

# THE CONSTITUTIONAL RIGHT TO TIMELY PROCESSING OF WELFARE APPLICATIONS

## I

### INTRODUCTION

By means of public assistance legislation, the federal government cooperates with the states to assist individuals with low incomes. One such form of assistance is Aid to Families with Dependent Children (AFDC).<sup>1</sup> The statute which authorizes this program requires that support be furnished with reasonable promptness to qualified individuals.<sup>2</sup> Yet despite the clearly stated law, some state agencies remain unable or unwilling to process applications within the specified time period. This delay on the part of the state denies some applicants the benefits they are otherwise entitled to receive. The purposes of this Note will be: 1) to show that such a denial constitutes a deprivation of a property right protected by the due process clause of the fourteenth amendment,<sup>3</sup> and 2) to suggest some possible remedies to redress the deprivation of this right.

## II

### *GOLDBERG v. KELLY*: FOCAL POINT FOR THE DISCUSSION OF DUE PROCESS FOR RECIPIENTS OF GOVERNMENT BENEFITS

A discussion of the contention that applicants for welfare benefits have a right to timely processing of their applications rooted in the due process clause should originate with the landmark case of *Goldberg v. Kelly*.<sup>4</sup> In *Goldberg*, the Supreme Court affirmed a three-judge district court's ruling<sup>5</sup> that an evidentiary hearing was constitutionally required prior to the termination of AFDC benefits. The Court declared that welfare benefits are a matter of statutory entitlement for persons qualified to receive them. The Court observed that the extent to which a recipient must receive the protection of procedural due process is dependent upon whether the interest of the recipient in avoiding a loss of benefits outweighs the interest of the government in summary adjudication of welfare claims.<sup>6</sup> A crucial factor in this determination was the Court's

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1. Social Security Act §§ 401-10, 42 U.S.C. §§ 601-10 (1970).

2. 42 U.S.C. § 602(a)(10) (1970).

3. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

4. 397 U.S. 254 (1970).

5. *Kelly v. Wyman*, 294 F. Supp. 893, 901 (S.D.N.Y. 1968).

6. 397 U.S. at 263.

realization that cutting off welfare benefits “may deprive an *eligible* recipient of the very means by which to live while he waits.”<sup>7</sup> Additionally, the Court noted that reliance upon welfare for daily needs impairs the ability of the recipient deprived of these benefits to pursue his or her grievance within the welfare bureaucracy. The Court therefore concluded that the interest of the *Goldberg* plaintiffs in receiving uninterrupted payments, combined with the interest of the state in ensuring that payments are not erroneously terminated, clearly outweighed the state’s interest in avoiding the increased fiscal and administrative burdens required by pretermination evidentiary hearings.<sup>8</sup>

*Goldberg v. Kelly* provided a significant breakthrough in establishing the constitutional rights of welfare recipients. But are the safeguards mandated by *Goldberg* applicable to persons who have applied for, but have not yet begun to receive welfare benefits? Although the Supreme Court has not addressed itself to this issue, the question has been raised in several lower federal courts. Two cases support the extension of procedural due process to applicants for government benefits. In *Barnett v. Lindsay*<sup>9</sup> the district court stated that the rule enunciated in *Goldberg* was grounded on the premise that eligible individuals are statutorily entitled to welfare benefits. The court reasoned that the rights connected with this entitlement arise as soon as the statutorily defined need is present, and not after the payment of benefits has commenced. Consequently, the court held that the procedural protections of *Goldberg* must be applied “whenever the proposed administrative action contemplates the denial or termination of statutorily created welfare benefits.”<sup>10</sup> The court granted an injunction forbidding the State of Utah from terminating, denying or altering aid to an applicant or recipient without providing notice and an opportunity for a hearing. The issue before the court in *Alexander v. Silverman*<sup>11</sup> was whether applicants for welfare were constitutionally entitled to receive a written statement of reasons and an administrative hearing on the question of eligibility after their application for welfare had been denied. The court, relying on *Goldberg*, held that they were so entitled.

No less than the welfare recipients in *Goldberg*, applicants deprived of AFDC benefits solely as a result of a delay in the processing of applications may be without the means by which to live while they await an initial decision on eligibility. When a state attempts to terminate the payment of benefits to a *current* recipient, it is required to argue that a change of circumstances has rendered that recipient ineligible for future benefits. However, the state is unable to make any such argument with respect to initial applicants whose eligibility is uncertain because their application has not been processed in a timely manner. It is important that *applicants* for AFDC receive the protection of the due process clause if *Goldberg v. Kelly* is to have vitality beyond the specific context of the termination of government benefits.

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7. *Id.* at 264 (emphasis in original).

8. *Id.* at 266.

9. 319 F. Supp. 610 (D. Utah 1970).

10. *Id.* at 612.

11. 356 F. Supp. 1179 (E.D. Wis. 1973).

### III

## FEDERAL STATUTORY FRAMEWORK OF THE AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM

The Supreme Court noted in *King v. Smith*<sup>12</sup> that "(t)he AFDC program is based on a scheme of cooperative federalism."<sup>13</sup> Although the states are not required to participate in the program, those which do so are required to submit a plan to the Secretary of Health, Education and Welfare for approval.<sup>14</sup> This plan must conform with certain provisions of the Social Security Act<sup>15</sup> and the regulations promulgated by HEW.<sup>16</sup> A subsection of the statute provides "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."<sup>17</sup> Regulations adopted pursuant to the statute provide that "reasonable promptness" means that the period between the date of application and the date of the mailing of the first assistance check or the notification of denial shall not exceed 45 days.<sup>18</sup>

These statutory and regulatory provisions have provided the basis for challenges to delays in rendering eligibility decisions. The plaintiffs in *Rodriguez v. Swank*<sup>19</sup> challenged a state regulation which provided that assistance payments to new applicants could not be made (with certain exceptions not relevant here) for months prior to the month in which the application was approved. The plaintiff applied for assistance in September, 1969, but received no benefits for months before her application was approved in December. The Illinois procedure often resulted in delays longer than the 30 days allowed by the federal regulation then in effect. The court ruled that because the federal regulations at issue were valid and binding upon the defendants, the complaint stated a valid cause of action, and it rejected the defendants' argument that the complaint was deficient in that it failed to allege that the delay was not the fault of the plaintiffs. The court placed the burden for explaining the delay on the state officials.

State eligibility regulations which differ from those promulgated by HEW have also been the subject of litigation. The plaintiffs in *Like v. Carter*<sup>20</sup> were applicants for various forms of assistance under the Social Security Act. They brought a class action challenging the failure by the Missouri Department of Public Health and Welfare to process applications in a timely manner. The plaintiffs argued that the state's failure to render eligibility decisions within the time specified in the regulations violated their rights under the due process and equal protection clauses and the Social Security Act. The court noted that the Missouri regulation adhered to the time standards established by HEW except for the provision "unless there are unusual or extreme circumstances."<sup>21</sup> The

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12. 392 U.S. 309 (1968).

13. *Id.* at 316.

14. 42 U.S.C. § 601 (1970).

15. Social Security Act §§ 401-10, 42 U.S.C. §§ 601-10 (1970).

16. 45 C.F.R. § 206.10(a) (1975).

17. 42 U.S.C. § 602(a)(10) (1970).

18. 45 C.F.R. § 206.10(a)(3)(i) (1975). Prior to 1973 this time period was 30 days.

19. 318 F. Supp. 289 (N.D. Ill. 1970), *aff'd*, 403 U.S. 901 (1971).

20. 448 F.2d 798 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045 (1972).

21. MISSOURI DIV. OF WELFARE, REGULATION NO. 4.1 (1968).

defendant state and local welfare officials agreed that applications should be acted upon within 30 days, but argued that the "extreme circumstances" exception should be construed to excuse delays brought about by the large number of applicants and the inability of the state to employ a sufficient number of trained caseworkers. The court flatly rejected this argument and declared that the state's interpretation of its own regulation completely nullified the requirement of timely processing contained in the federal and state regulations. The court held that the plaintiffs were entitled to a declaratory judgment that applications for public assistance must be processed within 30 days. The court also held that, if the processing took longer than 30 days, the applicants were entitled to retroactive relief beginning on the thirty-first day after their applications were filed.<sup>22</sup>

Although *Like* provides further recognition of the right to have applications timely processed, the opinion of the Eighth Circuit can be criticized in several respects. The plaintiffs alleged that their rights had been abridged under both the equal protection and due process clauses and the Social Security Act, but the court did not articulate upon which of these bases its opinion was premised. The court also offered little guidance to the lower court in fashioning the proper remedy to be awarded on remand. One commentator<sup>23</sup> has suggested that the court in *Like* should have employed a balancing process to determine if the plaintiffs' rights under the due process clause had been violated, taking into account the nature of the governmental function, the rationale of the regulation in question, the extent of the potential injury to applicants as a result of the delay in making eligibility decisions, and the alternative methods of adhering to the federal procedure. While such a balancing act has the merit of attempting to establish some kind of objective standards, it seems to ignore the fact that HEW has already weighed the competing factors in drafting the applicable regulations. Since the 45 day limit of the regulations arguably represents an attempt to balance the competing interests, it appears unwise to encourage the courts to dilute the efficacy of the 45 day limit by repeating the balancing process.

Another case brought under the statutory provisions concerned emergency aid. States are required to make such aid available immediately to applicants for AFDC to provide for the extraordinary needs of the applicants until a decision on eligibility is rendered.<sup>24</sup> The plaintiffs in *Adens v. Sailer*<sup>25</sup> sought such emergency aid from local welfare officials, but the method used by those officials to disburse aid checks resulted in delays in receiving the checks. In a decision which mandated timely processing, the court noted that the delay was due largely to administrative sloppiness and misapplication of the rules by the local welfare center.<sup>26</sup> The court ordered that action be taken at once to rectify the situation and threatened to issue an injunction cutting off federal welfare

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22. The use of retroactive benefits in the types of situations discussed herein has been precluded by *Edelman v. Jordan*, 415 U.S. 651 (1974). See text accompanying notes 96-105 *infra*.

23. Note, *Constitutional Law—Due Process and Compliance With Processing Requirements for Welfare Applications*, 50 N.C.L. REV. 673 (1972).

24. 45 C.F.R. § 233.120(a) (1975).

25. 312 F. Supp. 923 (E.D. Pa. 1970).

26. *Id.* at 925-26.

funds to the State of Pennsylvania if the distribution procedure were not purged of its deficiencies.

An examination of the above cases demonstrates that the federal courts have recognized the right of applicants for AFDC and other forms of government assistance to begin receiving benefits within a reasonable time period after application, as specified in the federal regulations. However these courts have been reluctant to articulate clearly the constitutional basis of such a right and have been hesitant to use their equity powers to fashion forceful remedies to help effectuate this right.

#### IV

#### USE OF DUE PROCESS AS A JURISDICTIONAL TOOL TO ALLOW LITIGATION OF A STATUTORY CLAIM

It has been argued in this Note that the failure of a state agency to process applications for AFDC benefits within the time period established by federal regulations constitutes the deprivation of a property right protected by the due process clause. In addition to the substantive merit of this claim, the assertion of a denial of due process can serve a valuable procedural purpose as well.

##### A. *Civil Rights Act Jurisdiction*

Most claims involving welfare benefits fail to satisfy directly the \$10,000 jurisdictional amount required to litigate a "federal question" in the federal courts.<sup>27</sup> Therefore, jurisdiction must be predicated on a federal statute specifically granting jurisdiction.<sup>28</sup> Actions brought by welfare recipients against a state usually contain two separate claims: a statutory claim that the state practice in question is inconsistent with a federal statute or regulation, and a constitutional claim, usually premised on the due process or equal protection clause. A court will often decide the statutory claim first, thereby eliminating the necessity for deciding the constitutional claim.<sup>29</sup> However, the constitutional claim is usually needed to give the court jurisdiction over the entire action under 28 U.S.C. § 1343(3).

The Civil Rights Act<sup>30</sup> seeks to protect persons against the deprivation of

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27. 28 U.S.C. § 1331(a) (1970), provides in full as follows:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28. 28 U.S.C. § 1343(3) (1970), provides in full as follows:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

29. The practice of deciding a statutory claim first is often traced to the concurring opinion of Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936). This judicially self-imposed doctrine is aimed at avoiding unnecessary constitutional adjudication.

30. 42 U.S.C. § 1983 (1970), provides in full as follows:

rights secured by the Constitution and laws of the United States. Its jurisdictional counterpart gives the federal courts jurisdiction over actions alleging a deprivation of rights secured by the Constitution or a federal statute *providing for equal rights*. Since the statute creating the cause of action speaks generally of "laws" while the jurisdictional statute speaks only of "Acts of Congress providing for equal rights," some commentators have argued that the federal courts lack jurisdiction over statutory claims not involving equal rights unless a violation of constitutional rights is also pleaded.<sup>31</sup> It is very difficult to argue that the Social Security Act, upon which many welfare claims are based, is a statute providing for equal rights.<sup>32</sup> It is also difficult to contend that section 1983 is an "Act of Congress providing for equal rights."<sup>33</sup> Consequently jurisdiction must be found elsewhere.

### B. Federal Question Jurisdiction

It is possible that jurisdiction over an action to assert the rights of applicants for AFDC benefits could arise under 28 U.S.C. § 1331,<sup>34</sup> despite the fact that the amount pleaded by any one individual does not exceed \$10,000. Federal court jurisdiction could be predicated on several bases. First, plaintiffs could be allowed to aggregate their claims to achieve the requisite jurisdictional amount. The Supreme Court observed in *Snyder v. Harris*<sup>35</sup> "that it was 'settled doctrine' that separate and distinct claims could not be aggregated to meet the required jurisdictional amount."<sup>36</sup> However, it can be argued that the right a plaintiff would seek to enforce in a suit to compel timely processing of welfare applications is one in which all plaintiffs would have a common and undivided interest in the amount sought. This "joint and common interest" situation falls outside the scope of the non-aggregation doctrine announced by the Court in *Snyder*.<sup>37</sup> In *Bass v. Rockefeller*,<sup>38</sup> a group of welfare recipients sought to enjoin enforcement of proposed new regulations in New York State that would reduce the availability of medical services to low income persons. The court said there are two tests to be used in determining whether aggregation is permitted. In the "interest in distribution" test, if the adversary of the class has no interest in how the claim is to be parceled out among the members

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Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

31. See Cover, *Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights Are Alleged*, 2 CLEARINGHOUSE REV., Feb.-Mar., 1969, at 5; Note, *Federal Jurisdiction Over Challenges to State Welfare Programs*, 72 COLUM. L. REV. 1404 (1972).

32. 72 COLUM. L. REV. 1404, 1421.

33. In *New York v. Giamison*, 342 F.2d 255 (2d Cir.), cert. denied, 380 U.S. 977 (1965), the Second Circuit with then Circuit Judge Marshall dissenting, held that section 1983 was not a law providing for equal rights pursuant to the federal removal statute, which contains the same wording as section 1343(3).

34. The text of section 1331(a) is quoted in note 27 *supra*.

35. 394 U.S. 332 (1969).

36. *Id.* at 336.

37. *Id.* at 337.

38. 331 F. Supp. 945 (S.D.N.Y.), vacated as moot, 464 F.2d 1300 (2d Cir. 1971).

of the class, aggregation is permissible.<sup>39</sup> In an action to require timely AFDC eligibility decisions, the defendants would obviously be concerned about the total cost of a decision in favor of the plaintiffs. However, it is unlikely that the defendants would care how much a particular plaintiff recovered in terms of the benefits to which he or she is entitled.

The second test elucidated in *Bass* is the "essential party test," which allows aggregation of class claims where none of the class members could bring a suit without directly affecting the rights of other persons similarly situated.<sup>40</sup> Clearly if one applicant or group of applicants were able to obtain a judgment that had the effect of expediting the manner in which claims were processed, this would have a marked impact on other applicants. Similarly, if a suit to compel timely processing were unsuccessful, and in effect sanctioned the delays caused by the state's procedures, the adverse impact of such a decision would reach all applicants. Therefore, it seems that persons initially seeking AFDC benefits who bring an action to require timely processing could satisfy both the "interest in distribution" and the "essential party" tests of *Bass*.

Applicants for AFDC benefits could also argue that the crucial factor in determining the amount in controversy is the *value* of the right which they seek to assert, and not the amount of money an individual applicant is entitled to receive under the AFDC program. They could argue that the value of receiving timely assistance to provide for the necessities of life for dependent children exceeds \$10,000. While this approach involves a court in the highly subjective process of attempting to affix a specific monetary value on a constitutional right, it has been viewed favorably by several lower federal courts.<sup>41</sup>

In *Weinberger v. Wiesenfeld*,<sup>42</sup> the Supreme Court invalidated a provision of the Social Security Act which allowed payment of benefits based on earnings of a deceased husband and father to be made to both the widow and minor children, but permitted payments based upon the earnings of a deceased wife and mother to be made to the minor children only. The Court observed that since it did not appear to a legal certainty that the amount in controversy did not exceed \$10,000, there was no need to await an accrual of \$10,000 in back benefits prior to commencing an action in which an injunction commanding future payments was sought.<sup>43</sup> The plaintiffs in an action regarding timely eligibility decisions could similarly argue that they should not be required to wait until they become entitled to a total of \$10,000 in benefits before they are allowed to commence an action.<sup>44</sup>

### C. *Pendent Jurisdiction*

While the various techniques used to meet the \$10,000 jurisdictional amount have met with scattered success in the federal courts, it would seem

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39. 331 F. Supp. at 950.

40. *Id.*

41. *See id.* at 952-53 n.6 and cases cited therein.

42. 420 U.S. 636 (1975).

43. *Id.* at 642 n.10.

44. *But see* *Rosado v. Wyman*, 414 F.2d 170, 176-77 (2d Cir. 1969), *rev'd on other grounds*, 397 U.S. 397 (1970), where the court held that the indirect damages to welfare recipients whose benefits had been decreased was too speculative to be considered as a basis for jurisdiction under section 1331.

wiser for a plaintiff to rely primarily on section 1343(3) as a jurisdictional basis for an action concerning timely eligibility decisions.

If the plaintiffs are able to plead a substantial constitutional claim, the court is empowered to rule on alleged statutory violations by using the doctrine of pendent jurisdiction. In order for a federal court to exercise pendent jurisdiction there must be: (1) a claim arising under the Constitution, law or treaties of the United States which is of sufficient substance to confer subject matter jurisdiction on the court; and (2) a sufficient connection between the constitutional and statutory claims so that the entire action constitutes a single constitutional "case."<sup>45</sup> The exercise of pendent jurisdiction is discretionary on the part of the court, which is required to weigh "considerations of judicial economy, convenience and fairness to litigants."<sup>46</sup>

The Supreme Court has been willing in recent years to utilize pendent jurisdiction in welfare cases. This willingness is evident in the Court's treatment of several difficult issues involving pendent jurisdiction in two cases brought by New York welfare recipients. In *Rosado v. Wyman*,<sup>47</sup> the method by which New York State computed the standard of need for welfare recipients was attacked as being inconsistent with a provision of the Social Security Act.<sup>48</sup> The plaintiffs also claimed that a state law which allowed smaller payments to Nassau County residents than were allowed to New York City residents under the AFDC program violated the equal protection clause. After the action in *Rosado* was commenced, the statute was amended to eliminate the payment differential between counties. The district court rendered a decision on the statutory claim<sup>49</sup> despite the defendants' argument that the court could not exercise pendent jurisdiction over the statutory action because of the alleged mootness of the constitutional action. After the Second Circuit<sup>50</sup> reversed the decision of the district court, the defendants argued their claim before the Supreme Court. The Court held in favor of the plaintiffs on the mootness issue, noting that this issue often does not become apparent until substantial judicial energy has been expended on a case. Therefore, since one of the purposes of pendent jurisdiction doctrine is judicial economy, the Court ruled it was not necessary for a federal court to have continuing jurisdiction over the constitutional claim in order to reach a statutory question. The Court concluded that judicial economy could best be fostered in those cases in which substantial judicial effort had been expended by litigating the case completely, even though the constitutional claim had become moot at an interim stage in the case.<sup>51</sup>

The Supreme Court again addressed the issue of pendent jurisdiction in

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45. *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

46. *Id.* at 726. One author has argued that to require the constitutional and statutory claims raised in a single welfare case to be litigated separately would clearly not be in the interests of judicial economy. Note, *Federal Jurisdiction Over Challenges to State Welfare Programs*, 72 COLUM. L. REV. 1004, 1414 (1972).

47. 397 U.S. 397 (1970).

48. The plaintiffs alleged that the New York procedure violated 42 U.S.C. § 602(a)(23) (1970), which required the computation of an individual's standard of need to take into account changes in the cost of living.

49. 304 F. Supp. 1350 (E.D.N.Y. 1969).

50. 414 F.2d 170 (2d Cir. 1969).

51. 397 U.S. at 405.



government benefit litigation when welfare recipients challenged a New York State regulation which permitted the state to recoup, by a reduction of subsequent grants, unscheduled emergency rent allowances advanced to recipients. In *Hagans v. Lavine*,<sup>52</sup> the plaintiffs, who received assistance under the AFDC program, alleged that this procedure violated the equal protection clause of the fourteenth amendment, the Social Security Act and the regulations promulgated thereunder. The Supreme Court held that the presence of both a statutory claim and a constitutional claim in the same action did not automatically require the district judge to postpone his decision on the statutory claim until a three-judge court had ruled on the constitutional claim. The Court cited language in *Rosado v. Wyman* to the effect that, even if the constitutional issue had not been declared moot, the best course for the three-judge court might have been to remand the case to the single judge for a disposition of the statutory claim.<sup>53</sup> Justice White, writing for the *Hagans* Court, stated that the action of the district judge, who found the constitutional issue to be substantial and then decided the statutory claim, "accurately reflects the recent evolution of three-judge-court jurisprudence."<sup>54</sup>

The decision in *Hagans* is helpful to litigants whose statutory claim is stronger than their constitutional argument. It also has a salutary side effect for welfare litigants, as it seems that the decision in *Hagans* will result in fewer government benefits cases being heard by three-judge district courts. Decisions of these three-judge tribunals are appealable directly to the Supreme Court.<sup>55</sup> Given the current makeup of the Court, this feature of direct appealability is of doubtful merit to the plaintiff in welfare litigation. They may well prefer the lengthy appellate route through the courts of appeals, with resort to the Supreme Court only by writ of certiorari, the procedure followed when an action is first tried before a single district judge.

As noted earlier, there must be a "substantial" constitutional claim before the court can exercise pendent jurisdiction.<sup>56</sup> Recently, the Supreme Court discussed the criteria for making such a determination. In *Goosby v. Osser*<sup>57</sup> the Court ruled on the substantiality of a constitutional claim raised by a group of pretrial detainees who argued that the Pennsylvania election laws unconstitutionally deprived them of the right to vote. The Court declared that a constitutional issue is insubstantial only if

its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.<sup>58</sup>

The question of the substantiality of a due process right to timely eligibility decisions has never been decided by the Supreme Court. However, given the number of welfare cases adjudicated in the federal courts in recent years covering a wide range of issues, it is apparent that under the *Osser* test, the right

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52. 415 U.S. 528 (1974).

53. *Id.* at 544, quoting *Rosado v. Wyman*, 397 U.S. at 403.

54. *Id.* at 544.

55. 28 U.S.C. § 1253 (1970).

56. See text accompanying note 45 *supra*.

57. 409 U.S. 512 (1973).

58. *Id.* at 518-19, quoting *Ex parte Poresky*, 290 U.S. 30, 32 (1933).

to timely processing is constitutionally substantial. A case in point is *Perez v. Lavine*,<sup>59</sup> in which a group of New York City welfare recipients brought an action complaining that inadequate staffing of welfare centers resulted in long delays in the processing of applications and the disbursement of assistance payments and that such delays denied them benefits without due process. They sought a declaratory judgment that the defendant state and local welfare officials were required "to provide sufficient trained personnel and adequate facilities to insure the prompt and adequate delivery of services."<sup>60</sup> Further, they requested an injunction forbidding the administration of welfare programs in the Bronx without adequate staffing. In denying the defendants' motion to dismiss, the court held that plaintiffs' due process claim was substantial, relying in part on the test enunciated in *Osser*.

## V

### THE POWER OF THE STATES TO DETERMINE THE ALLOCATION OF LIMITED RESOURCES AVAILABLE TO FUND WELFARE PROGRAMS

As the Supreme Court noted in *Board of Regents v. Roth*,<sup>61</sup> property rights are not created by the Constitution.<sup>62</sup> Rather, these rights arise from independent sources, including state law. The Court noted that the right to welfare benefits asserted in *Goldberg v. Kelly*<sup>63</sup> was grounded in the statute defining eligibility for those benefits. Similarly, the due process right to timely processing of applications for government benefits has its origins in federal statutes and regulations prescribing time guidelines which the states are required to follow.<sup>64</sup> These guidelines are mandatory on the states, which are under threat of losing federal financial assistance for their welfare programs.<sup>65</sup> Thus, it could be argued that the right to obtain government benefits has been given sufficient statutory protection to obviate the need for constitutional enforcement. But the availability of a due process right to speedy processing of welfare applications is of great importance in rebutting the state's argument that it alone should be allowed to determine the allocation of the scarce resources available for financing welfare programs.

In *Dandridge v. Williams*,<sup>66</sup> the Supreme Court rejected a challenge to a Maryland state procedure which placed a ceiling on the amount of welfare payments that a family could receive, regardless of the number of children in the family. As Justice Stewart noted in his opinion for the Court, "(t)he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."<sup>67</sup>

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59. 378 F. Supp. 1390 (S.D.N.Y. 1974).

60. *Id.* at 1391.

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

62. *Id.* at 577.

63. 397 U.S. 254 (1970). See text accompanying notes 4-11 *supra*.

64. See text accompanying notes 14-18 *supra*.

65. 42 U.S.C. § 604(a) (1970). But it is clear that this action hits hardest the very people the AFDC program is designed to assist.

66. 397 U.S. 471 (1970).

67. *Id.* at 487.

This statement has shown considerable vitality in subsequent cases. When the State of Vermont implemented a policy change in computing benefits under its version of the AFDC program, the result was an increase in benefits for 95 percent of the recipients. But, in *Provost v. Betit*,<sup>68</sup> a group of persons whose benefits were decreased by the change claimed that they were entitled to a hearing prior to the reduction. A three-judge court rejected this claim, stating that when a state agency makes a legislative decision affecting a large number of recipients, as opposed to an adjudicative decision affecting an individual, no prereduction hearing is required. In the process of distinguishing *Goldberg v. Kelly*, the court relied on the above-quoted passage from *Dandridge*.<sup>69</sup> Similarly, when the State of Delaware made an across-the-board decrease of 11.7 percent in the amount to which each recipient was entitled, without providing any recipients an opportunity for a hearing, this action was upheld on the authority of both *Provost* and *Dandridge*.<sup>70</sup>

Taking its cue from these holdings, a state might argue that it simply does not have the resources to process all AFDC applications within the prescribed time period. This fiscal inability argument could be more readily rejected if the right to timely decisions on eligibility for government benefits were accorded constitutional stature. It appears to be a principle of constitutional adjudication that a lack of resources, or administrative inconvenience may not be interposed as a successful defense when a constitutional right is involved.<sup>71</sup> In *Goldberg v. Kelly*<sup>72</sup> the defendant state officials argued that the interest of the State of New York in preserving its fiscal and administrative resources justified denying the plaintiffs an evidentiary hearing until after benefits were terminated. The Supreme Court rejected this argument, concluding that the recipients' interest in continued benefits, coupled with the state's interest in not seeing benefits erroneously terminated, outweighed the state's interest in preventing future increases in its administrative or fiscal burden.<sup>73</sup> The Court intimated that "skillful use of personnel and facilities"<sup>74</sup> could ameliorate the state's difficulties.

It appears at first glance that this language in *Goldberg* is inconsistent with the result in *Dandridge*, which gave the state wide latitude in allocating its admittedly scarce resources. However, a closer look indicates that the results in these two cases can be harmonized. In *Dandridge* the state had made a decision on a *substantive* matter, how its limited welfare resources should be allocated among potential recipients. If one accepts the conclusion of the Court that there was no equal protection violation in the system used by the state, it

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68. 326 F. Supp. 920 (D. Vt. 1971).

69. *Id.* at 924. See text accompanying note 67 *supra*.

70. *Rochester v. Ingram*, 337 F. Supp. 350, 355 (D. Del. 1972). For other applications of the *Dandridge* rationale, see *Doe v. Norton*, 365 F. Supp. 65, 84 (D. Conn. 1973) (unwed mother could be compelled to disclose name of putative father and to institute paternity action against him); *Cancel v. Wyman*, 321 F. Supp. 528, 531 (S.D.N.Y. 1970), *appeal dismissed*, 441 F.2d 553 (2d Cir. 1971) (resources of non-adopting stepfather assumed to be available to stepchildren). See also *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 279-80 (1974), where Justice Rehnquist argued in dissent that the *Dandridge* rationale should have been applied to uphold a one year county residency requirement for free emergency medical care.

71. See *Frontiero v. Richardson*, 413 U.S. 677 (1973).

72. 397 U.S. 254 (1970).

73. *Id.* at 266.

74. *Id.*

seems possible to concede that the state should be given considerable discretion in determining the level of benefits each recipient will receive.<sup>75</sup>

The alleged constitutional violation in *Goldberg* was of a much different nature from the one raised in *Dandridge*. In *Goldberg*, the plaintiffs' complaint concerned the state's refusal to observe procedural due process standards prior to the termination of welfare benefits. Confronted with this *procedural* right rather than a *substantive* question regarding the level of benefits to be distributed, the Court refused to accept the state's defense that it lacked adequate resources. It seems clear that the asserted right to have applications processed in a timely manner is much closer to the procedural right asserted in *Goldberg* than it is to the substantive right at issue in *Dandridge*. Therefore, the right to timely eligibility decisions can be pressed without disregarding the wide degree of freedom the states have been given in determining the level of benefits individual recipients will receive. The recognition of a right to timely processing simply would require, as did *Goldberg v. Kelly*, that AFDC programs be managed in a manner consistent with the due process clause.<sup>76</sup>

While the defense of a lack of adequate resources may at first seem appealing, and may appear to circumvent the difficult federalism problems that arise when a federal court is asked to require state welfare officials to take certain actions, this argument cannot be allowed to excuse the states from their responsibility to process applications for government benefits in a timely manner. To allow this defense could abridge or completely deny the right of applicants to a timely eligibility decision.

## VI

### PROPERTY RIGHTS PROTECTED BY THE DUE PROCESS CLAUSE—THE IMPLICATIONS OF *ROTH*

For a number of years, the determination of whether a property interest advanced by an individual would receive constitutional protection depended upon whether that interest was denominated a "right" or a "privilege."<sup>77</sup> In

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75. See *Jefferson v. Hackney*, 406 U.S. 535 (1972), in which the Supreme Court rejected an equal protection challenge to a Texas system of allocating welfare funds that resulted in AFDC recipients receiving a lower level of benefits than recipients under other categorical assistance programs.

76. The Supreme Court has rejected in another context the argument by a government entity that it lacked adequate resources to take the steps necessary to vindicate a constitutional right. In *Watson v. City of Memphis*, 373 U.S. 526 (1963), the city attempted to delay the desegregation of its park system, arguing that its budget was inadequate to provide the additional supervision the city assumed would be necessary when the parks and playgrounds were desegregated. This argument was curtly rejected by the Court when Justice Goldberg said, "[t]he vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny them than to afford them." *Id.* at 537. The argument that a governmental entity lacked adequate resources to rectify conditions violating constitutional rights has consistently been rejected in the area of substandard prison conditions. See *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974); *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark. 1971).

77. An often-quoted statement on the right-privilege distinction was made by Justice Holmes in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892), a case brought by a former policeman dismissed for his political activities, Justice Holmes, said, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

*Board of Regents v. Roth*<sup>78</sup> the Supreme Court took a large step in the direction of a more reasoned analysis in this area. The plaintiff in *Roth* was a non-tenured faculty member at a branch of the Wisconsin state university system whose employment was terminated by the college after one academic year. Rules promulgated by the Board of Regents provided non-tenured teachers, dismissed in the middle of a one year term, with some opportunity for review, but gave no protection to such teachers who were simply not rehired for the following year. Roth commenced an action in a federal district court, attacking his dismissal on both procedural and substantive grounds. Substantively, he argued that his dismissal resulted from his criticism of university officials, and therefore violated his right to free speech under the first amendment. His procedural argument was that he had a right to be informed of the reasons for his dismissal and to be afforded a hearing before being dismissed. After Roth won favorable rulings from the district court and the Seventh Circuit,<sup>79</sup> the Supreme Court addressed the issue as to whether Roth's interest in his job fell within the species of liberty or property entitled to the protection of the due process clause.

Justice Stewart's opinion for the majority considered in some detail the nature of the protection of property rights under the due process clause:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . He must, instead, have a *legitimate claim of entitlement to it*. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide for an opportunity for a person to vindicate those claims.<sup>80</sup>

The district court had held that Roth was entitled to a hearing, after it had weighed his interest in reemployment against the interest of the defendants in summarily denying reemployment. Justice Stewart disagreed with this analysis, ruling that a weighing process is part of the determination of only the *type* of hearing required; in the initial analysis to ascertain whether due process requirements are applicable in the first place, Justice Stewart wrote, the *nature*, not the weight of the interest involved is important.<sup>81</sup> In examining the nature of Roth's property interest, the Court noted that his interest in employment was created and defined by the terms of his appointment. Roth's contract specifically provided that his employment was to terminate after one year. No provision was made concerning the renewal of his contract. Therefore, the majority concluded that Roth's interest in continued employment within the Wisconsin state university system was not constitutionally protected.

In looking at the nature of the right to timely processing of AFDC applications, as required by the Supreme Court in *Roth*, it appears that this right must be defined in light of the statutes and regulations specifying the procedure for

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See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

78. 408 U.S. 564 (1972).

79. 310 F. Supp. 972 (W.D. Wis. 1970), *aff'd*, 446 F.2d 806 (7th Cir. 1971).

80. 408 U.S. at 577 (emphasis added).

81. *Id.* at 570-71.

making eligibility decisions. The pertinent regulations establish a clear time limit of 45 days for the state agency to render an eligibility decision.<sup>82</sup> The question for purposes of determining the applicability of the due process clause is whether an applicant for government benefits, who has not yet received his initial payment, may be said to have a legitimate claim of entitlement to these payments. This question should be answered in the affirmative. Justice Stewart observed in *Roth* that, under *Goldberg v. Kelly*, persons receiving welfare benefits had an interest in continued receipt of these payments. This interest was secured by procedural due process. He also noted that, although the plaintiffs in *Goldberg* had not shown themselves to be within the statutory terms of eligibility, the Court had held they had a right to a hearing at which they could attempt to make such a showing. Further, applicants for government benefits have not as yet shown themselves to be eligible for benefits within the terms of the statute. These applicants may be as qualified to receive benefits as the current recipients. Under the rationale of *Goldberg* and *Roth*, current recipients of AFDC have a *property* right to continued receipt of government benefits, protected by the due process clause. The sole reason eligible applicants have not begun to receive assistance results from the failure of the responsible state agency to process applications in a timely manner. To deny benefits to prospectively eligible individuals solely because of bureaucratic delay is a result that cannot be countenanced under the due process clause as interpreted by the Supreme Court in *Roth*.

Property rights protected by the due process clause have taken a number of different forms since the Supreme Court's decision in *Roth*. In *Bloodworth v. Oxford Village Townhouses*,<sup>83</sup> the plaintiffs resided in a housing complex developed by a private group under section 236 of the National Housing Act.<sup>84</sup> The tenants alleged that plans by the management to discontinue the payment of electricity costs as an element of the carrying charge, while at the same time raising the carrying charge without a prior hearing, violated a property right protected by the due process clause of the fifth amendment. The court said that *Roth* and its companion case, *Perry v. Sindermann*,<sup>85</sup> provided that a recipient's expectation or need for government benefits deserved due process protection only if this need or expectation is "objectively justifiable."<sup>86</sup> The court noted that in *Sindermann* the Supreme Court had concluded that a series of yearly renewals might have furnished the plaintiff professor with a sufficient basis upon which to ground a reasonable expectation that his contract would be renewed. The court in *Bloodworth* reasoned that the plaintiffs could have a reasonable expectation grounded in section 236, which provided for extensive subsidies and supervision of government-assisted projects, that they would continue to receive low cost housing. The court required that the plaintiffs be given prior notice of, and the reasons for the proposed increase, together with

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82. 45 C.F.R. § 206.10(a)(3)(i) (1975).

83. 377 F. Supp. 709 (N.D. Ga. 1974).

84. 12 U.S.C. §§ 1701-50 (1970). The Act encourages the development of low-income housing by private interests by granting federal mortgage insurance, interest subsidies and tax advantages to developers.

85. 408 U.S. 593 (1972).

86. 377 F. Supp. at 716.

an opportunity to submit written objections to the management prior to the effective date of the increase.<sup>87</sup>

The assertion of a property right under *Roth* in a somewhat unusual factual setting occurred in *Graff v. Nicholl*.<sup>88</sup> The plaintiff had fallen victim to that nemesis of urban automobile owners, the tow truck. His car, mounted on cement blocks on a street near his home, awaiting the arrival of a needed part, was towed away and impounded by the Chicago police pursuant to a statute allowing the impoundment of cars which seemingly had been abandoned.<sup>89</sup> A three-judge court, noting that the automobile is a virtual necessity in modern society, said that its impoundment would be a serious loss to the plaintiff. The court held that the provisions of the Illinois Vehicle Code and the Municipal Code of Chicago,<sup>90</sup> which permitted the impoundment of abandoned automobiles displaying current license plates or registration stickers, without notice or prior hearing, violated due process. The court also invalidated the sections of those codes which required, without a hearing on the issue of abandonment, the payment of a fee as a condition precedent to the return of the vehicle.<sup>91</sup>

The Supreme Court has recognized that "it may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'" <sup>92</sup> It has forcefully been argued by Professor Charles Reich that intangible forms of wealth distributed by the federal government, such as licenses and franchises, are becoming increasingly more important forms of property in modern society.<sup>93</sup> Nevertheless, recipients of welfare benefits may be quite reluctant to contest government mistreatment for fear that such action might lead to further impairment or even complete termination of their payments. This reluctance might also cause applicants to submit to inexcusable delays in the processing of their applications.<sup>94</sup> In the absence of judicial willingness to enforce the timeliness requirements mandated by Congress, eligible applicants may effectively be denied access to government benefits to which they have a statutory right.

In the aftermath of *Roth*, as has been noted above,<sup>95</sup> two federal courts have utilized the due process clause to protect a property right in two important aspects of modern living: the ability to obtain decent housing, and the op-

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87. *Id.* at 718.

88. 370 F. Supp. 974 (N.D. Ill. 1974).

89. ILL. REV. STAT. ch. 95½, §§ 4-200 to -214 (1971); CHICAGO, ILL., MUNICIPAL CODE, §§ 27-360, -367, -372, -372.1, -423 to -429 (1972).

90. ILL. REV. STAT. ch. 95½, § 4-200 (1971); CHICAGO, ILL., MUNICIPAL CODE, § 27-260(4) (1972).

91. 370 F. Supp. at 985, 986, *invalidating* ILL. REV. STAT. ch. 95½, § 4-214 (1971).

92. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970).

93. Reich, *The New Property*, 73 YALE L.J. 733, 738-39 (1964). Professor Reich stated in a subsequent article: "The idea of entitlement is simply that when individuals have insufficient resources to live under conditions of health and decency, society has obligations to provide support, and the individual is entitled to that support as of right." Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1256 (1965).

94. See O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 SUP. CT. REV. 161, 173. In *Goldberg*, the Supreme Court noted another factor leading to reluctance by recipients to contest adverse decisions. The recipient deprived of benefits is forced to search for alternate means to obtain the necessities of life. This reduces the time he or she has to fight the welfare bureaucracy. 397 U.S. at 264.

95. See text accompanying notes 83-91 *supra*.

portunity to use a familiar means of transportation. These decisions appear to be well grounded in past decisions of the Supreme Court pertaining to the protection of property rights. In light of these cases and the fact that AFDC assistance can be crucial in meeting the daily needs of poor children, it seems difficult to argue that the right of an eligible applicant to receive AFDC benefits in a timely manner is not similarly protected by the due process clause.

## VII FORMULATION OF AN APPROPRIATE REMEDY TO COMPENSATE FOR STATE DELAY IN PROCESSING APPLICATIONS FOR GOVERNMENT BENEFITS

By far the most difficult problem regarding the due process rights of applicants for government benefits who have fallen victim to bureaucratic delay arises in the formulation of an effective remedy to vindicate these rights. Prior to 1974, a major remedy sought by welfare litigants was the payment of retroactive benefits by the responsible state agency. Such a remedy seemed to restore recipients to the position which they would have occupied "but for" the delay-ridden procedure used by the state. However, the use of retroactive benefits as a remedy in welfare litigation was severely restricted, if not totally destroyed, by the decision of the Supreme Court in *Edelman v. Jordan*.<sup>96</sup>

The plaintiff in *Edelman* brought an action against state and local welfare officials in Illinois. He alleged that his application under the Aid to the Aged, Blind and Disabled Program (AABD)<sup>97</sup> had not been acted upon within the 45 days required by the applicable federal regulation. In an unpublished opinion, the district court found that the Illinois regulations for AABD were inconsistent with the federal regulations. In addition to issuing an injunction requiring compliance with the federal regulations, the court ordered the release of all funds wrongfully withheld from persons who applied for AABD in Illinois between July 1, 1968 and April 16, 1971—the date on which the court issued a preliminary injunction. The Court of Appeals for the Seventh Circuit affirmed the district court,<sup>98</sup> rejecting the state's defense that the award of retroactive benefits was prohibited by the eleventh amendment. The court held that *Ex Parte Young*<sup>99</sup> did not forbid the payment of amounts such as those at issue in *Edelman*, which the court characterized as being in the nature of equitable restitution.

In reversing the Seventh Circuit, Mr. Justice Rehnquist, writing for the majority, indicated that the relief sought in *Edelman* was similar to the monetary award against the State of Indiana declared impermissible in *Ford Motor Co. v. Department of Treasury of Indiana*.<sup>100</sup> In *Ford*, the Court observed that the state is the real party in interest when the action is essentially one for the recovery of money from the state, and denied Ford's request for a refund of contested taxes. The *Edelman* Court ruled that the payment of retroactive as-

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96. 415 U.S. 651 (1974).

97. Effective January 1, 1974, AABD was merged into the Supplementary Security Income Program, 42 U.S.C. §§ 1381 *et seq.* (Supp. IV, 1974).

98. *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973).

99. 209 U.S. 123 (1908).

100. 323 U.S. 459 (1945), *cited in* 415 U.S. at 663, 665.



sistance sanctioned by the Seventh Circuit more closely resembled the direct payment of money by the state not permitted by *Ford* than it did the prospective injunctive relief allowed in *Ex Parte Young*.

Justice Marshall, dissenting, contended that by its participation in a program in which it received federal matching funds, a state waives immunity from federal orders requiring the payment of retroactive benefits. More importantly, he argued that a court's power to order retroactive benefits is essential to ensure state compliance with the federal requirements set forth in the Social Security Act. Otherwise, the state would have nothing to lose and everything to gain by failing to comply with the Congressional mandate of reasonable promptness in processing applications.

The decision of the Supreme Court in *Edelman* dealt a serious blow to the use of litigation against state officials as a method for assuring the proper administration of welfare programs. Similarly, the due process right outlined in this Note would be greatly enhanced if one could argue that the remedy for violations of this right is the payment of retroactive benefits calculated from the expiration of the federally prescribed period for the processing of applications. But it is premature to conclude that *Edelman* has stunted the development of this right. There is language in Justice Rehnquist's opinion which actually supports the existence of a due process right to the timely processing of welfare applications. Justice Rehnquist noted that some decisions of the Court, which fashioned a remedy in equity, have had profound impacts on states' treasuries, although the relief was of a prospective nature.<sup>101</sup> He also noted that these fiscal consequences were the necessary result of the decrees. He concluded that "such an ancillary effect on the state treasury is a permissible and often inevitable consequence of the principle announced in *Ex parte Young*."<sup>102</sup> Clearly, this language forecloses the argument that a suit to require timely processing of AFDC benefits, but not retroactive benefits, is barred by the eleventh amendment because of the effect a judgment against the state would have on its treasury.

Illinois argued in *Edelman* that the establishment of arbitrary maximum times in the HEW regulations for the processing of applications and the distribution of initial benefits, without considering their effect on the efficient administration by the states of the affected programs, was inconsistent with the "reasonable promptness" language in the statute.<sup>103</sup> The Seventh Circuit rejected this argument, holding that the time requirements specified by the regulations were appropriate interpretations of the congressional mandate of

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101. 415 U.S. at 667. Justice Rehnquist cited *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Graham v. Richardson*, 403 U.S. 365 (1971). In *Graham*, welfare officials in Arizona and Pennsylvania were prohibited from denying welfare benefits to aliens who fulfilled other eligibility requirements.

102. 415 U.S. at 668. In *Ex parte Young*, 209 U.S. 123 (1908), the Court ruled that a party could seek an injunction in federal court to prevent a state official from enforcing a statute alleged to violate the fourteenth amendment.

103. At the time *Edelman* was decided, 42 U.S.C. § 1382(a)(8), provided that "aid or assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1382(a)(8) (1970). It is significant that this promptness requirement is framed in language identical to that currently used in the AFDC Program. 42 U.S.C. § 602(a)(10) (1970), *quoted in text* accompanying note 17 *supra*.

“reasonable promptness.”<sup>104</sup> The Supreme Court agreed with this conclusion.<sup>105</sup> Thus, the Court is on record, through dicta in a case of recent vintage, as approving the HEW regulations that lie at the very heart of the right to prompt receipt of government benefits by eligible recipients.

After *Edelman*, it is more important than ever that persons seeking government benefits have their applications processed in a timely manner. Prior to *Edelman*, it could be argued that, while a failure to process applications in a timely manner might temporarily disadvantage the applicant, this disadvantage could be redressed by the payment of retroactive benefits. But the impact of *Edelman* seems to be that once government benefits are lost, they may not be regained by a successful litigant. Even the successful litigant is unable to return to the position that he or she would have occupied but for the unlawful conduct of state officials.

The harshest remedy would be an injunction halting the use of federal funds to assist the state in financing the AFDC program.<sup>106</sup> Although the adverse consequences such a remedy would have on the administration by the state of its welfare program might well frighten or cajole the state into compliance, the very magnitude of the remedy poses danger to welfare litigants. The Supreme Court has said on several occasions that a state is not required to utilize federal funds in financing its welfare program.<sup>107</sup> The state is free to use only its own funds and to establish its own rules and regulations for allocating and distributing these funds.<sup>108</sup> The effect of such a move by the state would almost certainly be to reduce or eliminate the benefits received by applicants for AFDC. Although this possibility of state withdrawal from federal funding should not alone cause attorneys for plaintiffs to discard the possibility of requesting the Department of Health, Education and Welfare to cut off federal funds, it should be a factor given considerable weight in the selection of appropriate remedies. It is entirely possible that the force of public opinion would prevent a state from refusing federal fiscal support of its welfare program. But this possibility involves a very risky judgment which plaintiffs’ attorneys should be reluctant to make if other viable alternatives exist.

Another remedy for failure to process AFDC applications in a timely man-

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104. 472 F.2d at 996.

105. 415 U.S. at 659-60 n.8.

106. The statutory authority to halt the payment of federal funds to a state program not in compliance with statutory requirements resides with the Secretary of Health, Education and Welfare. 42 U.S.C. § 604 (1970). However, the Supreme Court has rejected the argument that this statutory delegation of authority to the Secretary deprives a federal court of the power to review state welfare programs or to prohibit the further granting of federal funds to state programs violating the statutory norms. In rejecting the argument that such judicial review was forbidden, the Court said in *Rosado v. Wyman*: “We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program.” 397 U.S. 397, 420 (1970).

107. See *Rosado v. Wyman*, 397 U.S. 397, 420-21 (1970); *King v. Smith*, 392 U.S. 309 (1968).

108. Even though a state relied solely on its own funds, it would still be bound to dispense aid in a manner that does not encroach upon rights guaranteed by the United States Constitution. Clearly, a plan which discriminated against recipients on the basis of race or religion would violate the equal protection clause of the fourteenth amendment. It would seem that if a constitutional right to the timely processing of welfare applications were firmly established, as this Note advocates, a state would be bound by some time restrictions in processing applications.

ner involves the use of a concept known as "presumptive eligibility."<sup>109</sup> Under presumptive eligibility any person whose AFDC application remains unprocessed for 45 days would be presumed to be eligible and immediately mailed an assistance check. From the applicants' perspective, this remedy is less dangerous than the termination of federal funds to the state, and the large expenditures that could result from the use of presumptive eligibility might accelerate improvement by the state of its AFDC program. But the manner in which the remedy fails to distinguish between applicants who meet the eligibility requirements and those who do not even have a colorable claim to benefits diminishes its attractiveness. Distributing AFDC benefits to any applicant who applies for benefits and does not get a response within 45 days would reduce the already limited funds available for qualified applicants.<sup>110</sup>

After the Supreme Court ruled in *Rodriguez v. Swank*<sup>111</sup> on the validity of an Illinois regulation governing the AFDC program, the legal battles between the plaintiffs, a group of AFDC recipients, and the Illinois Department of Public Welfare continued. The Seventh Circuit reviewed a district court decision concerning the appropriate remedy to be imposed on the State of Illinois for its delay in processing AFDC applications.<sup>112</sup> The district court had entered a supplemental order in February, 1972 to assist in the implementation of the original *Rodriguez* decision, which had been affirmed by the Supreme Court. When the defendant state officials persisted in their noncompliance, the plaintiffs suggested additional remedies. The district court rejected the presumptive eligibility proposal but accepted an alternative advanced by the plaintiffs. Under this alternative, persons whose applications remained unprocessed for longer than the period specified in the regulations, through no fault of their own, were entitled to compensatory damages of \$100 in addition to the regular benefits they were entitled to receive. This remedy, affirmed by the Seventh Circuit, takes on increased stature in light of the fact that this decision came after the Supreme Court's *Edelman* ruling. After examining portions of Justice

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109. This remedy was used by the court in *Class v. White*, [1972-1974 Transfer Binder] CCH Pov. L. REP. ¶ 16,314, at 16,749-50 (D. Conn. 1972).

110. The *Class* case does not speak well for the efficacy of presumptive eligibility. Plaintiffs later moved for a civil contempt citation against state welfare officials. *Class v. Norton*, 376 F. Supp. 496 (D. Conn.), *aff'd in part, rev'd in part*, 505 F.2d 123 (2d Cir. 1974). Although the contempt proceeding occurred nearly two years after the court's original order, the court noted that there had been substantial non-compliance with the initial order.

Congress provided for a type of presumptive eligibility in the Supplementary Security Income program which replaced four previous forms of categorical assistance. The relevant statutory provision states:

(4) The Secretary—

(A) may make to any individual initially applying for benefits under this subchapter who is presumptively eligible for such benefits and who is faced with financial emergency a cash advance against such benefits in an amount not exceeding \$100; and

(B) may pay benefits under this subchapter to an individual applying for such benefits on the basis of disability for a period not exceeding 3 months prior to the determination of such individual's disability, if such individual is presumptively disabled and is determined to be otherwise eligible for such benefits . . . .

42 U.S.C. § 1383(a)(4) (Supp. IV, 1974).

111. 403 U.S. 901 (1971).

112. 496 F.2d 1110 (7th Cir. 1974), *cert. denied*, 419 U.S. 879 (1975).

Rehnquist's opinion in *Edelman*,<sup>113</sup> the court of appeals concluded that the effect of this remedy on the state was an "ancillary effect on the state treasury," considered permissible and inevitable in *Edelman*.<sup>114</sup>

The major disadvantage of this "compensatory damages" remedy seems to be that the same amount is paid to all persons who have been victimized by governmental delay, regardless of their individual circumstances. No allowances are made for such factors as the size of the applicant's family, other resources the applicant may have, or the length of the delay. However, this remedy possesses certain advantages. It is less drastic than a cutoff of federal funds, and it does not open the door to specious applications, as would presumptive eligibility. The compensatory damages remedy appears to represent a constitutionally acceptable means to reimburse applicants for the time they were forced to await an eligibility decision, a result *Edelman* seemingly precluded. If the compensatory damages concept could be structured to meet the differing situations without arousing the opposition of the courts on the eleventh amendment issue, this remedy would appear to be the most favorable of the alternatives examined in this Note.

## VIII CONCLUSION

Prior to 1970, the right of AFDC recipients to receive benefits as long as they continued to satisfy the requirements for eligibility seemed to be subject to the whims or capricious actions of state or local welfare officials. *Goldberg v. Kelly* strengthened the position of these recipients by requiring the observance of procedural due process safeguards prior to the termination of benefits. Congress has sought to protect initial applicants for AFDC benefits from untoward delays by requiring that applications be processed within a "reasonable time," interpreted by HEW to mean within 45 days. However, some states have failed to comply with this statutory provision, as they have employed poorly trained staff personnel. Consequently, applicants are often forced to wait much longer than the specified 45 day period. Since eligible applicants are at least arguably in worse financial straits than current AFDC recipients, it seems incongruous that the former group should be without a means to redress this deprivation.

Recent decisions of the Supreme Court of the United States and the lower federal courts suggest that applicants for government benefits have a definable property interest which is protected by the due process clause of the fourteenth amendment. The problems faced by welfare applicants who are beleaguered by inefficient and insensitive welfare agency personnel are not in need of legislative solution. What is necessary is that courts explicitly recognize a right to timely processing of welfare applications and provide a viable and effective remedy for violations of this right.

GARY R. BATENHORST

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113. See text accompanying notes 96-105 *supra*.

114. 496 F.2d at 1113, quoting *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).