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NOTES

Limiting the Discretion of the Administrator of Poor Relief in Indiana

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"Where discretion is absolute, man has always suffered."[1]

Introduction

General welfare assistance in Indiana is administered through 1008 elected township trustees[2] who decide, within their townships, to whom relief is granted, the manner in which relief is granted, and the extent to which the relief is granted. The result is a patchwork system of small geographical areas, with basic welfare decisions in each area subject to the discretion of a single trustee. A developing line of cases in federal and state courts restricts the exercise of trustees' discretion by applying the Due Process and Equal Protection Clauses of the United States

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1. United States v. Wunderlich, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting).

2. Ind. Code § 12-20-5-1 (Supp. 1992).

(a) The township trustee of each township is ex officio the administrator of poor relief within the township.

(b) The township trustee shall perform all duties with reference to the poor of the township as prescribed by law.

(c) A township trustee, in discharging the duties prescribed by this article, is designated as the administrator of poor relief.

The Indiana poor relief statute, formerly Article 2 of Title 12 of the Indiana Code, was replaced in its entirety in 1992 by Article 20. Most of the sections of Article 20 cited in this Note had substantially identical counterparts in Article 2, and except as otherwise noted, all of the sections of Article 2 that were judicially interpreted in cases cited in this Note have substantially identical counterparts in Article 20.

Constitution[3] and the Equal Privileges Clause of the Indiana Constitution.[4]

I. The Role of Township Trustees in Poor Relief

A. Statutory Duties of the Administrator of Poor Relief

The Indiana poor relief statute imposes on the state's township trustees the responsibility to "perform all duties with reference to the poor of the township as prescribed by law."[5] The duties are both procedural and substantive.

The procedural duties prescribed by the statute are relatively specific.[6] For example, the township trustee must receive applications for poor relief,[7] investigate the claims,[8] take action on an application within seventy-two hours,[9] give notice to reapply to persons who have received poor relief for 170 days,[10] and give ten days written notice to recipients before termination of benefits.[11]

The statute also mandates the types of relief which trustees are to provide.

> A township trustee, as administrator of poor relief, may provide and shall extend poor relief only when the personal effort of the poor relief applicant fails to provide any of the following items:
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> (1) Food, including prepared food.
> (2) Clothing.
> (3) Shelter.
> (4) Light.
> (5) Water.

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3. U.S. Const. amend. XIV, § 1.
4. Ind. Const. art. I, § 23.
5. Ind. Code § 12-20-5-1 (Supp. 1992).
6. Several of the provisions were added only after courts held the statute to be unconstitutional for lack of procedural safeguards of the rights of applicants and recipients. For example, the duty to provide notice of termination of benefits, (*infra* note 11 and accompanying text), was added after the poor relief statute was declared unconstitutional for want of such a provision. Brooks v. Center Township, 485 F.2d 383, 385-86 (7th Cir. 1973), *cert. denied*, Indiana v. United States Court of Appeals for the Seventh Circuit, 415 U.S. 911 (1974).
7. Ind. Code § 12-20-6-1 (Supp. 1992).
8. *Id.* § 12-20-6-9 (Supp. 1992).
9. *Id.* § 12-20-6-8 (Supp. 1992). The statute excludes weekends and legal holidays from the 72-hour period.
10. *Id.* § 12-20-6-2 (Supp. 1992).
11. *Id.* § 12-20-14-1 (Supp. 1992).

(6) Fuel for heating and cooking.

(7) Household supplies, including first aid and medical supplies for minor injury or illness.

(8) Household necessities that include basic and essential items of furniture and utensils.

(9) Heating and cooking stoves.

(10) Transportation to seek and accept employment.[12]

Furthermore, the law authorizes the trustee to furnish temporary aid to relieve "immediate suffering."[13] There are specific provisions for medical treatment,[14] utility bills,[15] school lunches,[16] emergency shelter,[17] food,[18] livestock feed,[19] transportation,[20] funeral expenses,[21] and insulin.[22] The statute even authorizes trustees to maintain gardens for poor relief.[23]

Although the statute prescribes what relief the trustees must provide, it does not dictate the extent to which it must be provided. Trustees must maintain written standards of eligibility and benefits,[24] but no law fixes the content of the standards.[25]

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12. *Id.* § 12-20-16-1 (Supp. 1992).
13. *Id.* § 12-20-17-1 (Supp. 1992).
14. *Id.* § 12-20-16-2 (Supp. 1992).
15. *Id.* § 12-20-16-3 (Supp. 1992).
16. *Id.* § 12-20-16-4 (Supp. 1992).
17. *Id.* § 12-20-17-2 (Supp. 1992).
18. *Id.* § 12-20-16-5 to -9 (Supp. 1992).
19. *Id.* § 12-20-16-10 (Supp. 1992).
20. *Id.* § 12-20-16-11 (Supp. 1992).
21. *Id.* § 12-20-16-12 (Supp. 1992).
22. *Id.* § 12-20-16-14 (Supp. 1992).
23. *Id.* § 12-20-16-13(c) (Supp. 1992).
24. The statute itself does not require standards. In Hopson v. Schilling, 418 F. Supp. 1223 (N.D. Ind. 1976), an applicant challenged the constitutionality of the trustees' practice of administering poor relief without written eligibility and benefit standards. An unpublished consent decree obligated the trustees to maintain written standards. Hopson v. Schilling, No. L-75-30 (N.D. Ind. May 18, 1978). *See* Cynthia J. Reichard, Note, *Due Process in the Administration of General Assistance: Are Written Standards Protecting the Indigent?*, 59 IND. L.J. 443, 449-50 (1984); IND. LEGISLATIVE SERVS. AGENCY, FAMILIES IN POVERTY AND LOCAL SERVICE DELIVERY, at 84 (1991) [hereinafter FAMILIES IN POVERTY].
25. *See* FAMILIES IN POVERTY, *supra* note 24, at 84. Although there are no statutory guidelines for granting relief, there are specific provisions for *denying* relief. For example, "[t]he township trustee may deny poor relief assistance to an individual if the township trustee determines that the individual does not intend to make the township or county the individual's sole place of residence." IND. CODE § 12-20-8-3 (Supp. 1992). This requirement of intent to make the township the sole place of residence replaces a former requirement of a three-year residency within the state, *Id.* § 12-2-1-5 (1988). The latter was held to be unconstitutional for discriminating against those who had recently exercised their right to travel between states. Eddleman v. Center Township of Marion County, 723 F. Supp. 85, 89-90 (S.D. Ind. 1989). Also, the trustee may deny relief to persons who receive benefits under Assistance For Dependent Children. IND. CODE § 12-20-6-6 (Supp. 1992); Wayne Township v. Hunnicutt, 549 N.E.2d 1051, 1053 (Ind. Ct. App. 1990).

B. The Scope of Trustee Discretion

The absence of uniform eligibility and benefit standards creates expansive discretion in the office of the trustee. The following subsections exemplify the practical operation of trustee discretion. Specific examples are taken from a typical set of poor relief standards.[26]

1. Discretion to Determine Who is Eligible for Relief.—The law furnishes only the ambiguous mandate that trustees provide relief "only when the personal effort of the poor relief applicant fails to provide any of" a list of items essential for subsistence.[27] Because there are no state standards for deciding whether an applicant's own efforts have failed to satisfy the applicant's needs, it falls within the discretion of the individual trustee to determine who has need and who does not.[28]

Income guidelines are one of the most consequential rules for determining need. If a family's monthly income exceeds a specified amount established by the trustee, the family is not eligible for relief of any type.[29] Furthermore, the trustee decides what income to consider and determines the method of calculating monthly income.[30]

Income is not always the only factor in a trustee's determination of eligibility. The trustee may decide to grant relief to applicants with extraordinary expenses even if their incomes exceed the usual guidelines.[31] The trustee may choose to deny relief to an applicant if the trustee finds that the applicant "wastes income"[32] or engages in activities such as providing false information, failing to actively seek employment, or appearing intoxicated in the trustee's office.[33]

2. Discretion to Determine Nature and Extent of Relief.—Over a century ago, the Supreme Court of Indiana held, "[t]he nature and extent of such relief, in each particular case, is largely entrusted to the sound discretion and practical judgment of the township trustee, as overseer of the poor."[34] The holding still stands.[35]

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26. Ed Buckley, Poor Relief Standards for the Perry Township Trustee of Marion County (1992).

27. Ind. Code § 12-20-16-1 (Supp. 1992).

28. *Hunnicutt*, 549 N.E.2d at 1503 ("The determination of need is placed within the Trustee's discretion."); Families in Poverty, *supra* note 24, at 84.

29. Buckley, *supra* note 26, at 11.

30. Buckley, *supra* note 26, at 11. (Trustee considers monetary and nonmonetary income received within the previous 30 days).

31. Buckley, *supra* note 26, at 13.

32. Buckley, *supra* note 26, at 10.

33. Buckley, *supra* note 26, at 13-14.

34. Board of Comm'rs v. Harlem, 8 N.E. 913, 916 (Ind. 1886).

35. State *ex rel.* Van Buskirk v. Wayne Township, 418 N.E.2d 234, 241 (Ind. Ct. App. 1981) ("[T]he legislature extended to the Trustee discretion in the administration of poor relief assistance as regards the nature and extent of the relief to be afforded given the particular circumstances of the individual applicant.").

Consider for example an applicant who, in danger of losing his or her home to foreclosure, appears at a trustee's office and asks for assistance in making a mortgage payment. Although the trustee must provide shelter[36] and may not categorically refuse to make loan payments for people purchasing a home,[37] the trustee establishes the criteria for deciding who will receive aid for loan payments and who will be forced to obtain alternative shelter.[38] If the trustee refuses to make mortgage payments, thereby forcing the applicant to find rental shelter, the applicant may find that the trustee refuses to provide a security deposit required by landlords.[39] Furthermore, the trustee may refuse to provide rent if the applicant chooses a landlord who is not on a list of those approved by the trustee.[40] Finally, the amount of rent to be paid is determined at the trustee's discretion.[41]

3. Authority to Create Procedures.—As well as establishing poor relief eligibility and benefit standards, trustees also mandate procedures that an applicant must follow in order to be eligible.[42] For example, the trustee may require an applicant to account for every individual household expenditure with written receipts or notarized affidavits.[43] He or she may direct an applicant to seek less expensive housing.[44] If the applicant fails to comply with these procedural requirements, the trustee may automatically deny relief.[45]

4. Protection Against Abuse of Discretion.—Trustees are independent, elected officials; they are not subject to any direct supervision.[46]

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36. IND. CODE § 12-20-16-1 (Supp. 1992).

37. *Van Buskirk*, 418 N.E.2d at 242.

38. BUCKLEY, *supra* note 26, at 22-23 (listing 16 factors Trustee considers in deciding whether to make a loan payment).

39. BUCKLEY, *supra* note 26, at 22. *But see* Center Township v. Coe, 572 N.E.2d 1350, 1362 (Ind. Ct. App. 1991) (affirming on other grounds mandatory injunction requiring a trustee to pay rental deposits for persons eligible for shelter assistance).

40. BUCKLEY, *supra* note 26, at 21.

41. BUCKLEY, *supra* note 26, at 21.

42. *See* South Bend Community Sch. Corp. v. Portage Township, 520 N.E.2d 446, 453 (Ind. Ct. App. 1988) (holding that pertinent statute gave trustee right to create eligibility standards and procedures which applicants must follow in order to receive aid for school books). *But see* Schrader v. Mississinewa Community Sch. Corp., 521 N.E.2d 949, 953 (Ind. Ct. App. 1988) (Garrard, J., concurring) (distinguishing *South Bend Community School* from the instant case, in which there was no reasonable relationship between the Trustee's procedural requirement and his duty to determine eligibility for assistance for school books).

43. BUCKLEY, *supra* note 26, at 12-13.

44. BUCKLEY, *supra* note 26, at 22.

45. BUCKLEY, *supra* note 26, at 13-14, 22.

46. FAMILIES IN POVERTY, *supra* note 24, at 84; Louis Rosenberg, *Overseeing the Poor: A Legal-Administrative Analysis of the Indiana Township Assistance System*, 6 IND.

Nonetheless, disappointed applicants can appeal a trustee's denial or termination of relief to the board of county commissioners.[47] When reviewing the decision, the Board follows the standards established by the trustee.[48] The commissioners decide only the merits of an individual case; they do not judge the adequacy or the fairness of the standards governing the adjudication.

The decision of the Board of County Commissioners can be appealed to the county circuit court, which hears the case as an original cause.[49] These courts review the merits of an individual case, as well as the substance of written standards. The courts will invalidate the standards if they are arbitrary or capricious.[50]

C. Allegations of Arbitrariness and Inequality

In principle, nothing is wrong with a statute that vests such discretion in the township trustee. For a general assistance program to work effectively, it must be run by someone who has the authority to make and interpret standards and guidelines. In Indiana, the legislature has placed the authority in the offices of the township trustees. In practice, critics allege, the granting of such expansive discretion to so many individuals, each the "supreme administrator"[51] of poor relief within a tiny geographical area, fosters "inconsistency and arbitrariness"[52] and "striking . . . inequalities."[53]

An analysis of Indiana poor relief published twenty years ago identified two types of inequalities among poor relief applicants or recipients.[54] The first occurs when a single trustee discriminates between classes of

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L. Rev. 385, 391 (1973). Each township has an advisory board, and the state board of accounts is responsible for assuring there is no misappropriation of money. However, these boards do not review the decisions of the trustee in establishing guidelines or in applying them to individual applications for relief.

47. Ind. Code § 12-20-15-1 (Supp. 1992). *See generally* Richard A. Dean, Note, *General Assistance Programs: Review and Remedy of Administrative Actions in Indiana*, 47 Ind. L.J. 393 (1972).

48. Ind. Code § 12-20-15-4 (Supp. 1992); Pastrick v. Geneva Township, 474 N.E.2d 1018, 1021 (Ind. Ct. App. 1985).

49. Pastrick v. Geneva Township, 474 N.E.2d 1018, 1021 (Ind. Ct. App. 1985); State *ex rel.* Van Buskirk v. Wayne Township, 418 N.E.2d 234, 239-40 (Ind. Ct. App. 1981).

50. *See Van Buskirk*, 418 N.E.2d at 244-45.

51. Rosenberg, *supra* note 46, at 391.

52. Families in Poverty, *supra* note 24, at 84.

53. Rosenberg, *supra* note 46, at 404.

54. Rosenberg, *supra* note 46, at 410-11. Rosenberg also discusses discrimination among taxpayers in different townships. *Id.* at 411. Discrimination among taxpayers is not considered in this Note.

people within a single township.[55] Critics and plaintiffs have alleged discrimination among all manner of classifications of applicants or recipients. For example, the plaintiffs in a case discussed below claimed that a trustee's method of providing emergency shelter by placing homeless applicants in private missions discriminated against those whom the missions would not accept: women, families, and individuals who were in need of detoxification or medical treatment for substance abuse problems.[56] In an earlier case the plaintiffs claimed that a trustee's policy of paying rent but not loan payments discriminated between applicants for poor relief who rented their homes and those who purchased them.[57]

The structuring of poor relief administration as a geographical patchwork creates the second type of inequality, the unequal treatment of similarly situated applicants or recipients from township to township.[58] For example, advocates of poor relief reform allege that eligibility standards vary dramatically among the townships.[59] The following table illustrates the variation in monthly income eligibility guidelines for a single person.

County	*Township*	*Monthly Income*[60]
Crawford	Johnson	$ 78.75
Marion	Wayne	166.00
Lagrange	Bloomfield	210.00
Porter	Washington	210.00
Johnson	Franklin	232.00
Huntington	Huntington	250.00
Tippecanoe	Fairfield	260.00
Posey	Black	277.00
Montgomery	Wayne	310.00
Clinton	Union	350.00
Allen	Wayne	437.00
Franklin	Ray	625.00

Of course there are many possible explanations for such differences. Among them are variations in the amount of public funds available for

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55. Rosenberg, *supra* note 46, at 410-11.

56. Center Township v. Coe, 572 N.E.2d 1350 (Ind. Ct. App. 1991).

57. State *ex rel.* Van Buskirk v. Wayne Township, 418 N.E.2d 234 (Ind. Ct. App. 1981).

58. Rosenberg, *supra* note 46, at 411.

59. Joseph A. Micon, Jr., et al., Indiana Poor Relief: The Myths and Facts About Township Assistance 9-10 (1987) (Indiana Task Force on Poor Relief, Lafayette Urban Ministry) (1987).

60. *Id.* at 9. The original source lists income guidelines from 31 counties. A sample covering the range of township size and amount of income guidelines is included here.

poor relief, local differences in the cost of providing basic subsistence, and the availability of other sources of aid. Some of the possible explanations mitigate the inequality of the differing eligibility guidelines; others do not.

Eligibility guidelines are not the only indicators of inequality among townships. For example, trustees differ in the amount of benefits they provide.[61] Some townships have guidelines that are more generous than others. However, generous guidelines do not necessarily mean that more assistance is actually delivered. Although rural townships are more generous with income guidelines than are urban townships, the percentage of poor people who actually receive aid is smaller in rural townships.[62]

Policies and decisions which are arbitrary, even if not discriminatory, can injure poor people. Observers have noted that eligibility standards are frequently far below the poverty level and that benefits are inadequate. Therefore, guidelines are apparently created without reference to the actual cost of providing basic subsistence.[63]

Factors other than those explicitly stated in written standards can also cause capricious decisions. The observation that poor people in rural townships are less likely to receive relief than those in urban townships suggests that unidentified factors influence eligibility decisions.[64]

D. Restrictions on Trustee Discretion

The unfairness and inequality described above are not inherent in the poor relief statute itself; rather they flow from the arbitrary and unequal application of the statute as it operates through the discretion of individual trustees.

Over the last two decades, courts have recognized federal and state constitutional protections against arbitrary decisions and unequal treatment within the Indiana poor relief system. This Note examines some of those cases, beginning with the earliest decisions which established procedural requirements and extending to the most recent case that explicitly placed substantive constitutional restrictions on the exercise of trustee discretion.

II. Due Process Limitations to Trustee Discretion

A. Procedural Due Process

The first judicially imposed restrictions on the otherwise expansive discretion of trustees were grounded in procedural due process. The

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61. *Id.*
62. *Id.* at 10.
63. Families in Poverty, *supra* note 24, at 83.
64. Micon, Jr., *supra* note 59, at 10.

threshold question for a due process claim is whether the plaintiff has suffered deprivation of liberty or property.[65] In *Goldberg v. Kelly*,[66] the Supreme Court held that welfare benefits may constitute a property interest protected by procedural due process.[67] Although the facts of *Goldberg v. Kelly* were limited to the termination of categorical welfare benefits under a federal statute, later cases held that due process also protects general assistance benefits created under state statutes and that the right to due process may belong not only to recipients, but also to applicants for general assistance.[68] In Indiana, it is now settled law that township trustees must procedural provide due process to poor relief applicants[69] and to poor relief recipients.[70]

In Indiana and other states, the most important procedural protection against unfair effects of the administrator's discretion in general welfare assistance is the use of written, objective, ascertainable standards.[71] The requirement of written standards and their effectiveness has been previously analyzed.[72] The only comments that need to be added here are those to place the use of written standards in perspective as the starting point for more intrusive restrictions.

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65. Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

66. 397 U.S. 254 (1970).

67. *Id.* at 263.

68. Daniels v. Woodbury County, 742 F.2d 1128, 1132-33 (8th Cir. 1984); Griffeth v. Detrich, 603 F.2d 118, 120-22 (9th Cir. 1979), *cert. denied*, Peer v. Griffeth, 445 U.S. 970 (1980); Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1138 (D. N.H. 1976). *Contra* Gregory v. Pittsfield, 479 A.2d 1304 (Me. 1984), *cert. denied*, 470 U.S. 1018, 1021 (1980) (O'Connor, J., dissenting) (observing that the Maine holding that no protected property interest exists until an application for general assistance is approved is against the weight of authority in lower federal courts).

69. Reichard, *supra* note 24, at 449-50 (citing Hopson v. Schilling, No. L-75-30, slip op. at 4 (N.D. Ind. May 18, 1978)).

70. Brooks v. Center Township, 485 F.2d 383 (7th Cir. 1973), *cert. denied*, Indiana v. United States Court of Appeals for Seventh Circuit, 415 U.S. 911 (1974).

71. *See supra* note 24 and accompanying text. For cases from other states in which courts have insisted on the use of written standards in the administration of general assistance programs, see Carey v. Quern, 588 F.2d 230, 232 (7th Cir. 1978) (holding ascertainable standards insure fairness and avoid arbitrary decision making); White v. Roughton, 530 F.2d 750, 754 (7th Cir. 1976) (deciding administrator of Illinois general assistance program who determined eligibility based on personal, unwritten standards had created "unfettered discretion" in himself and his staff, violating due process); Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1140 (D. N.H. 1976) ("The absence of standards creates a void in which malice, vindictiveness, intolerance or prejudice can fester."). Other procedural due process requirements not discussed in this Note include notice and the opportunity to be heard. *See, e.g.*, Brooks v. Center Township, 485 F.2d 383 (7th Cir. 1973), *cert. denied*, Indiana v. United States Court of Appeals for Seventh Circuit, 415 U.S. 911 (1974).

72. Reichard, *supra* note 24.

Courts have been uncertain, or at least unable to agree, whether the requirement of written standards is procedural or substantive due process.[73] On one hand, the court in *Baker-Chaput v. Cummett*[74] wrote that, although the substantive and procedural aspects of due process are "inextricably intertwined," the requirement of written standards "is essentially a question of substantive due process."[75] On the other hand, the Seventh Circuit decided *White v. Roughton*[76] under procedural due process.[77]

The Supreme Court recently elaborated on the distinctions between procedural and substantive due process. The plaintiff in *Washington v. Harper*,[78] a prisoner, claimed that the administration of psychotropic drugs against his will and without a judicial hearing violated his due process rights. The Washington Supreme Court analyzed the case as a procedural due process issue and held that the prisoner was entitled to a judicial hearing in which the state must present "clear, cogent, and convincing" evidence that the treatment was "both necessary and effective for furthering a compelling state interest."[79] The United States Supreme Court explained that such a holding went beyond procedure and into substance.

> The [state] court, however, did more than establish judicial procedures for making the factual determinations called for by [the Special Offender Center Policy].
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> . . . [T]he substantive issue is what factual circumstances must exist before the State may administer antipsychotic drugs to the prisoner against his will; the procedural issue is whether the State's nonjudicial mechanisms used to determine the facts in a particular case are sufficient.[80]

In view of *Washington v. Harper*, the better position is that the requirement that trustees put their eligibility criteria in writing is procedural, rather than substantive, due process. The content of the standards includes the factual circumstances that must exist before a trustee will grant poor relief. To reach the content of standards is to invoke substantive due process.

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73. Reichard, *supra* note 24, at 446.
74. 406 F. Supp. 1134 (D. N.H. 1976).
75. *Id.* at 1137.
76. 530 F.2d 750 (7th Cir. 1976).
77. *Id.* at 754.
78. 494 U.S. 210 (1990).
79. *Id.* at 218.
80. *Id.* at 219-20.

Pastrick v. Geneva Township[81] is an example of a case which dealt with only procedural aspects of poor relief standards. The Indiana Court of Appeals held that the county commissioners in hearing an appeal from a trustee's decision "are guided by uniform relief standards of eligibility and need established by the township trustee."[82] Even though *Pastrick* reinforced the importance of the written standards to establish the rules defining the rights of applicant poor relief applicants, it did not place any requirements or restrictions on their content.

In *State ex rel. Van Buskirk v. Wayne Township*[83] the Indiana Court of Appeals addressed the adequacy of trustee standards. The Wayne Township poor relief standards provided that "[t]he amount and length of assistance . . . shall be as determined by the Trustee."[84] Applicants who had been denied relief argued that the provision reserved unlimited discretion to the trustee in determining the nature and extent of benefits, a result that standards are intended to prevent.[85] In essence, a written standard which reserves "unfettered discretion"[86] for the administrator is no written standard at all. The court agreed with the applicants, holding that due process demands that poor relief standards must be reasonably complete and must set forth all the needs that will normally be met, including all those specifically called out in the statute.[87] Procedural due process provides the foundation for the holding because it simply elaborates on the due process requirement that trustees maintain written standards.

In *Wayne Township v. Hunnicutt*,[88] the Court of Appeals of Indiana held that the poor relief statute does not require a trustee to extend relief to recipients of Assistance to Dependent Children (ADC).[89] The poor relief applicants, who had been denied poor relief because they receive ADC benefits, argued that their right to due process was violated because the Trustee's written standards did not mention the categorical exclusion and because the Trustee had an unwritten policy of granting relief to ADC recipients.[90] The court, deciding the case on purely statutory

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81. 474 N.E.2d 1018 (Ind. Ct. App. 1985).

82. *Id.* at 1021 (applying IND. CODE § 12-2-1-18 (1982) (repealed 1992)). IND. CODE ANN. § 12-2-1-18 is superceded by IND. CODE ANN. § 12-20-15-4 (Supp. 1992).

83. 418 N.E.2d 234 (Ind. Ct. App. 1981).

84. *Id.* at 245.

85. *See* Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1139 (D.N.H. 1976), *quoted in Van Buskirk*, 418 N.E.2d at 245.

86. White v. Roughton, 530 F.2d 750, 754 (7th Cir. 1976).

87. *Van Buskirk*, 418 N.E.2d at 245 (citing Holmes v. New York City Hous. Auth., 398 F.2d 262 (2nd Cir. 1968)).

88. 549 N.E.2d 1051 (Ind. Ct. App. 1990).

89. *Id.* at 1054.

90. Brief for Appellees at 14-15, Wayne Township v. Hunnicutt, 549 N.E.2d 1051 (Ind. Ct. App. 1990) (No. 02A04-8902-CU-59).

grounds, did not reach the due process question because it was raised for the first time on appeal.[91] For present purposes, the unaddressed issues that were raised by the poor relief applicants are more important than the holding of the case. Those questions raise the point that the mere existence of written standards may fail to protect poor relief applicants and recipients. The potential inadequacy of procedural protections creates the need for judicial review of the content of the standards.

B. Review of Standards for Abuse of Discretion

Van Buskirk[92] contained a second holding which reached the content of written standards. The Van Buskirks claimed that the Trustee's income standards for eligibility were so low that some people whose own efforts had failed to provide basic subsistence would be ineligible.[93] The Court of Appeals held that poor relief standards are subject to review for abuse of discretion.

> Only if the standards can be said to be arbitrary and capricious, [sic] can a court invalidate them. The procedure followed for setting both the income eligibility and the benefit amounts would be arbitrary if made without reliance upon evidence reasonably related to the need for and cost of food, shelter, etc.[94]

Therefore, the *Van Buskirk* court described circumstances under which the simple existence of a procedure required by due process was insufficient to protect poor relief applicants from arbitrary decisions.[95] In doing so, the court expressed a willingness to judge the content of poor relief standards by looking beyond procedural protection and into substance.

The essence of substantive due process is protection from arbitrary action.[96] The results of state action must not be "arbitrary or capri-

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91. 549 N.E.2d at 1052 n.2.

92. State *ex rel.* Van Buskirk v. Wayne Township, 418 N.E.2d 234 (Ind. Ct. App. 1981).

93. *Id.* at 244.

94. *Id.*

95. Reichard, *supra* note 24, argues generally that written standards, particularly ones as malleable as those in Indiana, are insufficient to protect the rights of indigent people.

96. *See, e.g.*, Slochower v. Board of Higher Educ., 350 U.S. 551, 559 (1956). There are two tests for violation of substantive due process: compelling state interest when a fundamental right is involved, Roe v. Wade, 410 U.S. 113, 155 (1973), and rational basis in other cases, Bowers v. Hardwick, 478 U.S. 186, 195 (1986). Because there is no fundamental right to welfare benefits, Lavine v. Milne, 424 U.S. 577, 585 n.9 (1976) (citing Dandridge v. Williams, 397 U.S. 471 (1970)), most claims that a trustee's action violates substantive due process would be judged under low scrutiny.

cious,"[97] and statutes must not be "discriminatory, arbitrary, or oppressive."[98] In *Van Buskirk*, the Court of Appeals of Indiana held that a trustee's eligibility and benefit standards which are not based on evidence of the actual cost of basic subsistence would be "arbitrary and capricious."[99]

The principles of due process prohibit the state from creating arbitrarily defined benefits, whether the definition of those benefits is established by statute or entrusted to the discretion of township trustees. The express legislative purpose which underpins the Indiana poor relief statute "is to provide necessary and prompt relief to the citizens and residents of Indiana,"[100] a purpose that is to be "accomplished as equitably and expeditiously as possible."[101] This purpose cannot be equitably accomplished if the right to poor relief is allowed to expand and contract at the whim of a local official who is not accountable to anyone. If a trustee establishes eligibility guidelines with no demonstrated relationship to the ability of a person to provide his or her own subsistence or if the trustee employs benefit guidelines with no demonstrated correlation to the cost of meeting basic needs, such guidelines do not bear a reasonable relation to the purpose of the statute. Under this analysis, the holding of *Van Buskirk* not only comports with due process but is compelled by due process.

III. Center Township v. Coe: Alleviating Inequality Within a Township

Center Township v. Coe[102] is the first published decision to impose explicit, substantive constitutional restrictions on the exercise of a trustee's discretion. The Court of Appeals of Indiana held that a trustee violated the Equal Protection Clause of the federal constitution and the Equal Privileges Clause of the Indiana Constitution by providing unequal benefits to different classes of people within the same township. *Coe* therefore addresses the first type of inequality described by Rosenberg.[103]

The homeless plaintiffs in *Center Township v. Coe* challenged the Trustee's policy of providing emergency shelter by housing poor relief recipients in private missions. Because some missions accepted only single men and because some rejected anyone who had been drinking, the

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97. City of Eastlake v. Forest City Enter., Inc., 426 U.S. 668, 676 (1976).

98. Johns v. May, 402 So. 2d 1166, 1169 (Fla. 1981).

99. State *ex rel.* Van Buskirk v. Wayne Township, 418 N.E.2d 234, 244 (Ind. Ct. App. 1981).

100. Ind. Code § 12-20-1-2 (Supp. 1992).

101. *Id.* § 12-20-1-2 (Supp. 1992).

102. 572 N.E.2d 1350 (Ind. Ct. App. 1991).

103. *See supra* notes 54-57 and accompanying text.

township suffered an inadequate supply of emergency housing for women, for families, and for indigents who had consumed alcohol or who required detoxification or medical treatment for substance abuse problems. The trial court held that the Trustee's policy denied those classes of people equal protection[104] in the provision of emergency shelter.[105]

The homeless appellees argued that, inasmuch as the Trustee's means of providing emergency shelter disrupted family living arrangements, the court should apply strict scrutiny.[106] The appellees further argued that, inasmuch as the Trustee's practices discriminated by gender, his actions were subject to middle level scrutiny.[107] Finally, the appellees argued that the Trustee's policy violated equal protection under any standard of review:

> [R]egardless of whether this Court applies a strict, middle, or low level of scrutiny to review the Trustee's actions, they do not comport with the fundamental principle of the equal protection clauses of the Indiana and the United States Constitutions, which require the government to treat similarly situated people equally. The Trustee's discriminatory program does not serve a

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104. Equal protection requires that people who are similarly situated be treated alike. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). The highest standard of review is strict scrutiny, under which the state must demonstrate a compelling interest to justify the classification. *Id.* at 440. Strict scrutiny applies only when a fundamental right is threatened or when the law discriminates against a suspect class of people. *Id.*; Eddleman v. Center Township, 723 F. Supp. 85, 87 (S.D. Ind. 1989). Under the lowest standard of review, the statute must be "rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 439. For gender classifications, *id.* at 440-41; Craig v. Boren, 429 U.S. 190, 197 (1976), and for illegitimacy classifications, *Cleburne*, 473 U.S. at 441, the Court has required that the classification have a substantial relationship to an important government interest. There is no fundamental right to welfare benefits. Dandridge v. Williams, 397 U.S. 471, 485 (1970); Eddleman v. Center Township, 723 F. Supp. at 91 n.12. If the challenged statute does not discriminate against a suspect class, courts review welfare cases under a rationality standard. Califano v. Aznavorian, 439 U.S. 170, 174 (1978).

105. *Coe*, 572 N.E.2d at 1353. The trial court had held that the Trustee violated two other constitutional provisions not discussed here. Because the missions frequently required residents at the emergency shelters to attend religious services, the trial court held that the Trustee had violated the First Amendment. *Id.* The court of appeals affirmed. *Id.* at 1358. The trial court also held that the Trustee's failure to discharge his statutory duty violated due process. *Id.* at 1352. The court of appeals did not reach the due process claim.

106. Brief for Appellees at 45, Center Township v. Coe, 572 N.E.2d 1350 (Ind. Ct. App. 1991) (No. 49A028909CV455) (citing Moore v. City of East Cleveland, 431 U.S. 494 (1977); *see* Halet v. Wend Inv. Co., 672 F.2d 1305, 1310-11 (9th Cir. 1982)).

107. Appellees' Brief at 45-46, *Coe* (No. 49A028909CV455) (citing Craig v. Boren, 429 U.S. 190 (1976)).

> compelling or important state interest, and is not even rationally related to any legitimate goal. [Citations omitted.][108]

The court, disregarding the first two arguments, implicitly accepted the third by following the New York Superior Court, which had reviewed a similar case under the rational basis standard.

> The City of New York cannot enter into an agreement . . . that purports to set standards for shelters for the homeless, that is applicable only to shelters housing men, unless a rational basis exists for excluding women from its terms. No such basis has been urged or suggested by defendants and, indeed, none exists.[109]

The Indiana court declared, "[w]e agree with the courts of New York that unequal treatment of homeless women and families denies those women and families the equal protection guarantees of the State and Federal Constitutions."[110]

Although the nature and extent of relief are within the discretion of a trustee, the Trustee of Center Township exercised that discretion in a manner that arbitrarily discriminated between classes of people within his charge. *Center Township v. Coe* establishes that such action does not withstand even the lowest level of scrutiny.

Center Township v. Coe is consistent with the holding of the United States Supreme Court in *Allegheny Pittsburgh Coal Co. v. County Commission*.[111] In *Allegheny Pittsburgh* a local tax assessor adopted a practice of assessing real property value based on the purchase price with only minor adjustments to the assessed value of property which had not been recently sold. The result was dramatic disparity among the assessed values of comparable properties. The Court rejected the county's argument that the practice adopted by the assessor was rationally related to the purpose of assessing property at its true value. The assesor had used recent market value and, as the market information became outdated, adjusted the assessed value based on some measure of change in market values in the area.[112] The Court held that such a practice violated equal protection.[113]

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108. *Id.* at 46 (citing Eldredge v. Koch, 459 N.Y.S.2d 960 (N.Y. Sup. Ct. 1983), *rev'd on other grounds*, 469 N.Y.S.2d 744 (N.Y. App. Div. 1983); Reilly v. Robertson, 360 N.E.2d 171 (Ind. 1977), *cert. denied*, 434 U.S. 825 (1977); Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

109. *Coe*, 572 N.E.2d at 1361 (quoting Eldredge v. Koch, 459 N.Y.S.2d 960, 961 (N.Y. Sup. Ct. 1983)).

110. *Id.* at 1362.

111. 488 U.S. 336 (1989).

112. *Id.* at 343.

113. *Id.*

Allegheny Pittsburgh is similar to *Center Township v. Coe* in holding the practice of a local official unconstitutional under rational basis analysis. In both cases, the practice was theoretically non-discriminatory,[114] but the practical results were that people who were similarly situated were treated disparately. In both cases there was an unambiguous declaration of state purpose or policy: the West Virginia Constitution provided for uniform property taxes throughout the state,[115] and the Indiana statute provided that the purpose of poor relief law was "to provide necessary and prompt relief to the citizens and residents of Indiana."[116] In both cases, local officials on their own initiative implemented policies which were not rationally related to that purpose.[117]

In addition to ruling under the Fourteenth Amendment, the trial court in *Center Township v. Coe* held that the trustee's action violated the plaintiffs' rights to equal protection under Article 1, Section 23, of the Indiana Constitution.[118] The court of appeals discussed equal protection as if constitutionality under the federal and state constitutions were the same issue—a comparison which is taken up in Section IV of this Note. Here, it is sufficient to observe that *Center Township v. Coe* establishes that the state constitution affords protection against discriminatory treatment by a trustee within a single township.

IV. Alleviating Inequality Among the Townships

Center Township v. Coe does not directly reach the second type of inequality described by Rosenberg: the disparate administration of poor

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114. "We do not intend to cast doubt upon the theoretical basis of such a scheme." *Id.*

115. *Id.* at 338; W. Va. Const. art. X, § 1. The state constitution provided the starting point for the Supreme Court's analysis despite the holding of the Supreme Court of Appeals of West Virginia that the tax assessor's practice did not violate the state constitution. *In re* Tax Assessments Against Oneida Coal Co., 360 S.E.2d 560, 564 (W. Va. 1987).

116. Ind. Code § 12-20-1-1 (Supp. 1992).

117. 488 U.S. at 345. The Supreme Court recently confirmed that the fatal aspect of the tax assessor's practice in *Allegheny Pittsburgh* was the lack of any relationship between that practice and the state's policy. Nordlinger v. Hahn, 112 S. Ct. 2326, 2335 (1992). In upholding California's acquisition-value tax structure, *id.* at 2331-36, the Court distinguished *Allegheny Pittsburgh*, *id.* at 2333-35. "*Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme. By contrast, Article XIIIA was enacted precisely to achieve the benefits of an acquisition-value system." *Id.* at 2335.

118. 572 N.E.2d 1350, 1360-62 (Ind. Ct. App. 1991). Ind. Const. art. 1, § 23, is sometimes called an equal protection clause because it serves essentially the same purpose as the Equal Protection Clause of the Fourteenth Amendment. *See infra* section IV.B. This Note refers to Art. 1, § 23, as the Equal Privileges Clause to avoid confusion and because it more accurately represents the text of the constitution.

relief among the townships.[119] Attempts to apply equal protection and equal privileges to address inequality across township lines face certain problems which are beyond the scope of this Note. For example, there is judicial reluctance to impose uniformity across political boundaries. This reluctance manifests itself in the hesitancy of courts to grant relief for racially segregated schools when desegregation plans cross school districts.[120] The matter is further complicated by the fact that intertownship inequality is not caused by the action of a single trustee, or even by some or all of the trustees working in concert, but rather intertownship inequality is created when all 1008 trustees independently exercise their discretion. Does equal protection provide a mechanism for requiring all the trustees to treat their clients equally? This Note puts aside those practical problems to consider whether, even in principle, equal protection and equal privileges provide a guarantee of equality in poor relief across township lines.

A. Equal Protection Among Townships

Rosenberg was the first commentator to consider the application of the Equal Protection Clause to eliminate intertownship inequality in Indiana poor relief. His search for a theoretical foundation centered on a means of invoking strict scrutiny.[121] The best hope lay in the argument that townships differ in their wealth and that wealth would be considered a suspect classification.[122]

The Supreme Court soon thereafter dashed that hope in *San Antonio Independent School District v. Rodriquez*,[123] in which the Court refused to invoke strict scrutiny in reviewing the funding of schools with a disparity of wealth among school districts.[124] Wealth is not a suspect classification.[125] Equal protection attacks on inequality between townships will almost certainly be based on a simple geographical classification, a classification which also is not suspect.[126] Intertownship inequality flowing from the exercise of trustee discretion will be subject to low judicial scrutiny.

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119. *See supra* notes 58-60 and accompanying text.

120. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974). *But see* Hills v. Gautreaux, 425 U.S. 284, 298 (1976) (clarifying that "[n]othing in the *Milliken* decision suggests a *per se* rule that federal courts lack authority" to impose a remedy that crosses municipal boundaries).

121. Rosenberg, *supra* note 46, at 405-06.

122. Rosenberg, *supra* note 46, at 405-06.

123. 411 U.S. 1 (1973).

124. *Id.* at 17-18.

125. *E.g.*, Harris v. McRae, 448 U.S. 297, 377 (1980).

126. Price v. Block, 535 F. Supp. 1239, 1247 (E.D.N.C. 1982).

Equal protection claims seeking to correct the inequalities among townships must succeed in arguing that the Indiana statute, as applied by the 1008 township trustees, discriminates among geographical classifications of people and that the classification is not rationally related to any legitimate state interest. Trustee defendants will challenge that argument by claims that the geographical fragmentation of the poor relief system is rationally related to the state interest in maintaining local control over poor relief.[127] Indeed, according to proponents of the Indiana system, the system is a good one precisely because control of eligibility and benefits at such a local level allows trustees to meet the needs of the poor in a flexible, efficient manner.[128]

Rosenberg was skeptical that any equal protection action to correct intertownship inequality could succeed under a rational basis scrutiny, noting that perfect geographical equality of government services is certainly too much to expect.[129] Although it may be too much to ask that city parks in Terre Haute be identical to the city parks in Indianapolis,[130] it does not seem to be too much to ask the state to provide evenhanded administration of a program that provides food and shelter to the poor. Furthermore, it does not seem too much to ask that courts be able to distinguish between the two.[131] Nonetheless, Rosenberg's skepticism is as well founded today as it was twenty years ago. It is unlikely that the Equal Protection Clause offers a remedy for intertownship inequality in poor relief.

B. Equal Privileges Among Townships

More constitutions than one protect the rights of individuals. "The federal Constitution was designed to guard the states as sovereignties against potential abuses of centralized government; state charters, however, were conceived as the first and at one time the only line of protection of the individual against the excesses of local officials."[132]

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127. *See* Rosenberg, *supra* note 46, at 415-17.

128. *See* Howard M. Smulevitz, *Laissez Welfaire*, INDIANAPOLIS STAR, Sept. 22, 1991, at F1 (quoting a trustee: "This is what's great about the (trustee) system, you have flexibility.").

129. Rosenberg, *supra* note 46, at 416.

130. A comparison proposed by Rosenberg. *See* Rosenberg, *supra* note 46, at 416.

131. *See* Dandridge v. Williams, 397 U.S. 471, 520-22 (1970) (Marshall, J., dissenting) (suggesting a higher level of scrutiny for cases involving benefits necessary for sustaining life); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, 578 n.73 (4th ed. 1991). The court has not adopted such a standard, *id.* at 754, and in the absence of Justices Marshall and Brennan (the only justice joining in Justice Marshall's dissent), it is unlikely to do so soon.

132. People v. Brisendine, 531 P.2d 1099, 1113 (Cal. 1975).

For intertownship inequality in poor relief to survive, it must pass scrutiny not only under the Fourteenth Amendment, but also under the corresponding state constitutional provision, the Equal Privileges Clause.[133]

At least one state examines inequality in welfare benefits more closely under its state constitution than under the federal constitution. In Montana, equal protection claims under the state constitution are reviewed under a mid-level scrutiny when the discrimination affects welfare benefits.[134] The justification for the higher level of review lies in the state charter itself: The Montana Constitution provides for welfare benefits.[135] The middle-tier scrutiny adopted by the Montana court is similar to that suggested by Justice Marshall[136] in his dissent to *Dandridge v. Williams*.[137]

Might Indiana also invoke state constitutional analysis which provides broader rights than does the federal approach? The notion of state constitutional rights which are broader than federal constitutional rights is certainly not novel in Indiana. Chief Justice Shepard of the Supreme Court of Indiana has pointed out "a fine line of cases in which the Indiana Supreme Court held that the Indiana Bill of Rights afforded Hoosiers rights which the federal Constitution did not."[138]

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133. IND. CONST. art. 1, § 23. "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

Intertownship inequality in poor relief might also be attacked under IND. CONST. art. 4, § 23, which requires that "all laws shall be general, and of uniform operation throughout the State." However, the standard of review under IND. CONST. art. 4, § 23 is the same as the standard of review under IND. CONST. art. 1, § 23. Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 597 (Ind. 1980). Therefore, a challenge to intertownship inequality under IND. CONST. art. 4, § 23, appears to be identical to an attack on a geographical classification under the Equal Privileges Clause. This Note considers only the latter.

Another argument which might be made, but is not considered here, is that placing the authority to create eligibility and benefit standards at the discretion of the trustees without the protection of the usual administrative rulemaking procedures is an unconstitutional delegation of legislative authority under IND. CONST. art. 4, § 1. *See* Dortch v. Lugar, 266 N.E.2d 25, 49-50 (Ind. 1971).

134. Butte Community Union v. Lewis, 712 P.2d 1309, 1311 (Mont. 1986). *See generally* Scott C. Wurster, Note, *Butte Community Union v. Lewis: A New Constitutional Standard for Evaluating General Assistance Legislation*, 48 MONT. L. REV. 163 (1987).

135. The Montana Supreme Court refused to hold that the state constitution created a fundamental right for purposes of equal protection analysis. *Butte Community Union*, 712 P.2d at 1311.

136. Wurster, *supra* note 134, at 168-69.

137. 397 U.S. 471, 508-30 (Marshall, J., dissenting).

138. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, Address to the Annual Meeting of the Indiana Civil Liberties Union (Sept. 17, 1988), *in* 22 IND. L. REV. 575, 577 (1989).

However, Chief Justice Shepard did not mention the Equal Privileges Clause. In Indiana case law "[t]here are a myriad of Indiana cases in which the two provisions have been considered in unison."[139] The Indiana Supreme Court has held, "[i]t is well established that the rights intended to be protected under both constitutional provisions are identical."[140]

Hammer v. State[141] was perhaps the first case to set forth a rationale for the holding that the Equal Privileges Clause and the Equal Protection Clause are identical.[142] Hammer was convicted for wearing the badge or emblem of a secret society incorporated by the state in violation of a state statute reserving to society members the right to wear such insignia. Hammer appealed, challenging the constitutionality of the statute under the Equal Protection Clause of the Fourteenth Amendment and under Article 1, Section 23 of the Indiana constitution. Considering the relationship between the two provisions the court commented,

> Section 23 of the [Indiana] Bill of Rights is the antithesis of section 1, art. 14, of the federal Constitution, for, while the latter operates upon states to prevent abridgment by the states of constitutional rights of citizens of the United States, Section 23 prevents the state from granting privileges or immunities . . . [that] shall not equally belong to all citizens. One section prevents the curtailment of the constitutional rights of citizens, and thus prohibits the enlargement of the rights of some in discrimination against others, but, so long as all are treated alike under like circumstances, neither section is violated.[143]

The above passage can be taken to mean that the Equal Privileges Clause protects precisely the same rights as those protected by the Equal Protection Clause of the Fourteenth Amendment, no more and no less. The statute in question did not violate the federal constitution, and therefore, it did not violate the state constitution.

In *Sidle v. Majors*[144] the Indiana Supreme Court described the relationship between the state Equal Privileges Clause and the federal

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139. State *ex rel.* Miller v. McDonald, 297 N.E.2d 826, 829 (Ind. 1973), *cert. denied*, McDonald v. Miller, 414 U.S. 1158 (1974).

140. Haas v. South Bend Community Sch. Corp., 289 N.E.2d 495, 501 (Ind. 1972). *Accord* State *ex rel.* Miller v. McDonald, 297 N.E.2d at 829. The Seventh Circuit, Huff v. White Motor Corp., 609 F.2d 286, 298 (7th Cir. 1979), and the Indiana Court of Appeals, *see, e.g.*, Gary Community Mental Health Ctr., Inc. v. Indiana Dep't of Pub. Welfare, 507 N.E.2d 1019, 1023 n.3 (Ind. Ct. App. 1987); Frame v. South Bend Community Sch. Corp., 480 N.E.2d 261, 265 (Ind. Ct. App. 1985), have followed.

141. 89 N.E. 850 (Ind. 1909).

142. *Id.* at 852-53.

143. *Id.* (citing Cory v. Carter, 48 Ind. 327 (1874); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899)).

144. 341 N.E.2d 763 (Ind. 1976).

Equal Protection Clause in essentially the same way it did much earlier in *Hammer v. State*. "[W]e see no differences in the equal protection provisions of the state and federal constitutions. Both are designed to prevent the distribution of extraordinary benefits or burdens to any group."[145]

Therefore, the current state of Indiana Constitutional law is that the Equal Privileges Clause of the Indiana Constitution protects exactly the same rights as those protected by the Equal Protection Clause of the Fourteenth Amendment. An attempt to alleviate unequal poor relief among the townships which fails under the federal constitution will also fail under the state constitution, unless new ground is broken in Indiana Constitutional analysis.

However, it is not inevitable that the law continue to develop the way it has. The almost syllogistic conclusion of the *Hammer* court that the two provisions are identical ignores significant textual and historical differences between the two clauses.[146] In fact, one of the cases cited in *Hammer*, *Cory v. Carter*,[147] held that the Equal Privileges Clause, which is seventeen years older than the Fourteenth Amendment, was "not intended for persons of the African race"[148] because those persons were not "citizens" as the word is used in Article 1, Section 23,[149] despite an acceptance that the Fourteenth Amendment made them citizens of any state in which they were residents.[150] All this provides curious historical footing for the modern position that the rights intended to be protected by equal protection and equal privileges are the same.[151]

There is more to build on than textual and historical distinctions. In *Reilly v. Robertson*,[152] the supreme court maintained that it will not blindly follow Fourteenth Amendment law in interpreting Article 1, Section 23, of the Indiana Constitution.

> It has been established by this Court that the rights intended to be protected by Art. 1, § 23, of the Indiana Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution are identical. . . . This does not mean, however, that federal cases interpreting the Equal Protection Clause are binding upon this Court in making an

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145. *Id.* at 767.

146. Patrick Baude, *Is There Independent Life in the Indiana Constitution?*, 62 IND. L.J. 263, 270-71 (1987).

147. 48 Ind. 327 (1874).

148. *Id.* at 340.

149. *Id.* at 340-41.

150. *Id.* at 358.

151. *See* Baude, *supra* note 146, at 270-71.

152. 360 N.E.2d 171 (Ind. 1977), *cert. denied*, 434 U.S. 825 (1977).

> interpretation of the Indiana Constitution. Our interpretation of a state constitutional provision is an independent judicial act of this Court, and in making that judgment, federal cases have only persuasive force.[153]

The supreme court then discussed separately the minimum standards for the Equal Protection Clause and the Equal Privileges Clause.[154]

At least two other cases provide the seed for a distinct standard of review for the Indiana Constitution. In *Steup v. Indiana Housing Finance Authority*[155] the court upheld a statute granting benefits to persons at or below 125% of the poverty level against attacks under both the Fourteenth Amendment and Article 1, Section 23.[156] The court first set forth the standard of review under the federal constitution. For cases which do not involve a suspect classification, the standard is whether there is "any rational foundation for the discrimination."[157] "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[158] The court used different language to describe state constitutional analysis. "Under Article 1, § 23 of the Indiana Constitution, 'a classification, to be valid, must be based on substantial distinctions which make one class so different from another as to *suggest the necessity* for different legislation with respect thereto.'" (emphasis added).[159]

Davis Construction Co. v. Board of Commissioners,[160] quoted in *Steup*, was a case decided solely on the basis of Article 1, Section 23.

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153. *Id.* at 175 (citing Haas v. South Bend Community Sch. Corp., 289 N.E.2d 495 (Ind. 1972) and Midwestern Petroleum Corp. v. State Bd. of Tax Comm'rs, 187 N.E. 882 (Ind. 1933)). *Accord*, City of Indianapolis v. Wright, 371 N.E.2d 1298, 1300 (Ind. 1978), *appeal dismissed*, 439 U.S. 804.

154. 360 N.E.2d at 174-75.

155. 402 N.E.2d 1215 (Ind. 1980).

156. *Id.* at 1222-23.

157. *Id.* at 1222 (quoting Loving v. Virginia, 388 U.S. 1, 9 (1967)).

158. *Id.* at 1222 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

159. *Id.* at 1222-23 (quoting Davis Construction Co. v. Bd. of Comm'rs, 132 N.E. 629, 631 (Ind. 1921)). *But see* Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585 (Ind. 1980). In *Johnson*, decided only weeks after *Steup*, the supreme court described judicial scrutiny under Art. 1, § 23, as "whether the legislative classification is based upon substantial distinctions with reference to the subject-matter." *Id.* at 597. While the court maintained the connection between the classification and the subject of the legislation, the distinction between classes must be only substantial; the requirement that the distinction between classes suggest a necessity for unequal treatment was not mentioned. *Id. Accord*, Rohrabaugh v. Wagoner, 413 N.E.2d 891, 894 (Ind. 1980).

160. 132 N.E. 629 (Ind. 1921).

In *Davis*, the General Assembly had passed a statute granting relief to certain construction contractors who became unable to fulfill their obligations to the state because of conditions during World War I. The group of contractors to which the relief was granted was very small and "could not [have been] more clearly pointed out if they were mentioned by name."[161] The supreme court held that the classification was unconstitutional under Article 1, Section 23, and expressly reserved the question of federal constitutionality.[162]

Reilly, *Steup*, and *Davis*, if taken in isolation, provide a foundation for the development of a minimum standard of review for the Indiana Bill of Rights which is subtly different than the minimum standard for the Fourteenth Amendment. Under the Fourteenth Amendment a classification must be merely rationally related to a legitimate state interest, but under a test implied by *Davis* and *Steup*, the classes must be so distinct as to suggest a *necessity*[163] for treating them differently with respect to the subject matter of the legislation.[164] Although *Davis* and *Steup* might be developed into a test slightly more stringent than classic low scrutiny, it would probably not be the same as the middle tier of *Craig v. Boren*,[165] and probably not the same as the standard advocated by Justice Marshall.[166] Where the *Craig v. Boren* test focuses on the importance of the state's interest, under *Steup* and *Davis* a court would examine the nature of the classification and its relationship to the objective of the legislation. Where Justice Marshall advocated a test which balances the interests of the state against the interests of the plaintiff in receiving the benefits, a test which is inherently sensitive to the nature of the benefit provided by the legislation, nothing in *Davis* and *Steup* suggests such a balancing.

The justification for examining some classifications more rigorously under state constitutional analysis than under federal analysis lies in the textual difference between the two clauses: privileges versus protection. Both *Steup* and *Davis* deal with benefits or privileges: low-income housing in *Steup* and the cancellation of contractual obligations under *Davis*. Sometimes the distinction between privileges and protection may be

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161. *Id.* at 631.

162. *Id.*

163. *Id.* at 631; *Steup*, 402 N.E.2d at 1222-23.

164. Reilly v. Robertson, 360 N.E.2d 171, 175 (Ind. 1977), *cert. denied*, 434 U.S. 825 (1977).

165. 429 U.S. 190 (1976). The *Reilly* court also considered the *Craig v. Boren* standard separately from the Art. 1, § 23 standard of review. 360 N.E.2d at 175.

166. Dandridge v. Williams, 397 U.S. 471, 520-22 (1970) (Marshall, J., dissenting) (suggesting a higher level of scrutiny for cases involving benefits necessary for sustaining life).

difficult to discern, and sometimes a case will involve a privilege for one class of people, working against protection of the law for another. Nonetheless, the framers of the Indiana Constitution used substantially different words than did those who drafted the Fourteenth Amendment, and any justification for interpreting the two clauses differently will likely flow from those differences in words.

Dramatic intertownship inequality in poor relief could not withstand review under a standard that asks whether it is necessary to have disparate levels of benefits provided in different townships in order to achieve the purpose of the statute. While it might be necessary to provide for local variations in the cost of providing basic subsistence, gross disparities that go beyond those variations would not be upheld. The suggested standard would not, however, threaten all classifications in the granting or administration of welfare. For example, eligibility guidelines which meet the *Van Buskirk*[167] standards[168] would pass muster as did the income guideline in *Steup*.[169]

However, the common thread that runs through *Davis*, *Reilly*, and *Steup* has not been isolated by Indiana courts, but rather it lies woven into the tapestry of cases which hold that there is no difference between the two constitutional provisions. *Reilly* has been interpreted as standing simply for the general proposition that federal constitution decisions are not binding for Indiana Constitutional decisions.[170] Cases following *Steup* have frequently diluted the wording of the standard of review under Article 1, Section 23, omitting the requirement of a "necessary" classification.[171] *Davis* is relatively obscure and seldom cited by Indiana courts, and its analysis has also been equated with federal analysis.[172] Absent expansion of the Equal Privileges Clause, it offers no more protection than the federal constitution.

C. *The Role of* Van Buskirk *in Alleviating Intertownship Inequality*

Perhaps none of this discussion of the applicability of the principles equal protection and equal privileges would be necessary if trustees

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167. State *ex rel.* Van Buskirk v. Wayne Township, 418 N.E.2d 234 (Ind. Ct. App. 1981).

168. *See supra* section II.B.

169. Steup v. Indiana Housing Fin. Auth., 402 N.E.2d 1215, 1222-23 (Ind. 1980).

170. Priest v. State, 386 N.E.2d 686, 689 (Ind. 1979). In fact, it has been cited for the proposition that the two clauses are equivalent. *See, e.g.*, Championship Wrestling, Inc. v. State Boxing Comm'n, 477 N.E.2d 302, 304 (Ind. Ct. App. 1985).

Perhaps *Reilly*'s true contribution is to establish that Art. 1, § 23, can provide adequate and independent state grounds to escape review by the United States Supreme Court. *See* Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (holding that the Supreme Court will review state court decisions when there are no adequate and independent state grounds).

171. *See supra* note 159.

172. Vicory v. State, 400 N.E.2d 1380, 1383 (Ind. 1980).

followed the principles established by the *Van Buskirk* court. If eligibility and benefit standards truly reflected the local cost of providing basic subsistence and were generous enough to actually deliver that type of relief, then the issues of disparity among the townships would disappear. To have local poor relief decisions made with the genuine purpose of meeting basic needs of the poor and to have the standards by which those decisions are guided to be established by realistic evaluation of the local costs of providing those needs would go far in eliminating unfairness and intertownship inequality from poor relief.

V. Reform

Advocates for poor relief reform suggest at least two changes—one modest, the other more sweeping.

The more modest proposal is for the township trustees to adopt state-wide standards which can be adjusted for local variation in costs, substantiated by evidence such as market surveys.[173] The adoption of guidelines such as those proposed by the Metropolitan Poor Relief Administration Council[174] would significantly enhance the fairness and equality of poor relief administration while leaving trustees with enough discretion to adapt relief to local needs and conditions.

The more sweeping proposal, one dependent on political rather than judicial reform, is to integrate the administration of general assistance with the administration of the categorical assistance programs.[175] Such an approach has advantages beyond the creation of fairness within the general assistance program. These advantages include increased administrative efficiency and simplified accessibility to recipients.[176]

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173. Families in Poverty, *supra* note 24, at 87.

174. The Metropolitan Poor Relief Administration Council was created by the Indiana General Assembly and assigned the duty of developing poor relief guidelines for eligibility, benefits, and trustee accessibility. Ind. Code § 12-2-1-15-1 to -6 (Supp. 1991).

175. Families in Poverty, *supra* note 24, at 88.

176. *Id.* Allegations that trustees are inefficient at delivering government services are not new. The following scathing attack on trustees was written over sixty years ago at a time when township trustees had many more responsibilities than they do today.

> The maintenance of obsolete forms of local government is costing Indiana citizens millions of wasted dollars annually. The state board of accounts . . . can not prevent county commissioners from purchasing worthless gravel at twice the price other commissioners are paying for good gravel. Yet on the whole, county commissioners are performing a better service than township trustees. If any officers have vindicated their abolition it is township trustees. Township trustees are constantly managing less mileage of roads but constantly at a higher cost. Township trustees are spending startling sums of money for poor relief. In one county it is said seven doctors were paid $83,000 for charity medical cases. A separate county government and several township governments within a city are unnecessary and expensive.

Hugh E. Willis, *Revision of the Indiana Constitution*, 5 Ind. L.J. 329, 347 (1930).

The judicial restrictions to trustee discretion are maturing very slowly.[177] Two decades passed between *Goldberg v. Kelly* and *Center Township v. Coe*. According to critics of the poor relief system, the unfairness and inequality described by Rosenberg twenty years ago still exists. Because poor relief is essentially a legislative issue, the best hope for removing arbitrariness and inequality from general assistance in Indiana is through legislative reform such as the adoption of eligibility and benefit guidelines that are uniform across the state.

VI. Conclusion

A line of judicial decisions has placed constitutional restrictions on the discretion of the township trustee in the administration of poor relief in Indiana. The earlier cases established that poor relief applicants and recipients have a right to due process and that due process requires the use of written, objective standards in the adjudication of poor relief applications. A later case, *Van Buskirk*, intruded further on trustee discretion by requiring the standards to be based on evidence of the local cost of basic subsistence. The most recent case, *Center Township v. Coe*, explicitly invoked constitutional restrictions on the substantive aspects of a trustee's discretion, holding that a trustee violated his client's right to Equal Protection and Equal Privileges by providing unequal benefits to different classes of people within his township.

Center Township v. Coe is likely the high water mark for constitutional restriction of trustee discretion. The Equal Protection Clause probably will not provide a guarantee of equality in poor relief among townships, and neither will the Equal Privileges Clause unless it is expanded by the Indiana Supreme Court. *Van Buskirk* may prove to be the strongest guarantee of uniformity across township lines in that each trustee must formulate eligibility and benefit standards with an eye toward the local cost of basic subsistence. If unfairness and inequality are to be eliminated from Indiana poor relief, it will have to be done by the General Assembly.

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177. In some instances judicial impact on the poor relief system has been not only slow but almost completely ineffective. Eddleman v. Center Township of Marion County, 723 F. Supp. 85 (S.D. Ind. 1989) was the *second* decision to hold unconstitutional the residency requirement for poor relief eligibility. The first, which was generally ignored, was Major v. Van Dewalle, Civil No. 4169 (N.D. Ind. Dec. 10, 1969). *See Eddleman*, 723 F. Supp. at 88-89; Rosenberg, *supra* note 46, at 388.