedural due process rights for the poor and explore how, consistent with the current federalism, such protections may be used to address race discrimination within a devolved welfare system.

A. Procedural Due Process and Race Discrimination

At its core, procedural due process prevents against the unfair administration of government benefits. Indeed, Goldberg v. Kelly, the seminal case affirming the right to procedural due process in the welfare context, was brought to remedy the unfairness inherent in the arbitrary administration of basic necessities in New York City's welfare system. This is consistent with preventing and remedying the disparate impact of standardless, discretionary decision making. Specifically, public assistance recipients who are disparately impacted by caseworkers and other welfare workers exercising their discretion in a racially biased manner can assert that such decisions are made possible by and result from a lack of

65. See Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24 (1981) (due process "expresses requirements of 'fundamental fairness'"). See also Carey v. Quern, 588 F.2d 230, 232 (7th Cir. 1978) ("In the context of eligibility for welfare assistance, due process requires at least that the assistance program be administered in such a way as to insure fairness and avoid the risk of arbitrary decision making.") (citing White v. Roughton, 530 F.2d 750, 753 (7th Cir. 1976)); Holmes v. New York City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968).

66. 397 U.S. 254 (1970). See DAVIS, supra note 7, at 87-90 (discussing the arbitrariness of New York City caseworkers' actions that Goldberg sought to remedy); Jeffrey, supra note 10, at 164 (noting that Goldberg responded to and remedied to a history of arbitrary administration of public assistance programs, due in large part to the unfettered discretion of caseworkers).

67. A due process claim may seek injunctive relief to remedy the discrimination. Compensatory damages, however, may be more difficult to obtain. While a due process claim itself may not provide for the damages that were available under Title VI, plaintiffs may, in some cases, be able to bring a § 1983 claim against municipalities for compensatory damages once they have established that a due process violation has occurred. The 11th Amendment precludes recovery of such compensatory damages against the state. Edelman v. Jordan, 415 U.S. 651 (1974). Where the state has delegated authority to administer welfare systems to localities, however, welfare administrators may not enjoy Eleventh Amendment immunity, and plaintiffs may be able to recover damages, although recovering such damages in the welfare context can be difficult. For a discussion of the challenges of obtaining compensatory and other damages in welfare, and in particular procedural due process, litigation, see Randal S. Jeffrey, Facilitating Welfare Rights Class Action Litigation: Putting Damages and Attorney's Fees to Work, 69 BROOK. L. REV. 281, 303-13 (2003).
appropriate procedures, in violation of the right to procedural due process. To state this constitutional claim, potential plaintiffs must satisfy the two-step due process inquiry: (1) whether they have been deprived of an interest in life, liberty or property; and (2) whether the appropriate process has been granted, i.e., whether the procedures followed were constitutionally sufficient. This section discusses each prong in turn.

1. Property Interest in the Receipt of Public Assistance Benefits in the Era of TANF

In Goldberg v. Kelly, the Supreme Court established that welfare recipients have a property interest in their receipt of welfare benefits which is protected by procedural due process. Welfare reform calls into question whether recipients can still claim a property interest in their benefits, yet there are strong arguments in favor of individuals' continued enjoyment of procedural due process protections.

Section 401(b) of the PRWORA states explicitly that “[t]his part shall not be interpreted to entitle any individual or family to assistance under any state program funded under this part.” The existence of an “entitlement” appeared essential to the Goldberg analysis; in establishing procedural due process protections for welfare recipients, the Court first had to confirm that welfare recipients have a property interest in their receipt of benefits. The Court found that welfare benefits are, indeed, a form of property created by the state, as they are “a matter of statutory entitlement for persons qualified to receive them.” Thus, individuals who meet the eligibility requirements for benefits have a “legitimate claim of entitlement” to any benefits provided under the welfare law, and may not be deprived of such benefits without due process

69. Id. at 262. In Goldberg, New York City AFDC recipients challenged a city policy which failed to afford them a pre-termination fair hearing. Id. at 256. According to the City’s policy, welfare recipients whose benefits were terminated were only allowed to challenge the loss of benefits after they were in fact lost. Id. at 257. Moreover, there was no provision for personal appearance before the reviewing official for oral presentation of evidence, or for confrontation and cross-examination. Id. at 259. The Court ruled that the post-termination procedures were insufficient to protect the welfare recipients' due process rights and ordered the City to institute pre-termination hearings. Id. at 264-66.
71. 397 U.S. at 261-62.
72. Id. at 262 n.8.
Because TANF contains language purporting to eliminate welfare benefits' "entitlement" status, it may be argued that, since states are no longer statutorily required to provide benefits to those deemed eligible for them, individuals no longer have a property interest in their benefits. Moreover, under TANF states are given wide latitude to reduce welfare programs and administrative protections, which could obviate the due process protections that arise from a statutory entitlement. The "no entitlement" language would appear to undermine the procedural due process protections that welfare recipients have relied upon since Goldberg.

Nevertheless, there is strong support for welfare recipients' continued constitutional right to due process in their receipt of benefits, TANF's language regarding "entitlements" notwithstanding. First, PRWORA's language cannot, on its own, eliminate due process protections. Moreover, in Board of Regents of State Colleges v. Roth, the Supreme Court clarified that determination of whether an individual has a property interest giving rise to due process protections hinges on the nature of the interest, specifically whether an individual has a reasonable expectation in the receipt of benefits, such that due process protections attach: "[t]o have a property interest in a government benefit, a person must have more than a unilateral expectation, she must have a legitimate claim of entitlement to it." Yet that "legitimate claim of entitlement" depends on the statute defining eligibility for the benefit. As the Court stated in Roth, "[p]roperty interests...are created and their dimensions 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." 76

Discretion plays a strong role in this determination. Courts are more likely to find that individuals have a reasonable expectation in the receipt of benefits where a statute contains mandatory, substantive criteria limiting the government's discretion. On the

73. Id.
74. In Cleveland Bd. of Educ. v. Lauderhill, the Supreme Court held that states are not able to define away procedural due process rights. 470 U.S. 532, 541 (1985). In that case, the Court held that while state law may be the source of property interests, it cannot trump the Constitution in determining the appropriate procedural safeguards that attach to the interest. Id.
75. 408 U.S. 564, 577 (1972).
76. Id. at 577.
77. Id. See Weston v. Cassata, 37 P.3d 469, 476 (Colo. Ct. App. 2001) (citing Roth for the proposition that "if the statutory scheme comprehensively sets forth the conditions under which claims of entitlement attach, and the individual recipient meets those conditions, the official decision maker merely acts as a conduit for distribution of
other hand, where government discretion is unfettered, individuals are more likely not to have a vested property interest in benefits, and thus procedural due process protections are not triggered. For example, in *Washington Legal Clinic for Homeless v. Barry,* a group of plaintiffs who were seeking emergency shelter asserted a procedural due process challenge. The Court of Appeals for the District of Columbia held that a local law's explicit statement that "nothing . . . shall be construed to create an entitlement in any homeless person or family to emergency shelter" was not dispositive of whether the plaintiffs did, in fact, have a property interest in their benefits giving rise to a procedural due process claim. Rather, in determining whether due process rights attach, the court held that it must first examine the amount of discretion the statute vested in the agency to allocate the shelter. Noting that the less discretion a state official has to determine a benefit, the more likely the benefit is a "property right," the court held that because, in that case, agency administrators did in fact have unfettered discretion in allocating available shelter to the homeless, the emergency shelter program in question did not create a constitutionally protected entitlement.

In the case of TANF, as discussed, *supra,* states do have a great deal of discretion in structuring and administering their welfare systems, as do caseworkers in handling individual cases. The federal law, however, contains several important limitations on that discretion, indicating that procedural due process still protects access to and receipt of benefits. Significantly, the law requires that states implementing TANF "set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment." And regulations implementing the TANF law require states to develop procedural safeguards in their administration of state welfare programs, as well as require states to submit fair hearing plans to the federal government for review.

welfare benefits. In such a situation, the potential recipient's compliance with the statutory standards, rather than the decision of an official, gives rise to the welfare benefit.

79. Id.
80. Id. at 38.
81. Id.
82. Id. at 37-38. The United States Court of Appeals for the Second Circuit recently addressed a similar issue with regards to New York's Home Elderly Assistance Program (HEAP). In *Kapps v. Wing,* 2005 U.S. App. LEXIS 5333 (2d Cir. Apr. 4, 2005), the Second Circuit held that applicants for HEAP benefits have a property interest in their benefits so long as federal funds are available, since state law imposes "discretion-restricting" guidelines for determining eligibility. 2005 U.S. App. LEXIS 5333, at *15-*22.
84. See 45 C.F.R. § 205.10(a)(1)(ii) (2004) ("Under this requirement hearings shall
Thus, while states have discretion over whether to provide welfare benefits, and caseworkers have discretion over significant decisions regarding individual applicants' and recipients' cases, that discretion is not unfettered; rather, the federal law explicitly requires states to set forth discretion-constraining standards, thereby preserving recipients' and applicants' procedural due process rights.\(^{85}\)

Indeed, while the "no entitlement" provision is perhaps, in the words of Professor Christine Cimini, "ambiguous,"\(^{86}\) Congress likely did not intend to eviscerate due process protections under the new law. For example, as Professor Cimini notes:

> [O]ne plausible interpretation is that the 'no entitlement' language is intended to refer to the time-limited nature of the TANF program, as opposed to the unlimited nature of the AFDC program. The provision could also mean that, as opposed to the AFDC system . . . when the block grant money awarded to a particular state is depleted, the recipient is no longer entitled to a benefit.\(^{87}\)

The "no entitlement" provision could also refer to the fact that an individual is ineligible for assistance unless he or she complies with work and other requirements.\(^{88}\)

Professor Cynthia R. Farina, too, notes that the term meet the due process standards set forth in the U.S. Supreme Court decision of Goldberg v. Kelly, 397 U.S. 254 (1970), and the standards set forth in this section.

> See also Cimini, supra note 10, at 112 (arguing that even with TANF's "no entitlement" provision, welfare recipients maintain a legally cognizable property interest in welfare benefits and are thus still entitled to procedural due process protections, as they have a legitimate expectation of benefits for which they are eligible).

It is important to note, however, that in the wake of the 1996 welfare reform law, several states have nevertheless restricted the due process rights of beneficiaries and applicants to their welfare programs. For example, in Wisconsin, the administrative agency for the welfare program in the state is only required to review agency decisions involving the denial of an application based on the determination of financial eligibility, and there is no requirement to continue benefits while an appeal is pending. Moreover, the program does not require prompt review and notification. \(\text{See Zietlow, supra note 10, at 37-38 (citing Wis. Stat. § 49.152(1) (1996)).}\)

\(^{85}\) As the Supreme Court of Appeals of West Virginia noted:

> [W]hile there is no absolute right to the receipt of cash assistance payment in the presence of other meaningful support, once the State has established a scheme for making such payment, the State's scheme must provide the program participants with adequate due process protections.


\(^{86}\) Cimini, supra note 10, at 111.

\(^{87}\) \textit{Id.}

\(^{88}\) \textit{Id.} at 112.
"entitlement" has several meanings, and the "no entitlement" provision of TANF perhaps undermined the entitlement status of welfare assistance in some ways unrelated to procedural due process protections. For example, an entitlement can refer to the right of individuals to enforce provisions of federal law against state welfare administrations, and the right of states to claim reimbursement from the federal government to defray the cost of providing assistance to eligible individuals, both of which TANF may indeed have eliminated. She notes, however, that an entitlement also denotes the right to certain procedural protections when there exist certain "discretion-constraining regulatory standards," as was at issue in Roth. This is the case with TANF, and, as Farina states, the "no entitlement" provision contained in TANF cannot undermine this type of entitlement, since it is for the judiciary and not the legislature to decide whether a statute creates a property interest.

Indeed, post-AFDC, courts recognize that the "no entitlement" clause in TANF is not dispositive in the due process determination. At least three courts addressing the issue have held that TANF benefits still fall within the protections of the Due Process Clause.

2. The Process Due in a Devolved Welfare System

The second inquiry in the due process analysis, what process is due, was first addressed in Goldberg v. Kelly but refined by the Court in Matthews v. Eldridge. The balancing test the Court announced in

89. Farina, supra note 10, at 618.
90. Id. Farina notes that it was this type of entitlement that was at issue in King v. Smith, 392 U.S. 309, 333 (1968), discussed infra note 138.
91. Farina, supra note 10, at 618.
92. Id.
93. Id.
94. Weston, 37 P.3d at 476-77 (holding that the "no entitlement" provision within TANF does not preclude finding of a protected property interest when other state statutes require that assistance be provided to those who meet statutory criteria); State of West Virginia ex rel. K.M. v. W. Va. Dep't of Health and Human Res., 212 W. Va. 783, 799 (2002) (while the "no entitlement" provision means that there is no absolute right to cash assistance, "once the state has established a scheme for making such payments, the State's scheme must provide the program participants with adequate due process protections"). See also Reynolds, 35 F. Supp. 2d at 341 (recognizing that plaintiffs "have an overarching property interest in their continued receipt of food stamps, Medicaid, and cash assistance").
95. 424 U.S. 319 (1976). At a minimum, due process requires notice and "the opportunity to be heard ... at a meaningful time and in a meaningful manner." Goldberg, 397 U.S. at 267 (citing Grannis v. Ordean, 234 U.S. 385, 394 (1914) and Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). See also Mullane v. Cent. Hanover Bank and Trust Co., 339 U.S. 306, 313 (1950) (holding that the Due Process Clause requires a deprivation of life, liberty, or property "be preceded by notice and opportunity for
that case requires courts to weigh:

The private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and . . . the Government's interest, including the function involved and the fiscal and administrative burdens that the additional requirement would entail.96

Where standardless discretionary caseworker determinations, i.e., insufficient procedural safeguards, disparately impact poor people of color by curtailing their access to benefits and services, the required process arguably is not provided.

a. The Critical Need for Benefits

First, under Goldberg, an individual's interest in receipt of assistance is significant, indeed dire.97 In recognizing the importance of procedural due process protections for welfare recipients, the Court in Goldberg stated that "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

hearing appropriate to the nature of the case"). In the context of welfare benefits, that means that the government must give welfare recipients timely and adequate notice detailing the reasons for a proposed benefits termination, and a pre-termination hearing. These pre-termination hearings must include the right to confront any adverse witnesses and present arguments and evidence orally, the right to counsel at the hearing, and the right to an impartial decision maker who makes decisions solely on the evidence presented at the pre-termination evidentiary hearing. Goldberg, 397 U.S. at 267-71. In determining what process was appropriate, the Court weighed the importance of welfare to poor people, and the government's interest both in providing benefits and in containing its fiscal and administrative costs. Id. at 264-66. Significantly, in weighing these interests, the Court recognized the critical importance of welfare benefits both to individuals and to the government; by meeting individuals' basic subsistence needs, welfare promotes participation in the community, guards against "societal malaise," and promotes the general welfare. Id. at 265.

The Court's due process inquiry was refined in the case of Matthews v. Eldridge, 424 U.S. 319 (1976). In that case, the Court affirmed that an individual has a statutorily created property interest in the continued receipt of benefits (in this case disability insurance), and that due process included the right to be heard at a meaningful time and in a meaningful manner. Id. at 332-33.


97. Goldberg, 397 U.S. at 264 ("For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care.").
waits." Where access to support services, rather than a wholesale termination of benefits, is at stake, an individual's interest is no less significant. Indeed, to a welfare recipient facing time limits, access to any support service, such as transportation subsidies, child care, training or education, which would facilitate finding and keeping self-supporting work, is essential.

b. Risk of Erroneous Deprivation, as Suggested by Disparate Impact

Second, where standardless decision making has a disparate adverse impact on poor people of color, potential plaintiffs can show that the lack of the necessary procedural safeguards raises a substantial risk of erroneous deprivation of benefits and services. In particular, potential plaintiffs can show that caseworkers, exercising discretion with little oversight or check on inherent biases or prejudices, make decisions which disproportionately harm people of color, curtailing access to benefits and services that would enable them to leave welfare for self-supporting work. This disparate impact indicates that people of color run a substantial risk of being erroneously deprived of welfare and supporting benefits.

Indeed, there is growing evidence that devolution has a disparate discriminatory impact on African American and Latino welfare recipients. In 2001, the United States Civil Rights Commission reported on the experiences of minorities within the U.S. welfare system, noting that:

[W]elfare reform has done little to eliminate historical discrimination in public assistance. People of color encounter insults and disrespect as they attempt to navigate the welfare system. Women are subjected to sexual inquisitions at welfare offices and sexual harassment at job activities. Individuals with limited English proficiency encounter language barriers. Immigrants are often turned away because of misconceptions.

98. Id. at 264.
A study by the Institute for Wisconsin’s Future examined whether the change in the racial and ethnic composition of the caseload of Wisconsin’s welfare program, Wisconsin Works, or W-2, was attributable to differential treatment of blacks and Latinos through the state’s sanctioning policy. Under the W-2 program, participants incur sanctions in the form of loss of benefits when they do not attend all of the activities required in their “employability plan.” The study found “a consistent pattern of racial and ethnic disparities in the use of sanctions against W-2 participants.” Specifically, the research revealed that African Americans and Latinos were 75% and almost 50% more likely, respectively, to be sanctioned than their white counterparts. The study cited subjective program rules as a possible cause for the disparity, noting that individual welfare agencies and case-managers are granted vast discretion to determine when and whether a participant is sanctioned and what constitutes a realistic employability plan in the first instance. Caseworkers have the discretion to determine what supports and services a family may receive and what they are required to do in return, including whether a family loses benefits due to absence from an assigned work activity. The researchers concluded that the disparity in sanctioning rates “reveal[s] a potential lack of fairness within W-2 because of racial or ethnic bias.”

A study of Virginia welfare recipients found similar racial disparities. The study looked at two rural counties in northern Virginia and the interactions between the welfare recipients and their caseworkers to determine whether black and white welfare clients received similar or different support from their caseworkers. It found that black welfare recipients reported significantly less discretionary transportation assistance and less

102. Id. at 5.
103. Id. at i.
104. Id. at i–ii.
105. Id.
106. Id. at iii.
108. Id. at 25–26.
support from caseworkers in accessing education than white recipients.\textsuperscript{109} Moreover, the study found that fewer black recipients received notification of potential jobs from their caseworkers and were less likely to think that caseworkers treat similarly situated black and white recipients fairly.\textsuperscript{110} For example, the study found that 41\% of white recipients, but none of the black recipients, were encouraged by their caseworkers to pursue or complete their education.\textsuperscript{111} And 47\% of white recipients and no black recipients reported receiving transportation assistance other than gas vouchers.\textsuperscript{112} The report concluded that “[t]aken together, white welfare recipients benefit considerably from the discretionary actions of their caseworkers.”\textsuperscript{113}

Another study, surveying individuals who had come into contact with the welfare system in thirteen states, found that as a result of welfare reform and devolution to the state and local entities, individuals suffered differential treatment due to the arbitrary nature of the systems, and widespread discrimination based on race, gender, language, and national origin.\textsuperscript{114} Moreover, the study found that significantly more people of color than whites were required to perform a work activity in order to receive benefits,\textsuperscript{115} and blacks and Native Americans were more likely to have been sanctioned than members of other racial groups.\textsuperscript{116}

Evidence of disparate racial impact can strongly suggest a real risk of an “erroneous deprivation” of benefits, resulting from caseworkers making arbitrary decisions and exercising unregulated discretion in sanctioning, access to support services, and a host of other determinations regarding eligibility and benefits. Similar to the way in which it raises the inference of discrimination in the employment context,\textsuperscript{117} evidence of disparate impact in the welfare context suggests that decision makers are making prohibited, thus erroneous, determinations that deprive individuals of critical benefits and services. Accordingly, plaintiffs able to show evidence of such a disparate, adverse racial impact can argue that standardless and discretionary decision making raises the risk of an erroneous deprivation of benefits sufficient to satisfy the second

\textsuperscript{109.} Id. at 31.
\textsuperscript{110.} Id. at 31-32.
\textsuperscript{111.} Id. at 28.
\textsuperscript{112.} Id. at 29.
\textsuperscript{113.} Id. at 32.
\textsuperscript{114.} Gordon, Cruel and Unusual, supra note 100, at 33-35.
\textsuperscript{115.} Id. at 34.
\textsuperscript{116.} Id.
prong of the Mathews v. Eldridge analysis.

c. Value of Additional and Substitute Procedures

Numerous procedures could ameliorate or lessen the risk of the disparate impact that may result from discretionary decision making. For example, social service agencies could issue guidance to workers on standards and procedures as well as provide ongoing training on eligibility requirements and available support services for which all recipients may be eligible. They could also provide extensive and ongoing training concerning prohibited actions. Agencies could be required to keep statistical data to track, by race, the measurable but discretionary assistance that individuals receive, as well as be mandated to adopt a grievance procedure for race discrimination allegations pertaining to individual caseworker determinations. Moreover, they could be required to implement a review mechanism to ensure that all recipients have access to available programs and are not being unfairly steered away from more helpful or appropriate ones.

The type of remedy appropriate for a procedural due process violation will certainly depend upon the type of discretion that has resulted in a racial disparity. In some cases, a disparate racial impact will result where a state or locality allows for caseworker discretion, but places some standards on the exercise of that discretion. For example, caseworkers may have discretion to refer recipients to a particular job training program, but only if they meet certain criteria. If a disproportionate number of people of color are not referred to a particularly favorable program, an appropriate remedy might require the state or local district to set a benchmark, or quota, to ensure that people of color are not disproportionately excluded from the program.

In other cases, where the district allows complete discretion over a decision and sets no standards for exercising the decision, a different remedy may be appropriate. For example, the district may allow caseworkers to excuse recipients who show "good cause" for missing an appointment, yet provide no definition of "good cause," leaving it entirely to the discretion of caseworkers. If people of color are denied "good cause" excuses in numbers disproportionate to whites, then perhaps a more appropriate remedy would be a requirement that the district set more specific standards and implement a review mechanism to oversee caseworker decisions.

118. See U.S. Commission on Civil Rights, supra note 100.
119. See Gooden, supra note 107, at 32.
120. See U.S. Commission on Civil Rights, supra note 100.
The imposition of a variety of procedures and policies such as these would provide a check on caseworkers' discretion and stem the potential for race discrimination.

d. Government Interest in Allowing Caseworker Discretion

The government likely has a strong interest in vesting significant discretionary authority in ground-level caseworkers. When caseworkers are able to exercise discretion in individual cases, they have the flexibility to tailor services and benefits to the needs of each applicant and recipient. However, the government's interest in the flexibility that stems from discretionary decision making is not necessarily diminished by adopting the procedural safeguards suggested here. For example, standards and guidelines imposed on caseworkers' exercise of discretion can aid caseworkers in making individual determinations. They do not prohibit them from making such decisions altogether. Likewise, by tracking discretionary decisions, the government ensures that individual determinations are made fairly and without a discriminatory impact, but does not eliminate the ability of caseworkers to make such determinations. Providing training on eligibility and availability for support services as well as on prohibited actions ensures that caseworkers are fully informed in the decisions that they make, but does not constrain them from making decisions that are appropriate.

The additional procedures described above may entail some cost to agencies. The cost may not be prohibitive or even burdensome, however, and in fact in the long run may result in savings. Individuals will likely be better able to achieve economic self-sufficiency and thus have less need for public assistance if they receive the appropriate and necessary support services, training and job placement assistance.

B. Procedural Due Process Protections for the Poor and Federalism

Goldberg v. Kelly was the culmination of years of work by poverty lawyers to establish constitutional protections for the poor. The case solidified procedural due process as a tool for enforcing the rights of the poor in federal court, and in fact the

121. See Davis, supra note 7 (discussing the legal strategy to establish a constitutional right to live, which resulted in baseline protections, including the Due Process protections recognized in Goldberg v. Kelly).

122. See Jeffrey, supra note 10, at 289-90 (using client stories to illustrate the impact that lack of due process has on poor families). See also Daniels v. Woodbury County, 742
pre-termination hearing mandated in *Goldberg* was codified in the AFDC statute.\textsuperscript{123} Procedural due process is thus widely recognized as an essential protection for welfare recipients.\textsuperscript{124} As one commentator notes, *Goldberg* and its explication of due process is perhaps the more enduring of the early welfare cases: "*Goldberg* may provide the most useful weapon to poverty advocates in the 1990s and beyond to assure that the poor are treated fairly and equitably by welfare administrators."\textsuperscript{125}

In the context of block granting, devolution, and limited federal statutory protections, procedural due process protections also further the principles underlying federalism by guarding against state and local abuses, namely racial discrimination.

The story of race discrimination within the U.S. welfare system is well-told.\textsuperscript{126} In short, although the 1935 Social Security Act instituted a federal role for welfare and significantly expanded the federal government's role and responsibility in, as well as commitment of resources to, the provision of services for the poor,\textsuperscript{127}

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\item F.2d 1128 (8th Cir. 1984) (holding that county administered its general relief program in violation of due process by arbitrarily denying benefits and failing to give notice of appeal rights to applicants and recipients).
\item 42 U.S.C. § 302(a)(4) (2005) ("A state plan for aid and services to needy families and children must . . . provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted on with reasonable promptness.").
\item See Rebecca Zietlow, Two Wrongs Don't Add Up to Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures, 45 Am. U. L. Rev. 1111, 1114 (1996) (discussing importance of structured right, in particular procedural due process rights, for low-income people, particularly women of color); see also Cesar A. Persales, The Fair Hearing Process: Guardian of the Social Service System, 56 Brook. L. Rev. 889, 892 (1990) ("In the twenty years since *Goldberg*, the concept of due process has been woven into the fabric of our social welfare policy and institutionalized so well that it permeates the practices and policies of the [New York Department of Social Services] and local social services districts. This is due in great measure to the fair hearing process."); see also Nancy Morawetz, A Due Process Primer: Litigating Government Benefit Cases in the Block Grant Era, 30 Clearinghouse Rev. 97, 108 (1996) (discussing the importance of pre-termination hearings in light of the discretion wielded by eligibility workers). For a discussion of the cases elaborating on the due process protections that apply to public assistance programs and recipients, see Jeffrey, supra note 10, at 289.
\item See Lieberman, supra note 126, at 48-56. Prior to the federal welfare law in 1935, public assistance was purely a local matter, and many localities in fact had in place programs that discriminated against people who were not members of the community. Indeed, colonial poor laws were modeled on the English poor laws, which stressed local control and responsibility for the poor; poor laws focused on distinguishing local poor
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the federal law was brokered by compromise, particularly with the Southern States. As a result, the law effectively excluded certain populations, particularly African Americans, from coverage under its more generous, fully federally funded programs, and allowed vast state discretion and local control over the programs that did include African Americans, enabling states to perpetuate discrimination through lower benefit levels and tighter eligibility rules for people of color.128

Established as a small program within the Social Security Act, Aid to Dependent Children (AFDC's precursor) is particularly rooted in racial stereotypes and discrimination. The program was originally enacted as a nationalized version of the Mother's Pension, which was intended to assist white widowed women in caring for their children at home by making it unnecessary for them to participate in the labor market.129 These families were deemed "deserving" of assistance because of the important role that society thought white women played in providing a good home for their children.130

The population of ADC changed dramatically after World War II from that of white widowed women to women whose husbands had deserted or divorced them, as well as women who had never

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128. See QUADAGNO, supra note 126 at 21-119. For example, the old age insurance program, the Act's only exclusively federally funded program, protected workers aged 65 and older from loss of income due to retirement, yet contained strict eligibility rules which categorically denied assistance to workers in certain industries dominated by African Americans, including agricultural workers and domestic workers, thereby effectively excluding African Americans from coverage. Id. at 21. And by allowing local control over many programs, the Social Security Act ensured that Southern States could set eligibility rules and benefit levels that effectively excluded African Americans, ensuring their availability for low-wage labor markets such as sharecropping and domestic service, and allowing for the continued unequal treatment of blacks and whites through differential funding for various Social Security programs. See JILL QUADAGNO, THE TRANSFORMATION OF OLD AGE SECURITY: CLASS POLITICS IN THE AMERICAN WELFARE STATE 16 (1998); see also MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 318 (1988); LIEBERMAN, supra note 126, at 9.


130. Williams, supra note 129, at 723. See also MICHAEL KATZ, THE UNDESERVING POOR: FROM THE WAR ON THE POOR TO THE WAR ON WELFARE 68 (1989). "Deserving poor" was used to distinguish between those whom society considers "worthy" of assistance from those who are not. "Upright widows with children and old women remained the quintessential worthy poor." Id. at 67. See also ABRAMOVITZ, supra note 128, at 319.
married. The racial makeup of ADC families changed, too. The percentage of families receiving ADC who were black increased from 31% in 1950 to 48% in 1961. ADC shifted from a program perceived as assistance for the "deserving poor" to one perceived as being for the "undeserving poor." As historian Michael Katz notes, "In AFDC, race, gender, and relief fused into a powerful and degraded image that dominated attacks on the program and its participants from the 1960s through its abolition by Congress in 1996." With the changed demographics of ADC came increased eligibility restrictions aimed at preventing the program from being a means of support for black, divorced, deserted, and never married mothers. For example, "suitable home rules" were used to disqualify children on the basis of the alleged immorality of their mothers; "man in the house" and "substitute father" rules allowed welfare workers to make unannounced visits to recipients' homes and deny assistance to any woman found to be living with a man. Black women and their children were more vulnerable to these rules and their amorphous and discretionary definitions, and thus these measures disproportionately excluded black women and their children from ADC support.

131. KATZ, THE UNDESERVING POOR, supra note 130, at 68. This change was due in part to a change in the structure of the Social Security Act program. A 1939 amendment to the Social Security Act allowed widows and children of workers who had been eligible for old age insurance to receive benefits from the more generous old age insurance program, leaving ADC as a "last resort" for divorced, deserted and never married women. Michael Katz, Race, Poverty and Welfare: DuBois's Legacy for Policy, 568 ANNALS AM. ACAD. POL. & SOC. SCI. 111, 121 (2000); QUADAGNO, THE COLOR OF WELFARE, supra note 126, at 119.

132. ABRAMOVITZ, supra note 128, at 321.

133. KATZ, THE UNDESERVING POOR, supra note 130, at 68-69.

134. Id. at 121.

135. ABRAMOVITZ, supra note 128, at 323-26. These rules were applied broadly, enabling the state to deny assistance to single mothers who took in male boarders, cohabited with men, refused to reveal the identity of fathers of extramarital children, or "whose homes and behaviors simply did not look right to the investigating worker." Id. at 324.

136. QUADAGNO, THE COLOR OF WELFARE, supra note 126, at 100-151; ABRAMOVITZ, supra note 128, at 326. Certain current welfare policies are arguably vestiges of the racial stereotypes and ideologies that have historically undergirded the welfare system. For example, the family cap, or child exclusion provision, has been adopted in some form by 23 states to deny an incremental increase of public assistance to children born into families that are already receiving welfare. See Jodie Levin-Epstein, Lifting the Lid of the Family Cap, States Revisit Problematic Policy for Welfare Mothers, Center for Law and Social Policy 3, at http://www.clasp.org/publications/family_cap_brf.pdf (Dec. 2003) (listing states with family cap provisions). Many commentators argue that these policies are justified and informed in large part by the grossly mythologized "welfare queen," a black woman who sits at home and "breeds children at the expense of the taxpayers in
Accordingly, although the welfare law of 1996 was a watershed moment in terms of allowing state and local discretion over welfare law and policy, there has always been some element of local discretion in the administration of welfare programs. And this state and local discretionary treatment of the poor has long raised constitutional concerns, including concerns of discrimination. For example, the plaintiffs' lawyers in King v. Smith\textsuperscript{137} sought to prohibit Alabama and other Southern states from invading the privacy of and discriminating against African American public assistance recipients through "man in the house" and "substitute father" rules.\textsuperscript{138} Though deciding the matter on statutory grounds, the Supreme Court in King v. Smith acknowledged that these rules were often used to disguise systemic racism.\textsuperscript{139}

It is precisely this type of discrimination at the state and local level that federalism is designed to protect against. Although often described in terms of protecting states' rights, federalism was, in fact, originally conceived of as a way of protecting against discrimination against politically vulnerable populations: protecting the disadvantaged from the "tyranny of the state majority."\textsuperscript{140} Indeed, as Professor Sheryll Cashin notes, James Madison's original vision of dual sovereignty was inspired by the need to protect against local prejudices going unchecked by outside


Likewise, eligibility restrictions on most immigrants' receipt of public assistance is arguably informed by the perception that immigrants, largely Latino, flock to the United States to derive benefit from tax-paying Americans, as well as the desire to discourage immigrants of color from coming to the United States in the first place. See Kenneth J. Neubeck & Noel A. Cazenave, Welfare Racism and its Consequences, in WORK, WELFARE AND POLITICS 35, 38-39 (Francis Fox Piven et al. eds., 2002).

\textsuperscript{138} King challenged Alabama's substitute father rule, whereby a single mother on welfare could not cohabit with a man, regardless of whether he provided any support for the family. Alabama's substitute father provision was one type of "man-in-the-house" rule common in the Southern States. \textit{Id.} King was the first welfare case decided by the United States Supreme Court. A Brandeis brief provided to the Court in the case informed the Court that 182 of the 184 welfare cases closed under the substitute father provision in one county in Alabama from July 1964 to June 1966 involved black families, and that in June 1966, in seven Alabama counties, all of the more than 600 recipients whose welfare cases were closed were black. DAVIS, supra note 7, at 64.

\textsuperscript{139} 392 U.S. at 321-22.

forces. Procedural due process, grounded in the 14th Amendment, may protect against such discrimination.

Of course, there are several hurdles to the approach explored here. First, its success hinges upon courts recognizing welfare recipients' property interest in obtaining welfare benefits and support services from caseworkers with substantial discretionary authority. Second, such a claim would necessarily involve a showing of disparate racial impact sufficient to show that discretionary decision making raises a substantial risk of the erroneous deprivation of benefits or access to support services. This may limit the utility of the strategy to instances in which comparative studies are possible, and may pose a difficult burden of proof for plaintiffs alleging race discrimination.

Moreover, expanding procedural due process protections might occur at the expense of more substantive rights. Professor Rebecca Zietlow, who writes extensively about the procedural due process rights of the poor, argues that the original promise of Goldberg has not been realized, but rather Goldberg and its progeny have instituted a "formalist" approach which has resulted in "a bureaucratic state developed with an elaborate appellate process that is alienating for many welfare recipients." She nevertheless recognizes the value of procedural, formal protections for poor people, as the administrative process may be one of the few available means of redress, and the "notion of formal rights continues to resonate for the poor and the disenfranchised." Thus, procedural due process, as explored here, offers an important check on state and local discretion, with the potential of stemming race discrimination and consistent with the protections envisioned by a dual federalist system.

141. Id. (citing The Federalist No. 10 (James Madison)). Professor Cashin argues that federal protections for the poor can be provided through minimum national standards, rigorous evaluation, and reporting requirements. Id. at 625. See also James W. Fox, Citizenship, Poverty and Federalism, 1787-1882, 60 U. Pitt. L. Rev. 412, 569-77 (1999) (arguing that the national government has authority over fundamental aspects of citizenship, and egalitarian impulses upon which the country were founded include full citizenship rights extended to the poor).

142. Zietlow, supra note 10, at 23. Zietlow further argues that the formalist approach to due process may hurt rather than help the poor because "they serve to mask substantive injustice . . . . Thus, process has become part of the problem to the extent that it has become a means to legitimize a system that is fundamentally unfair." Id. at 26.

143. Id. at 31-32. Moreover, by focusing on fairness, procedural due process protections may spill over to enhance substantive rights. Zietlow argues that the Court is capable of applying and indeed has applied an "organic" approach to process, based on "substantive communitarian notion[s] of fairness" rather than the individualist formalist approach which it has adopted in more recent years. Id. at 51-52.
Conclusion

Block granting of the welfare program was the first step towards devolution of the safety net. President George W. Bush's proposed budget for fiscal year 2004 included proposals for block granting other low-income programs, including Medicaid and the State Child Health Insurance Program (SCHIP), Section 8 housing vouchers, Unemployment Insurance, Head Start, child welfare, and job training. In 2005, a House Ways and Means Subcommittee passed a version of welfare reauthorization bill, H.R. 240, which contains a proposal to allow five states to elect a food stamp block grant in lieu of the federal Food Stamp program. Thus, devolution raises concerns—namely accountability, politics, and discretion—that extend to a large swath of the country's social welfare system.

Invoking procedural due process protections may address some of these concerns. Indeed, consistent with the historical importance of procedural protections for the poor, and with courts' continuing recognition of the importance of preserving federal protections to guard against local and state abuse of the poor, procedural due process can address race discrimination in a devolved welfare system and perhaps bridge the gap between limited federal statutory rights and devolution of the safety net.

