

A NONPUBLIC FORUM OR A BRUTAL BUREAUCRACY? ADVOCATES' CLAIMS OF ACCESS TO WELFARE CENTER WAITING ROOMS

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In this Note, Sheri Danz evaluates the impact of the evolution of the public forum doctrine on advocates' claims of access to welfare centers. Welfare agencies often prohibit legal advocates from associating with and educating welfare applicants on welfare center grounds. Recently, courts have applied the public forum doctrine to uphold welfare agency restrictions on advocacy against First Amendment challenges by advocates. Danz argues that despite the increasingly formalistic and deferential nature of the Supreme Court's public forum decisions, reviewing courts should not uphold welfare agency policies that prohibit advocacy in welfare center waiting rooms. She first examines the use of bureaucratic disenfranchisement practices by welfare agencies to deny applicants their statutory rights and deprive them of much-needed benefits. Danz argues that these practices invoke a core concern of the First Amendment—to protect the right of citizens to check governmental abuse. Next, she explores changes in the public forum doctrine and assesses their impact on advocates' claims of access to welfare center waiting rooms. Finally, Danz identifies three grounds under the modern public forum doctrine that should lead a reviewing court to overturn prohibitions on advocacy at welfare centers: Restrictions on advocacy in welfare center waiting rooms lack the compelling interest required for restrictions in designated public fora, many prohibitions on advocacy reflect viewpoint-discriminatory motives, and courts that view restrictions as a component of bureaucratic disenfranchisement may find that restrictions on advocacy fail reasonably to promote legitimate governmental goals.

INTRODUCTION

Lakesha Reynolds, a mother of one, recently attempted to apply for public assistance because her unemployment insurance had run out, and she was unable to support her family with earnings from sporadic and low-paying temporary employment.¹ Having only one dol-

* I would like to thank the staff of the *New York University Law Review* for the work they have dedicated to publishing this piece. I am particularly grateful for the ideas and editing of Joanne Brandwood, Lewis Bossing, Diana Kasdan, Sally Kesh, David Kraut, Seth Nesin, Rafael Pardo, and Alex Reinert. Finally, I would like to thank Professors Helen Hershkoff and Sylvia Law, whose experience, knowledge, and insight shaped the development of this Note and made its writing a meaningful learning experience.

¹ Ms. Reynolds is the lead plaintiff in a current lawsuit challenging the practices of the New York City Human Resources Administration in converting its welfare offices from Income Maintenance Centers to Job Centers. See *Reynolds v. Giuliani*, 35 F. Supp. 2d 331, 348 (S.D.N.Y.) (granting preliminary injunction), modified, 43 F. Supp. 2d 492, 498 (S.D.N.Y. 1999) (permitting conversion of three additional job centers and requiring hearing on adequacy of city's auditing procedures). This narrative is based on her allegations.

lar and enough food to feed her family for the next day or two, she arrived at her local welfare center early on a Tuesday morning. She waited until late in the afternoon to meet with a caseworker. Although federal and state laws mandate the provision of expedited food stamps and emergency cash assistance to people in Ms. Reynolds's situation,² and although Ms. Reynolds informed her caseworker of her desperate situation and her desire to apply for these programs, the caseworker falsely told her that these programs no longer existed and instead gave her a referral to a local food pantry. The caseworker also improperly told Ms. Reynolds that she would remain ineligible for any form of assistance until she had completed a thirty-five day job search program.³ Finally, he gave her an application for public assistance. Although Ms. Reynolds had a right to turn in an application on the first day of contact with the welfare center,⁴ the caseworker told her to bring her application to her first job search appointment, scheduled nearly a week later. Pursuant to these instructions, Ms. Reynolds brought her completed application to the welfare office, ready to begin the job search program. Because the food pantry had told her that it would not have food until the date of her appointment, she went there prior to reporting to the welfare center and arrived late to her appointment. For this reason, the agency closed her case, forcing her to recommence the process.

Ms. Reynolds is not alone in enduring such practices. Applicants for public assistance have encountered bureaucratic obstacles since the enactment of the Social Security Act in 1935.⁵ Ms. Reynolds's

See Class Action Complaint ¶¶ 106-115, *Reynolds v. Giuliani*, 35 F. Supp. 2d 331 (S.D.N.Y. 1999) (No. 98 Civ. 8877 WHP) [hereinafter *Reynolds Complaint*], available at <<http://www.welfarelaw.org/jobsctr/com1215.htm>>.

² See *infra* note 30.

³ See *infra* notes 30-32 (describing timelines for processing emergency benefits, food stamps, and Medicaid applications).

⁴ Ms. Reynolds had a right to apply for food stamps on that day. See 7 U.S.C. § 2020(e)(2) (1994 & Supp. IV 1998) (requiring agency to permit and encourage application for food stamps on first day of contact with agency).

⁵ See discussion *infra* Part I.B. For a history of the inception of the Social Security program and the enactment of other New Deal relief programs, see generally Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973*, at 9 (1993) (explaining that Social Security Act had fostered distinction between "deserving and undeserving poor" and created "baroque reporting requirements intended to weed out those who were too disorganized or dysfunctional to obtain public support and therefore unlikely to use it as a springboard to permanent employment"); Susan D. Bennett, "No relief but upon the terms of coming into the house"—Controlled Spaces, Indivisible Disentitlements, and Homelessness in an Urban Shelter System, 104 *Yale L.J.* 2157, 2193 (1995) (noting that "early in the history of the Social Security Act, the discouragement of applications was an accepted bureaucratic strategy to limit costs and exclude undesirables"); J.L. Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia*, 57 *Va. L. Rev.* 818, 819 (1971) (discussing longstanding difficulties of

story forms one small component of a larger pattern of "bureaucratic disentanglement," the insidious process by which administrative agencies deprive individuals of their statutory entitlements and infringe on their constitutional rights.⁶ Bureaucratic disentanglement, effectuated through such practices as withholding information, providing misinformation, isolating applicants, and requiring extraordinary amounts of documentation, prevents the transformation of statutory rights into tangible benefits.⁷ Bureaucratic disentanglement helps explain geographical disparities in the provision of assistance,⁸ and suggests that

protecting recipients' rights in "system of broad standards, wide discretion and a fundamentally coercive relationship between the dispenser and the recipient of assistance"); see also Joel Handler, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law*, 92 *Yale L.J.* 1270, 1270 (1983) (describing current welfare practices as result of "routinization and bureaucratization" of welfare administration).

⁶ This term initially appeared in an article by Michael Lipsky. See Michael Lipsky, *Bureaucratic Disentanglement in Social Welfare Programs*, 58 *Soc. Serv. Rev.* 3, 3 (1984); see also Bennett, *supra* note 5, at 2159-60 (explaining that "[b]ureaucratic disentanglement can be achieved through any practice that frustrates attempts to apply for benefits, or that delays actual receipt of the benefits once the applicant's eligibility is officially confirmed" and arguing that such practices "are neither so neutral, nor so separate from the actions of individual workers, as they appear at first glance"); see also Gary L. Blasi, *Litigation Strategies for Addressing Bureaucratic Disentanglement*, in *The Rights of the Homeless* 285, 297-302 (PLI Litig. & Admin. Practice Course Handbook Series No. 366, 1988) [hereinafter Blasi, *Litigation Strategies*] (discussing advantages and disadvantages of "targeted litigation" approaches to addressing bureaucratic hurdles to assistance); Gary L. Blasi, *What's a Theory For? Notes on Reconstructing Poverty Law Scholarship*, 48 *U. Miami L. Rev.* 1063, 1071 (1994) ("When such direct methods are thwarted, government resorts to 'bureaucratic disentanglement'—relatively obscure and often informal changes in procedural rules and processing systems that effectively exclude large numbers of people."); Anna Lou Dehavenon, *Charles Dickens Meets Franz Kafka: The Maladministration of New York City's Public Assistance Programs*, 17 *N.Y.U. Rev. L. & Soc. Change* 231, 233-34 (1989-90) (describing "enormous and byzantine bureaucracy administered according to a mind-boggling array of rules" faced by welfare recipients and reporting that "recipients' benefits may be terminated even when they are completely eligible"); Handler, *supra* note 5, at 1271 (attributing agency practices to "volume, values, and the distribution of wealth and power"); Jonathan Zasloff, *Children, Families, and Bureaucrats: A Prehistory of Welfare Reform*, 14 *J.L. & Pol.* 225, 280-86, 306-08 (1998) (describing disempowering effects of federal assistance schemes on local agency administration). For further discussion of bureaucratic disentanglement at welfare centers, see *infra* Part I.B.

⁷ See Blasi, *Litigation Strategies*, *supra* note 6, at 287-88 (discussing "the chasm between abstract expressions of right and the concreteness of their deprivation"); Lipsky, *supra* note 6, at 8 (discussing methods used by Boston welfare agencies to limit access to welfare benefits).

⁸ See General Accounting Office, *Pub. No. GAO/HEHS-97-74, Welfare Reform: States' Early Experiences With Benefit Termination* 60 (1997) [hereinafter *GAO Report*] (comparing states' termination of benefits); Kathleen A. Maloy et al., *George Wash. Univ. Med. Ctr., A Description and Assessment of State Approaches to Diversion Programs and Activities Under Welfare Reform, Executive Summary* (1998) <<http://www.gwumc.edu/chpr/wr/execsum.htm>> (identifying regional differences in diversion programs); *Due Process and Fundamental Fairness in the Aftermath of Welfare Reform*, *Welfare News*, Sept. 1998, available at <<http://www.welfarelaw.org/DueProcess.htm>> [hereinafter *Welfare Law Center Report*] (stating that "[a]n applicant in one region may find the application process

sheer reduction in the number of recipients does not reflect decreased poverty.⁹ In contrast to the benevolent relationship that welfare agencies attempt to convey to the public,¹⁰ bureaucratic disenfranchisement evinces an adverse relationship between welfare agencies and applicants.

Disenfranchisement practices of local agencies often escape monitoring programs.¹¹ Even worse, monitoring programs effectively encourage bureaucratic disenfranchisement by providing incentives to reduce caseloads and cut costs, while ignoring the wrongful denial of benefits.¹² Consequently, the proper administration of public assistance programs largely depends on the private enforcement of rights. Legal

considerably different from a like applicant in another region" and discussing regional disparities within Virginia and Alabama).

⁹ See Karen Houppert, *You're Not Entitled!: Welfare 'Reform' Is Leading to Government Lawlessness*, *Nation*, Oct. 25, 1999, at 11, 17 (referring to National Governors' Association survey findings that 40-50% of former recipients had not found employment and that most employed former recipients were unable to bring families out of poverty); David Kocieniewski, *Study Finds Mixed Results in Reducing Welfare Rolls*, *N.Y. Times*, Oct. 22, 1999, at B6 (describing New Jersey findings that two-thirds of former welfare recipients continue to live below poverty line).

¹⁰ See, e.g., James A. Krauskopf, *A City Agency Intent on Running a Clean Food-Stamp Program*, *N.Y. Times*, Oct. 24, 1981, at A22 (denying, as administrator/commissioner of New York City Human Resources Administration, allegations that staff "is indifferent to the integrity of the food-stamp program"); Felicia R. Lee, *Giuliani's Spending Plan: AIDS Services; City Denies Basic AIDS Benefits, Suit Contends*, *N.Y. Times*, Feb. 15, 1995, at B4 (quoting deputy commissioner's assertion that complicated welfare cases are exception that "everyone hears about" and that "[i]t's not my sense that people are routinely falling through the cracks"); Frank Reeves & Peter J. Shelly, *Temporary Welfare; Ridge Administration Effort to Reform Public Assistance Doing Fine, Say Those Running It*, *Pitt. Post-Gazette*, July 6, 1997, at A1 ("To hear Public Welfare Secretary Feather Houstoun tell it, the Ridge administration's experiment in welfare reform is doing just fine."); Liz Trotta, *New York Welfare Chief Defends Moves*, *Wash. Times*, Dec. 12, 1998, at A3 (relating speech in which Jason Turner, New York City Human Resource Commissioner, stated administration's goal of "help[ing] people mobilize their internal resources and in some disciplined way to apply them").

¹¹ See Food & Nutrition Serv., U.S. Dep't of Agric., *New York Program Access Review November-December 1998*, at 13 (1999) [hereinafter *USDA Report*] (describing deficiencies in New York City's documentation practices); Zasloff, *supra* note 6, at 312 (describing repeated refusal of Wisconsin Governor Tommy Thompson "to support legislation that would make the bureaucracy find out what exactly happened to the welfare recipients who left the rolls"); Jason DeParle, *What Welfare-to-Work Really Means*, *N.Y. Times*, Dec. 20, 1998, § 6 (Magazine), at 50 (discussing New York City Mayor Rudolph Giuliani's resistance to studies tracking individuals diverted from applying for public assistance).

¹² See Dehavenon, *supra* note 6, at 246 (explaining that federal accounting rules, known as Quality Control, "impose[] sanctions only for payment error and not for denial error"); Zasloff, *supra* note 6, at 247 (portraying Quality Control as system "that places the highest priority on reducing overpayments and fraud"). Recent changes in federal assistance programs encourage increased reliance on disenfranchisement policies by promulgating timelines for the provision of federal funds, by penalizing states that fail to employ a specified percentage of recipients, by allowing greater programming latitude at the local level, and by instituting incentives to reduce rolls. See *infra* notes 43-45 and accompanying text.

advocates play an integral role in this system.¹³ Individuals must know of their rights in order to vindicate them, but the rapid and drastic changes in public assistance rules and the inaccessibility of information regarding statutory rights makes such awareness almost impossible.¹⁴ By providing information at welfare centers, legal advocates enable clients to confront immediately mistakes that can cause harmful delays or improper denial of desperately needed benefits. Without such advocacy, applicants must appeal to agency workers—the very individuals often imposing obstacles in the application process—for information. Advocacy at welfare centers also exposes legal advocates to systemic issues, thus improving their ability to advise future clients and plan pertinent litigation.¹⁵

Though courts have recognized a First Amendment right of association between legal advocates and clients and a First Amendment right to speak on public property,¹⁶ legal advocates attempting to advise and assist applicants in welfare center waiting rooms are often barred from doing so.¹⁷ In violation of First Amendment principles, many welfare agencies have imposed partial and complete prohibitions on advocacy in their waiting rooms.¹⁸ Ironically, the public forum doctrine, initially invoked to vindicate First Amendment rights to speak and associate on public property, has evolved in a way that creates significant hurdles for attempts to establish a right of access to welfare centers for legal advocates.¹⁹ The doctrine requires a compelling governmental interest to restrict speech in a public forum,²⁰ but because courts have generally come to regard welfare centers as non-public fora, they have applied exceedingly deferential standards in reviewing agency restrictions on advocacy.²¹

¹³ For the purposes of this Note, the term “legal advocates” refers to individuals who attempt to educate, advise, and assist welfare applicants regarding their legal rights to welfare and due process.

¹⁴ See Wendy Pollack, *Temporary Assistance for Needy Families: Assessments, Individual Responsibility Plans, and Work Activities*, 31 *Clearinghouse Rev.* 401, 402 (1998) (attributing delay in legal representation to applicants’ unawareness of legal rights and agency error).

¹⁵ See *id.* at 402, 404-05 (discussing legal services providers’ lack of knowledge of systemic issues and suggesting “that targeting individual representation” at centers may be effective means of systematic change).

¹⁶ See discussion *infra* Part II.A.

¹⁷ See discussion *infra* Part II.C.

¹⁸ See discussion *infra* Parts II.B, II.C.

¹⁹ See *id.*

²⁰ See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983) (describing standard of review for evaluating speech restrictions in public fora).

²¹ In applying the modern public forum doctrine’s bifurcated analysis, a reviewing court first classifies the property as a traditional public forum, designated public forum, or non-public forum, and then applies a corresponding standard of review to evaluate whether the

Under this deferential approach, courts fail to recognize that exclusion of legal advocates from welfare centers contributes to bureaucratic disenfranchisement. This oversight defeats attempts to advance administrative justice and further allows the continuation of agency errors that have serious consequences for some of the neediest members of society. This Note maintains that the public forum doctrine does not require such deference because welfare centers should not be classified as nonpublic fora. This Note also suggests that viewpoint-discriminatory motives, rather than reasonable governmental planning, underlie many prohibitions on advocacy in welfare center waiting rooms. For these reasons, reviewing courts can and should invalidate agency restrictions on legal advocacy.

Part I describes the rights that applicants for public assistance seek to invoke, then examines the application experience and the role of the advocate in bridging the gap between abstract rights and the reality of applying for public assistance. Part II analyzes recent changes in the public forum doctrine and their potential impact on legal advocates' attempts to establish a First Amendment right to access welfare centers. Part III demonstrates that, despite its evolution, the public forum doctrine continues to require judicial scrutiny of welfare center prohibitions on advocacy; this Part argues that such scrutiny should include a realistic assessment of the welfare application experience and a welfare agency's underlying purposes for prohibiting advocacy in welfare center waiting rooms.

I

RIGHTS VS. REALITY: BUREAUCRATIC DISENFRANCHISEMENT IN WELFARE OFFICE WAITING ROOMS

[S]tatutory rights . . . cannot be eaten or worn; neither do they provide shelter from the cold. The reality of such rights exists not in law journals, but in welfare office waiting rooms and on the streets. The contradictions between the precatory or even mandatory language of welfare statutes and the reality of the poor has perhaps never been wider than it is at present.²²

Though welfare policy has undergone significant changes since these words were written,²³ the contradictions between statutory enti-

challenged restriction violates a First Amendment right. See *id.* Regulations in nonpublic fora receive the most deferential standard of review. See discussion *infra* Parts II.B, II.C.

²² Blasi, *Litigation Strategies*, *supra* note 6, at 289.

²³ The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) enacted the most dramatic of these changes. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended primarily in scattered sections of 42 U.S.C. (Supp. IV 1998)). Known as "welfare reform," this act promised and implemented a transformation

tlements and the realities experienced by their intended beneficiaries persist. This section outlines statutory and constitutional rights to governmental assistance, examines agency policies and practices that violate rights and deprive individuals of intended benefits, and discusses the role of legal advocates in addressing illegal agency practices.

A. *Statutory and Constitutional Rights to Public Assistance*

In 1996, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), "reforming" America's welfare system and effectively ending federal entitlement to welfare.²⁴ However, various entitlements to public assistance have survived welfare reform. Food stamps remain available to both the unemployed and working poor,²⁵ individuals who meet financial eligibility requirements may still receive Medicaid,²⁶ and people with specified disabilities continue to qualify for Supplemental Security Income.²⁷ In the wake of welfare reform, several states have elected to create entitlement status to cash assistance,²⁸ and some state consti-

of the existing system of entitlements, altering the relationship between the federal government and states, prohibiting eligibility for certain groups, and establishing a five-year time limit for cash assistance. PRWORA transformed the federal-state relationship through its block grant provisions, see 42 U.S.C. § 603(a) (Supp. IV 1998), and work requirements, see id. § 607(a)-(e). Under PRWORA, states determine income limits and grant levels. See generally House Comm. on Ways & Means, 105th Cong., 1998 Green Book (Comm. Print 1998) (describing implementation of and state responsibilities under Temporary Assistance for Needy Families). PRWORA also reduced eligibility for immigrants and children with certain disabilities. See Joel F. Handler, *Welfare-to-Work: Reform or Rhetoric?*, 50 Admin. L. Rev. 635, 638-41 (1998) (describing "critical impact" of PRWORA on "well-being of low-income mothers and children"). Under PRWORA, states are prohibited from providing federal funds to families for a period that exceeds five years. See 42 U.S.C. § 608(a)(7)(A) (Supp. IV 1998).

²⁴ PRWORA specifically states that it "shall not be interpreted to entitle any individual or family to assistance under any state program funded under [the Act]." 42 U.S.C. § 601(b) (Supp. IV 1998).

²⁵ See 7 U.S.C. §§ 2011-2018 (1994 & Supp. IV 1998) (describing food stamp program goals, provisions, and eligibility requirements); see also Helen Hershkoff & Stephen Loffredo, *The Rights of the Poor* 136-55 (1997) (explaining federal food stamp program).

²⁶ See 42 U.S.C. § 1396a(a)(10)(A) (1994 & Supp. IV 1998) (delineating Medicaid qualification criteria); see also Hershkoff & Loffredo, *supra* note 25, at 178-99 (explaining Medicaid provisions).

²⁷ See 42 U.S.C. § 1382(a) (1994). But cf. Handler, *supra* note 23, at 639-41 (discussing reduced program eligibility for immigrants and children with certain disabilities as result of PRWORA).

²⁸ See, e.g., Colo. Rev. Stat. § 26-2-111 (1999) (setting forth mandatory eligibility criteria for public assistance); Wis. Stat. § 49.015 (1997-98) (setting forth eligibility criteria for program for general relief); N.Y. Comp. Codes R. & Regs. tit. 18, § 352.1 (1997) (specifying eligibility guidelines for provision of public assistance in New York); see also Melissa Kwaterski Scanlan, *The End of Welfare and Constitutional Protections for the Poor: A Case Study of the Wisconsin Works Program and Due Process Rights*, 13 Berkeley

tutions establish a governmental duty to provide for needy residents.²⁹ Moreover, federal and state statutes provide for certain forms of emergency assistance pending an eligibility determination.³⁰

Regardless of ultimate eligibility status, entitlement programs contemplate a fair procedure for the determination of eligibility. Most programs allow all persons an opportunity to apply for assistance and require agencies to provide a timely response to their application.³¹ Legislative schemes also establish a right to information about eligibility requirements and mandate standardized application procedures.³² These rights to information and timeliness operate as one component of an applicant's recognized constitutional due process right.³³ Hence, federal and state laws establish a variety of proce-

Women's L.J. 153, 154-55 (1998) (maintaining that states create property interest in public assistance by enacting rule-based, rather than discretionary, welfare programs).

²⁹ See, e.g., Ill. Const. preamble (describing endeavor to "eliminate poverty and inequality"); N.Y. Const. art. XVII, § 1 ("The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."). See generally Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1153-69, 1191-94 (1999) (distinguishing concerns of federal rationality review from those of state review and setting forth standard of review for claims involving state constitutional rights).

³⁰ See, e.g., 7 U.S.C. § 2020(e)(9) (1994 & Supp. IV 1998) (setting forth expedited food stamp program); 7 C.F.R. § 273.2(i)(1) (2000) (same); 42 C.F.R. § 435.930 (1999) (mandating that state agency and delegate local agency provide assistance in securing emergency medical care as needed); N.Y. Comp. Codes R. & Regs. tit. 18, § 351.8(c)(4) (1999) (requiring that agencies give emergency assistance "[w]hen eligibility has not been established but immediate need is determined to exist").

³¹ See, e.g., 7 U.S.C. § 2020(e)(2) (1994 & Supp. IV 1998) (providing that state permit any household applying for food stamps to apply on first day of in-person contact with agency); 42 U.S.C. § 1396a(a)(8) (1994) (requiring state to "provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals"); N.Y. Comp. Codes R. & Regs. tit. 18, § 350.3(a) (1998) ("Any person has the right to make application for that form of public assistance or care that he believes will meet his needs."); State Policy Documentation Project, *Findings in Brief* (visited Aug. 9, 2000) <<http://www.spdp.org/tanf/applications/appsumm.htm>> (reporting existence of right to file Temporary Assistance for Needy Families application in all 50 states).

³² See, e.g., 42 U.S.C. § 602(a)(1)(B)(iii) (Supp. IV 1998) (requiring that state plan include "objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment"); 7 C.F.R. §§ 272.5, 273.2(c)(4), 273.2(e)(1) (2000) (mandating availability of information regarding federal food stamp program's eligibility requirements and administrative procedures); 42 C.F.R. § 435.905(a)(1)-(3) (1999) (providing that individuals receive all information regarding Medicaid eligibility, criteria, and services whenever they request it); N.Y. Comp. Codes R. & Regs. tit. 18, § 351.8(b) (1999) (providing for notification of availability of emergency assistance); id. § 355.1 (1998) (requiring provision of information about public assistance eligibility and procedures); id. § 350.7(a) (1995) (providing that local agencies give all individuals who request or apply for cash assistance specified information).

³³ See U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

dural and substantive rights, available to all individuals seeking assistance.

B. The Reality of the Welfare Application Process and the Role of an Advocate

As many advocates and most applicants can attest, the existence of statutory rights to assistance routinely fails to translate into tangible benefits. Observers of the dissonance between abstract rights and the reality experienced by those in need have identified its source as "bureaucratic disenfranchisement."³⁴ Bureaucratic disenfranchisement takes place through "routine or obscure decision making, or the unobtrusive nondecisions of policymakers" in the setting of "bureaucratic rather than public political arenas," such as agency meetings, applicant interviews, and welfare office waiting rooms.³⁵ Its process has the effect of "erod[ing] the position of relatively powerless groups without arousing them or their watchdog allies," and of "appear[ing] to leave the structure of policy in place, while indirectly diluting its substantive value."³⁶ While a comprehensive definition of bureaucratic disenfranchisement does not appear in welfare policy literature, many facets of this process have been identified, including several that occur during the welfare application process: delay and denial tactics, unnecessarily burdensome documentation requirements, withholding of information and provision of misinformation, long waits and forced physical presence, and isolation of applicants.³⁷

State deprive any person of life, liberty, or property, without due process of law."); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (establishing right to pretermination fair hearing as part of welfare recipient's due process rights). Commentators have noted that a federal due process right exists despite PRWORA's express language. See, e.g., David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 *Brook. L. Rev.* 231, 280-306 (1998) (maintaining that postreform trend towards privatization entitles welfare recipients to greater due process protections and describing necessary protections); Scanlan, *supra* note 28, at 166-93 (setting forth postreform due process argument based on property and liberty interests); Michelle L. VanWiggeren, *Experimenting with Block Grants and Temporary Assistance: The Attempt to Transform Welfare by Altering Federal-State Relations and Recipients' Due Process Rights*, 46 *Emory L.J.* 1327, 1359-61 (1997) (analyzing language in PRWORA and concluding that "objective criteria" provisions indicate congressional intent to preserve due process rights). But see Rebecca E. Zietlow, *Two Wrongs Don't Add up to Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures*, 45 *Am. U. L. Rev.* 1111, 1126-29, 1139-49 (1996) (describing eviscerating effects of proposed reforms on traditional due process rights and setting forth alternative arguments for preserving such rights).

³⁴ See *supra* note 6.

³⁵ Lipsky, *supra* note 6, at 3-5.

³⁶ *Id.* at 20-21.

³⁷ See generally Bennett, *supra* note 5, at 2164-79 (delineating forms of bureaucratic disenfranchisement).

Though federal regulations require the immediate issuance of food stamp and Medicaid applications,³⁸ and some state regulations do the same for various forms of cash assistance,³⁹ their promise remains unrealized for countless individuals who have been turned away from centers pursuant to agency delay and denial tactics.⁴⁰ Such tactics range from inadvertent agency inefficiency to intentional policies.⁴¹ While administrative oversight may partially explain denial and delay, these tactics also serve to reduce the rolls and prevent the distribution of limited resources. An agency's acceptance of an application serves as official recognition of an applicant's potential need, triggers eligibility determination time limits, and formally invokes an applicant's constitutional due process rights.⁴² Understaffed and overburdened agencies can avoid these legal obligations by postponing or preventing the acceptance of an application.⁴³ By replacing per capita funding with a block grant system and providing roll reduction

³⁸ See *supra* note 31 and accompanying text.

³⁹ See *id.*

⁴⁰ As one commentator has written:

When you walk into a center, you have the right to get and file an application. To do that, you must first be deemed worthy of one by the person whose job it is to hand them out and initiate the herding process. Often people never get past point one, because the worker *who is obligated by law* to give you that application, not to question or determine your eligibility, often refuses to do so. When that happens, people who are rejected at the door, who have no resources to turn to for advice, just fall through the cracks. They are included in no statistics, anywhere.

Theresa Funciello, *Tyranny of Kindness: Dismantling the Welfare System to End Poverty in America* 26 (1993); see also Houppert, *supra* note 9, at 12 (reporting that 84% of applicants at one New York City welfare center left without filing applications).

⁴¹ See *Reynolds v. Giuliani*, 35 F. Supp. 2d 331, 344-45 (S.D.N.Y.) (describing delays endured by applicants, including month-long waits for expedited food stamps, and instances in which center staff improperly turned away individuals because of age or absence of spouse), modified, 43 F. Supp. 2d 492 (S.D.N.Y. 1999); *Fauntleroy v. Staszak*, 3 F. Supp. 2d 234, 239 (N.D.N.Y. 1998) (granting attorney's fees to plaintiffs for attorney monitoring of settlement that required Department of Social Services to provide timely benefit applications); *Perez v. Lavine*, 412 F. Supp. 1340, 1356-57 (S.D.N.Y. 1976) (ordering New York Social Services to revise their procedures because "statute and regulations . . . require that plaintiffs be able to pick up application forms within a reasonable time after they attempt to do so, specifically, on their first or second visit to an Income Maintenance center for that purpose").

⁴² See USDA Report, *supra* note 11, at 7 ("Denial of the opportunity to timely receive and file an appropriate application form is, in effect, a denial of a wide range of rights afforded to applicants in law and regulations."); Funciello, *supra* note 40, at 26 ("For all practical intents and purposes, from the state's point of view, [individuals in need] do not exist unless they have submitted an application."). But see Jerry L. Mashaw, *Dignitary Process: A Political Philosophy of Liberal Democratic Citizenship*, 39 U. Fla. L. Rev. 433, 439 (1987) (arguing that constitutional due process should not become so overprotective that it upsets balance of state created substantive and procedural rights).

⁴³ See Bennett, *supra* note 5, at 2160 ("Paradoxically, the very constitutional principles and statutory and regulatory safeguards designed to protect the rights of individuals and to

rewards,⁴⁴ federal welfare reform has instituted even greater financial incentives for agency use of such tactics.⁴⁵

Once applicants have successfully completed their initial application for public assistance, they must go through numerous additional steps in order to prove their eligibility,⁴⁶ including the submission of an extraordinary amount of documentation.⁴⁷ While agency efforts to assess eligibility and prevent fraud justify some documentation requirements, agencies often force applicants to fulfill seemingly illogical and nearly impossible requirements.⁴⁸ One observer has termed such requirements "verification extremism," and has described this practice as "the main cause of preapplication disenfranchisement in benefit systems everywhere," explaining that "fixations on the form of proof of eligibility . . . can be impassable logistical obstacles that bear little relationship to ensuring the integrity of the program."⁴⁹ In addition to verification extremism instituted by official agency policy,⁵⁰ verifica-

safeguard the administrative integrity of welfare programs may provide perverse incentives to cut individuals off before the application process has begun.").

⁴⁴ See 42 U.S.C. § 603(a) (Supp. IV 1998) (creating PRWORA system of block grant provisions); see id. § 607(b)(3) (Supp. IV 1998) (providing for reduction in states' work participation requirements corresponding to decrease in states' welfare rolls).

⁴⁵ See *Reynolds*, 35 F. Supp. at 333 (describing New York City's conversion of income maintenance centers into job centers as strategy responding to welfare reform); Maloy et al., *supra* note 8 (describing increase in use of diversion tactics in anticipation of and response to welfare reform); cf. GAO Report, *supra* note 8, at 3 (describing how under block grant program many states instituted benefit termination provisions to reduce their welfare rolls).

⁴⁶ See, e.g., Mark Green, *From Welfare to Work: Getting Lost Along the Way* 14 (1997) (discussing "series of complicated steps . . . that often force [welfare applicants] to travel all over the city").

⁴⁷ See, e.g., N.Y. Comp. Codes R. & Regs. tit. 18, § 351.1(b)(2) (1998) (requiring applicants to "furnish evidence" to verify identity, residence, family composition, cost of shelter, all sources of income, savings or other resources, and citizenship status); see also Bennett, *supra* note 5, at 2165-66 (listing District of Columbia emergency shelter system's documentation requirements).

⁴⁸ See, e.g., *Reynolds Complaint*, *supra* note 1, ¶¶ 84-85 (describing lengthy "Personal Job Profile Plan" that applicant must complete in order to receive application for any form of public assistance and alleging that "[r]eceptionists often deter and delay family's and individual's applications for food stamps, Medicaid and cash assistance by requiring them first to obtain and return documents from other agencies and outside sources as a condition of receiving the [Personal Job Profile] form"); Green, *supra* note 46, at 22-26 (describing New York City's Eligibility Verification Review (EVR) procedures and concluding that "[i]n many respects, EVR appears simply to be a method designed to keep people off the rolls"); Rita Henley Jensen, *Exploding the Stereotypes*, Ms., July/Aug. 1995, at 56, 60 (describing personal experience of having to resubmit originals of children's birth certificates every six months despite their unchanging nature).

⁴⁹ Bennett, *supra* note 5, at 2164; see also Dehavenon, *supra* note 6, at 247-48 (identifying requirement of periodic recertification as form of verification extremism).

⁵⁰ See Blasi, *Litigation Strategies*, *supra* note 6, at 293 ("Nor are these difficulties the inexorable consequence of the operations of a large bureaucracy: they are the products of careful strategic planning on the part of the management of the General Relief system.");

tion extremism results from discretionary decisions made by agency caseworkers.⁵¹

The failure to provide applicants with comprehensive and accurate information about application procedures, eligibility requirements, applicant responsibilities, and available services exacerbates the confusion caused by verification extremism and often prevents applicants from obtaining all, or *any*, of the benefits to which they are entitled. At the most extreme end of this spectrum, official agency policy fails to ensure the dissemination of accurate information to applicants.⁵² Center workers also frequently decline to provide applicants with simple information necessary to complete the application process successfully.⁵³ In more subtle but equally harmful ways, caseworkers also withhold crucial information about available services, including emergency cash assistance, expedited food stamps, training programs, and the availability of child care.⁵⁴ The withhold-

see also Bennett, *supra* note 5, at 2167-68 (explaining barriers caused by notarization requirements and questioning necessity of such requirements in light of applicants' presence).

⁵¹ See Welfare Law Center Report, *supra* note 8 (describing caseworker's decision to deny benefits because applicant turned in paystub one day late); Bennett, *supra* note 5, at 2168 (describing discretionary decisions of caseworkers).

⁵² See, e.g., *Reynolds v. Giuliani*, 35 F. Supp. 2d 331, 344-45 (S.D.N.Y.) (describing absolute dearth of information on expedited food stamps in training materials, as well as instances in which center staff turned away individuals because of age or absence of spouse at time of application), modified, 43 F. Supp. 2d 492 (S.D.N.Y. 1999); see also *Reynolds Complaint*, *supra* note 1, ¶ 88 (alleging that workers routinely and falsely announce to applicants "that anyone working part-time should not apply or should quit their jobs because their work schedules will not be accommodated, that people are required to work regardless of whether they are disabled, and that no emergency or expedited assistance is available").

⁵³ For example, Mark Green, Public Advocate of New York City, has described his staff's experience of waiting on five lines in order to learn where to obtain an application. See Green, *supra* note 46, at 19; see also *Reynolds Complaint*, *supra* note 1, ¶ 250 (alleging that caseworker falsely told one plaintiff that he was required to close his active Medicaid case in order to obtain expedited food stamps); Bennett, *supra* note 5, at 2172 (finding that "system withheld virtually all information from applicants about any aspect of the shelter application process—not only about whether they would be found eligible, but even about the families' chances of being sheltered that night"); Funicello, *supra* note 40, at 26-27 (describing applicant's experience of filling out welfare application in red ink, being told by caseworker instead to use black ink, and correcting errors under observation of caseworker, only to have application rejected by caseworker because of red marks on application).

⁵⁴ See, e.g., *Salazar v. District of Columbia*, 954 F. Supp. 278, 320 (D.D.C. 1996) (finding that District of Columbia failed to inform class members of available transportation and scheduling services); USDA Report, *supra* note 11, at 6 (reporting centers' failure to inform applicants of right to file food stamps application independently of other program choices); Zasloff, *supra* note 6, at 242-44 (documenting stories of two individuals who were never informed of their eligibility for childcare under California's educational and training program for welfare recipients); Houppert, *supra* note 9, at 15 (reporting results of studies finding state's failure to provide childcare vouchers to 90% of eligible children); Marcia K.

ing of such information has ramifications that extend beyond the serious harm to welfare applicants; it also undermines welfare reform's goal of supporting work and impairs a state's ability to comply with PRWORA time limits for the receipt of family assistance.⁵⁵

In a published account of her personal experience with welfare, a former welfare recipient has aptly referred to these practices as the "brutality of the bureaucracy."⁵⁶ Individuals who experience this brutality undergo dramatic effects on their ability to survive,⁵⁷ as well as their psychological well-being.⁵⁸ The fact that some of these effects result from misguided decisions by overburdened caseworkers rather than intentional malfeasance does not mitigate the harm. In addition, the physical and emotional isolation endured throughout the application process prevents applicants from interacting with other individuals who can offer validation and provide accurate information about the applicants' legal rights and entitlements.⁵⁹

In order to provide needed support to applicants and to confront these forms of bureaucratic disenfranchisement in the welfare context, legal advocates have tried to establish a presence in welfare center waiting rooms.⁶⁰ These advocates have attempted to distribute and post

Meyers, Gaining Cooperation at the Front Lines of Service Delivery: Issues for the Implementation of Welfare Reform (June 12, 1998) <http://www.rockinst.org/publications/rockefeller_reports/tr07.html> (discussing California Work Pays program administrators' failure to initiate discussions about work availability or implications).

⁵⁵ For information regarding PRWORA's time limits and work requirements, see *supra* note 23.

⁵⁶ Funicello, *supra* note 40, at 24.

⁵⁷ See *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (stating that "termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits"); *Morel v. Giuliani*, 927 F. Supp. 622, 635 (S.D.N.Y. 1995) ("To indigent persons, the loss of even a portion of subsistence benefits constitutes irreparable injury."); Dehavenon, *supra* note 6, at 244 (describing need to "beg, borrow, or steal just to survive" in response to erroneous deprivation of benefits).

⁵⁸ See Bennett, *supra* note 5, at 2180 ("If the experience of welfare waiting rooms is anything, it is destabilizing But at a more concrete level, verification extremism and other features of disenfranchisement make poor people's incomes insecure."); Dehavenon, *supra* note 6, at 240 (observing findings of "untold anxiety, deprivation, and misery" caused by erroneous deprivation of benefits (quoting New York State Bar Ass'n, Report of the Task Force on Administrative Adjudication 177 (1988))).

⁵⁹ This isolation results from welfare centers' strict demands of physical presence throughout various stages of the application process. See Bennett, *supra* note 5, at 2171-72 (recounting agency policies that prevent applicants from leaving welfare center waiting rooms and effects of this on applicants and children).

⁶⁰ See, e.g., Class Action Complaint ¶¶ 46-63, 66-79, *Sanchez v. Turner* (S.D.N.Y. 2000) (No. 00 Civ. 1674) [hereinafter *Sanchez Complaint*] (alleging welfare center's obstruction of advocates' attempts to distribute pamphlets, discuss rights with applicants, and translate applications), available at <http://www.brennancenter.org/programs/welfare_compl.html>; see also *New York City Unemployed & Welfare Council v. Brezenoff*, 742 F.2d 718, 719 (2d Cir. 1984) (describing limitations placed on welfare rights organization's ability to "speak with welfare clients and distribute literature" at welfare centers); *Albany Welfare*

pamphlets describing applicants' rights, answer questions, and assist in immediately addressing agency mistakes. However, many welfare agencies have resisted these efforts.⁶¹ Agencies prohibiting advocacy have asserted an interest in protecting privacy, alleviating congestion, and preventing fraud.⁶² Though these goals may seem facially legitimate, agency practices and policies reveal less benign purposes.⁶³ Moreover, these rationales overlook the significant individual and societal interests advanced by advocacy in welfare center waiting rooms. Because of the changing nature of welfare policy and the difficulty of obtaining accurate information about legal rights, welfare applicants often remain unaware of agency errors and the legal services available to correct these mistakes.⁶⁴ Advocacy in welfare center waiting rooms informs applicants of their rights and promotes accountability in a sphere largely isolated from public scrutiny and political accountability.⁶⁵

Despite legislative and judicial affirmation of the First Amendment associational interest between legal advocates and potential clients, welfare centers have experienced increasing success in forbidding legal advocacy in their waiting rooms.⁶⁶ The next section examines the effect of the public forum doctrine on First Amendment claims of access to welfare center waiting rooms.

Rights Org. v. Wyman, 493 F.2d 1319, 1320 (2d Cir. 1974) (same); *LeClair v. O'Neil*, 307 F. Supp. 621, 623-24 (D. Mass. 1969) (same), *aff'd mem.*, 401 U.S. 984 (1971); *Hurley v. Hinckley*, 304 F. Supp. 704, 707 (D. Mass. 1969) (same), *aff'd mem. sub nom. Doyle v. O'Brien*, 396 U.S. 277 (1970); *cf. Washington Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 38-39 (D.C. Cir. 1997) (evaluating homeless advocates' claims of access to emergency shelter waiting room); *Unemployed Workers Union v. Hackett*, 332 F. Supp. 1372, 1374-75 (D.R.I. 1971) (evaluating Unemployed Workers Union's claim of access to Department of Employment Security Office).

⁶¹ See *infra* notes 116-17 and accompanying text.

⁶² See *infra* notes 215-17 and accompanying text (discussing agency's asserted interest in preventing congestion and unwanted solicitation); *cf. Brezenoff*, 742 F.2d at 722 (analyzing prevention of fraud as rationale for agency limitation on solicitation in welfare centers).

⁶³ See *supra* notes 6-10 (discussing bureaucratic disenfranchisement) and *infra* notes 166-85 (discussing viewpoint discrimination).

⁶⁴ In fact, many statutory assistance schemes acknowledge the need for support during the application process. See, e.g., 45 C.F.R. § 205.10(a)(3)(iii) (1999) (mandating that every welfare applicant or recipient be informed in writing of right to representation); *id.* § 206.10(a)(1)(iii) (establishing right to assistance in welfare program); N.Y. Comp. Codes R. & Regs. tit. 18, § 351.1(d) (1995) (requiring agency to allow applicant to bring "attorney or other representative" to meetings regarding eligibility or grant amount).

⁶⁵ See *supra* notes 36-37 and accompanying text.

⁶⁶ See *infra* Part II.C.

II

FIRST AMENDMENT RIGHTS, THE PUBLIC FORUM DOCTRINE, AND JUDICIAL TREATMENT OF ADVOCATES' CLAIMS OF ACCESS

Prohibitions on legal advocacy in welfare centers infringe on fundamental First Amendment freedoms, including the associational interests of advocates and applicants and the right to speak on public property. Moreover, the insulation of welfare centers from public scrutiny and legislative monitoring implicates a core First Amendment goal: protecting citizens against governmental abuses.⁶⁷ However, legal advocates' First Amendment claims of access to welfare center waiting rooms have received a mixed reception by the courts and have produced no clear principle of access.⁶⁸ These cases signal the public forum doctrine's increasingly important role in the lower courts' evaluation of welfare center access claims and indicate an interpretation of recent changes in the public forum doctrine that requires exceedingly deferential review of agency prohibitions on advocacy.⁶⁹

A. *First Amendment Freedoms to Associate and Advocate*

Advocacy at welfare centers advances a "central value" of the First Amendment "in 'checking' the abuse of power by public officials."⁷⁰ In addition to speaking about welfare policy and center practices, advocacy at welfare centers involves informing applicants of their legal rights and obtaining information to plan systemic strategies to address uncurbed governmental abuses. The Supreme Court has long affirmed the constitutionally protected status of such speech and

⁶⁷ See *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (explaining role of First Amendment as "constitutional safeguard . . . 'fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'" (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))); Erwin Chemerinsky, *Constitutional Law* 752 (1997) (framing "the ability to criticize government and government officers as 'the central meaning of the First Amendment'" (quoting *Sullivan*, 376 U.S. at 273)); *supra* note 11 (discussing monitoring).

⁶⁸ See *infra* Part II.C.

⁶⁹ See, e.g., *Families Achieving Independence & Respect v. Nebraska Dep't of Soc. Servs.*, 111 F.3d 1408, 1418-21 (8th Cir. 1997) (en banc) (interpreting changes in public forum doctrine to require that regulations on speech and association in welfare centers satisfy reasonableness standards).

⁷⁰ Ronald D. Rotunda & John E. Nowak, 4 *Treatise on Constitutional Law* § 20.6 (citing Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 *Am. B. Found. Res. J.* 521, 527-28 (advocating for "systematic consideration" of First Amendment's "function . . . in checking the abuse of official power" and maintaining that "if one had to identify the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment, this checking value would be the most likely candidate")); see also Chemerinsky, *supra* note 67, at 752-53 (1997) (arguing that political speech is at center of First Amendment protections).

associational interests,⁷¹ and has directed specific attention towards protecting association between nonprofit organizations and potential clients.

The Supreme Court first recognized the elevated constitutional status of nonprofit advocacy in *NAACP v. Button*.⁷² Characterizing litigation as a "form of political expression," the Court viewed it as possibly "the sole practicable avenue open to a minority to petition for redress of grievances."⁷³ The Court thus affirmed lawyers' right to associate with potential litigants.⁷⁴ In subsequent cases, the Court has made clear that it understands the freedom of association to protect collective activity undertaken to enable relatively powerless individuals to "obtain meaningful access to the courts."⁷⁵ Thus, in *In re Primus*,⁷⁶ the Court affirmed legal advocates' constitutional right to associate with potential clients for the purposes of vindicating and advancing legal rights.⁷⁷ Holding unconstitutional a state's public reprimand of an ACLU representative for conducting educational and outreach activities for welfare recipients,⁷⁸ the Court reiterated that the First Amendment "require[s] a measure of protection for 'advocating lawful means of vindicating legal rights' . . . including 'advis[ing] another that his legal rights have been infringed and refer[ing] him to a particular attorney or group of attorneys . . . for assistance.'"⁷⁹ Such protected association is exactly what advocates contemplate when seeking access to welfare centers.

⁷¹ See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech.").

⁷² 371 U.S. 415, 428-29 (1963) (invalidating state's antisolicitation statute as applied to activities of NAACP).

⁷³ *Id.* at 430-31.

⁷⁴ See *id.* at 439 (reasoning that State's interest in regulating legal profession failed to outweigh NAACP's right to associate with potential litigants).

⁷⁵ *United Transp. Union v. Michigan*, 401 U.S. 576, 585 (1971) (invalidating decree that enjoined union from providing legal referrals to members or their families); see also *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 6-7 (1964) (invoking "constitutionally guaranteed right to assist and advise each other" and emphasizing importance of such association "to help one another to preserve and enforce rights granted . . . under federal laws," particularly "when dealing with practiced and carefully counseled adversaries").

⁷⁶ 436 U.S. 412 (1978).

⁷⁷ See *id.* at 431 (reasoning that "the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants").

⁷⁸ See *id.* at 439.

⁷⁹ *Id.* at 432 (quoting *NAACP v. Button*, 371 U.S. 415, 434, 437 (1963) (citations omitted)).

B. The Public Forum Doctrine: Competing Constitutional and Ownership Interests

Welfare center waiting rooms serve as particularly suitable places for the exercise of associational rights by welfare advocates and recipients.⁸⁰ Moreover, welfare centers are public spaces.⁸¹ Though the term "public forum" has emerged fairly recently in First Amendment jurisprudence,⁸² since 1939, the Supreme Court has rejected the view that the government has absolute discretion to control speech in public places.⁸³ In *Hague v. Committee for Industrial Organization*,⁸⁴ the Court overturned precedent equating governmental proprietary rights with those of a private property owner,⁸⁵ stressing the integral relationship between the ability to use public property and the ability to exercise fully First Amendment rights.⁸⁶

While the Court has vindicated this right in numerous contexts,⁸⁷ the right to use public property for expressive and associational pur-

⁸⁰ See *infra* notes 164-67, 204-07 and accompanying text.

⁸¹ See *New York City Unemployed & Welfare Council v. Brezenoff*, 677 F.2d 232, 238 (2d Cir. 1982) (describing welfare centers as "public places, open to all"); *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319, 1324 (2d Cir. 1974) (describing welfare waiting rooms as public places).

⁸² The concept of a public forum was initially used in 1965 by Professor Kalven, who maintained that "streets, . . . parks, . . . and other public places" constituted public fora, and that "the generosity and empathy with which such facilities are made available is an index of freedom." Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 11-12. The Supreme Court first adopted this term in 1972, announcing in *Police Dep't v. Mosley*, 408 U.S. 92 (1972), that "justifications for selective exclusions from a public forum must be carefully scrutinized." *Id.* at 98-99. For a comprehensive history of the origins of the public forum doctrine, see generally Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713 (1987).

⁸³ See *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 516 (1939) (reversing police officer's refusal to issue permit to lease banquet halls to organization with suspected communist associations).

⁸⁴ *Id.*

⁸⁵ See *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897) ("For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more of an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.").

⁸⁶ See *Hague*, 307 U.S. at 515 (reasoning that "[s]uch use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens").

⁸⁷ See, e.g., *Brown v. Louisiana*, 383 U.S. 131, 143 (1966) (overturning breach of peace conviction of civil rights demonstrators in public library); *Edwards v. South Carolina*, 372 U.S. 229, 238 (1963) (overturning breach of peace conviction of peaceful civil rights protestors on state house grounds); *Jamison v. Texas*, 318 U.S. 413, 416-17 (1943) (overturning conviction for distributing handbills on city streets); *Thornhill v. Alabama*, 310 U.S. 88, 106 (1940) (invalidating state code that prohibited distribution of handbills on public streets).

poses has competed against governmental proprietary interests.⁸⁸ Attempting to limit such activity, governments have employed general prohibitions,⁸⁹ as well as content-based regulations directed at specific activities.⁹⁰ Purported justifications for these impeding regulations include the preservation of property "for the use to which it is lawfully dedicated,"⁹¹ and the protection of intended users of governmental property.⁹² In weighing these competing interests against First Amendment rights, the Court has considered the purpose of the property,⁹³ the compatibility between an attempted activity and the normal use of the property,⁹⁴ and the evenhandedness of the challenged regulations.⁹⁵ Over time, the Court increasingly emphasized characteristics of the regulated property, distinguishing city transit systems, military bases, and fairgrounds from "the traditional settings where First Amendment values inalterably prevail."⁹⁶

⁸⁸ See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (interpreting allegedly vague statute in light of governmental goal of preventing disturbance of school activity); *Police Dep't v. Mosley*, 408 U.S. 92, 100 (1972) (acknowledging preventing school disruption as "legitimate concern," but holding interest insufficient to justify challenged regulation on peaceful labor picketing); *Adderley v. Florida*, 385 U.S. 39, 48 (1966) ("The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose."); *Edwards*, 372 U.S. at 236 (distinguishing plaintiffs' protest from protests involving violence or fighting words); *Jamison*, 318 U.S. at 416 (reasoning that "[o]f course, states may provide for control of travel on their streets in order to insure the safety and convenience of the traveling public").

⁸⁹ See, e.g., *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 791 (1984) (determining validity of municipality's general prohibition on posting of signs on public property).

⁹⁰ See, e.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300 (1974) (describing city's prohibition on political advertising in transit system). For a discussion of content-based regulations and the status of the law pertaining to such regulations, see Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983).

⁹¹ *Adderley*, 385 U.S. at 47.

⁹² See *United States v. Kokinda*, 497 U.S. 720, 732-33 (1990) (plurality opinion) (determining reasonableness of government's desire to protect users of postal property from pressures caused by solicitation); *Lehman*, 418 U.S. at 302-03 (recognizing streetcar commuters as "captive audience" and discussing city's goal of "provid[ing] rapid, convenient, pleasant, and inexpensive service to the commuters").

⁹³ See, e.g., *Greer v. Spock*, 424 U.S. 828, 838 (1976) (stating that "it is . . . the business of a military installation like Fort Dix to train soldiers, not to provide a public forum"); *Lehman*, 418 U.S. at 303 (distinguishing precedent by stating that "[t]he car card space . . . is a part of the [city's] commercial venture"); *Adderley*, 385 U.S. at 41 (distinguishing precedent on grounds that "[j]ails, built for security purposes, are not" open to public).

⁹⁴ See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (identifying compatibility as "the crucial question").

⁹⁵ See, e.g., *Adderley*, 385 U.S. at 47 (maintaining that "[n]othing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute against those refusing to obey the sheriff's order [to leave jail grounds]").

⁹⁶ *Lehman*, 418 U.S. at 302; accord *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981) (reasoning that "consideration of a forum's

The Court formally shifted its emphasis to the nature of governmental property in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.⁹⁷ Reasoning that "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue,"⁹⁸ the *Perry* Court interpreted its precedent as setting forth three categories of public fora: traditional public fora,⁹⁹ designated public fora,¹⁰⁰ and nonpublic fora.¹⁰¹ The Court assigned corresponding standards of review to each type of forum. The government must demonstrate the existence of a narrowly drawn compelling governmental interest to sustain a content-based restriction on expressive activities in either a traditional public forum or a designated public forum.¹⁰² However, the government need only satisfy a reasonableness standard to sustain restrictions in nonpublic fora.¹⁰³

Though the *Perry* Court presumably articulated forum categories to standardize the evaluation of First Amendment claims to use public property, critics have observed that this framework has had the effect of distracting judicial attention away from the First Amendment rights at stake, effectively subsuming their value under judicial categorization of governmental property.¹⁰⁴ Unfortunately, this sacrifice has

special attributes is relevant to the constitutionality of a regulation" and noting that "there are significant differences between a street and the fairgrounds"); *Greer*, 424 U.S. at 838 (distinguishing military bases from places that have "traditionally served as a place for free public assembly and communication"); *Lehman*, 418 U.S. at 304 (upholding content-based restriction on use of placards in city transit system).

⁹⁷ 460 U.S. 37, 40-41 (1983) (evaluating school district's prohibition of use of faculty mailbox by only one of two rival teachers' associations).

⁹⁸ *Id.* at 44.

⁹⁹ See *id.* at 45 (describing traditional public fora, including streets and parks, as "places which by long tradition or by government fiat have been devoted to assembly and debate").

¹⁰⁰ See *id.* (defining designated public fora as "public property which the State has opened up for use by the public as a place for expressive activity").

¹⁰¹ See *id.* at 46 (explaining category as "[p]ublic property which is not by tradition or designation a forum for public communication").

¹⁰² See *id.* at 45-46 (explaining that content-based regulations in public fora must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end" and that "[a]lthough a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum").

¹⁰³ See *id.* at 46 (requiring that content-based restrictions in nonpublic fora further goal of "reserv[ing] the forum for its intended purposes" and are "reasonable and . . . not an effort to suppress expression merely because public officials oppose the speakers' view").

¹⁰⁴ See Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1224 (1984) (objecting to public forum doctrine because it "distracts attention from the first amendment values at stake in a given case"); Edward J. Neveril, "Objective" Approaches to the Public Forum Doctrine: The First Amendment at the Mercy of Architect-

failed to yield doctrinal clarity or standardization. Since *Perry*, the Court has struggled to evaluate whether a government has designated property for expressive purposes,¹⁰⁵ and has even grappled with determining whether to equate sidewalks adjacent to governmental offices with traditional public fora of streets and parks.¹⁰⁶ *International Society for Krishna Consciousness, Inc. v. Lee (ISKCON)*¹⁰⁷ serves as the most recent example of the confusion that has resulted from the now categorical public forum doctrine. This case yielded a myriad of opinions and exposed the Court's inability to agree on either the characterization of fora or the appropriate application of corresponding tests.¹⁰⁸ Despite the Court's lack of consensus, the *ISKCON* decisions

tural Chicanery, 90 Nw. U. L. Rev. 1185, 1191 (1996) ("Because the categories determine the level of judicial scrutiny applied to the regulation, ascertaining the category of the property is usually tantamount to deciding the constitutionality of the regulation. Consequently, the public forum doctrine hinges on the proposition that freedom of speech depends to some extent on the location of speech."); see also *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 822 (1985) (Blackmun, J., dissenting) (criticizing majority's holding because "[t]he guarantees of the First Amendment should not turn entirely on either an accident of history or the grace of the Government").

¹⁰⁵ See, e.g., *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (maintaining that "a regulation prohibiting disruption . . . and a practice of allowing some speech activities on postal property do not add up to the dedication of postal property to speech activities"); *id.* at 750 (Brennan, J., dissenting) (characterizing plurality's reasoning as "unsound" and maintaining that "[t]he plurality has collapsed the distinction between exclusions that help define the contours of the forum and those that are imposed after the forum is defined" (emphasis in original)); *Cornelius*, 473 U.S. at 802 (explaining that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse").

¹⁰⁶ Compare *Kokinda*, 497 U.S. at 728-29 (rejecting position that sidewalk leading to post office is traditional public forum and instructing that "the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum"), with *United States v. Grace*, 461 U.S. 171, 179 (1983) (classifying sidewalks adjacent to Supreme Court building as traditional public fora, reasoning that "[s]idewalks, of course, . . . are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property" and reasoning that sidewalks in question "are indistinguishable from any other sidewalks in Washington, D.C.").

¹⁰⁷ The Court issued its decisions for this case in two separately published citations. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) [hereinafter *ISKCON I*] (opinion of the Court), and *Lee v. International Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) [hereinafter *ISKCON II*] (per curiam). Justice O'Connor authored a third opinion, concurring with the opinion in *ISKCON I* and with the judgment in *ISKCON II*. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 685 (1992) [hereinafter *ISKCON III*] (O'Connor, J., concurring); for citation purposes, the several concurring opinions in the case are commonly referred to as *ISKCON III*. These three separate opinions deal with the International Society for Krishna Consciousness's challenge to a regulation forbidding both solicitation and leafleting in the terminals of the three major airports located in the New York City metropolitan area.

¹⁰⁸ Applying a reasonableness inquiry, a Court plurality opinion upheld the prohibition on solicitation, declining to classify airport terminals as traditional or designated public fora. See *ISKCON I*, 505 U.S. at 680-84 (determining that recent development of "modern air terminal" and recent use of airport terminals for leafleting disqualify airport terminals

express the prevailing principle that governments do not have unrestricted power to regulate speech and association,¹⁰⁹ as well as the prominent role that the public forum doctrine continues to play in the evaluation of First Amendment claims against speech-restrictive regulations.¹¹⁰

Not surprisingly, developments in the public forum doctrine have confounded lower courts.¹¹¹ Welfare center access claims constitute just one example of the judiciary's struggle with categorizing governmental property and applying the corresponding standard of review.¹¹²

from traditional public forum status, that "frequent and continuing litigation evidencing the operators' objections belies any such claim" of intent to create designated public forum, and that solicitation prohibition reasonably furthered governmental goals of avoiding disruption, enabling flow of traffic, and protecting airport users from duress). In a separate determination, however, a bare majority of the Court held invalid a similar prohibition on leafleting in airports. See *ISKCON II*, 505 U.S. at 831 (per curiam) (relying on reasoning of concurring opinions in *ISKCON III*). Although Justice O'Connor concurred with *ISKCON I*, her opinion indicates that she considers greater scrutiny to be more appropriate in the case of airport terminals than in the case of nonpublic fora. See *ISKCON III*, 505 U.S. at 689 (O'Connor, J., concurring) (maintaining that because "the Port Authority is operating a shopping mall as well as an airport . . . [t]he reasonableness inquiry . . . is . . . whether [the regulations] are reasonably related to maintaining the *multipurpose environment* that the Port Authority has deliberately created" (emphasis added)). Justice Kennedy also came to the same conclusion as the plurality, although he regarded airports as traditional public fora. See *id.* at 700, 703 (Kennedy, J., concurring) (reasoning that "it is evident that the public spaces of the Port Authority's airports are public forums"). Justices Souter, Blackmun, and Stevens agreed with Justice Kennedy's classification of airport terminals as traditional public fora, but would have held that the applicable tests required the invalidation of the ban on solicitation. See *id.* at 710-12 (Souter, J., concurring).

¹⁰⁹ See *ISKCON I*, 505 U.S. at 677-78 (setting forth First Amendment limitations on governmental power to regulate speech in public places); *ISKCON III*, 505 U.S. at 687 (O'Connor, J., concurring) ("That airports are not public fora however, does not mean that the government can restrict speech in whatever way it likes."); *id.* at 695-96 (Kennedy, J., concurring) (maintaining that "[t]he First Amendment is a limitation on government power, not a grant of power," and that public forum doctrine "vindicates this principle by recognizing limits on the government's control over speech on property suitable for free expression").

¹¹⁰ All the Justices framed their analyses in public forum terms. See *supra* note 108.

¹¹¹ See, e.g., *Families Achieving Independence & Respect v. Nebraska Dep't of Soc. Servs.*, 111 F.3d 1408, 1419 n.19 (8th Cir. 1997) (en banc) (noting that "the Supreme Court could have been clearer in its directives in this area" and citing First and Ninth Circuit opinions indicating lack of clarity in Supreme Court's public forum directives); *AIDS Action Comm. v. Massachusetts Bay Transp. Auth.*, 42 F.3d 1, 9 (1st Cir. 1994) (portraying "the relatively murky status of the public forum doctrine"); *Jacobsen v. United States Postal Serv.*, 993 F.2d 649, 655 n.2 (9th Cir. 1992) (stating that, because of *ISKCON* opinions, "the jurisprudence in this area is now quite muddled").

¹¹² See, e.g., Jonathan Bloom, *A Funny Thing Happened to the (Non)Public Forum: Lebron v. National Railroad Passenger Corporation*, 62 Brook. L. Rev. 693, 723-40 (1996) (identifying discrepancies in opinions regarding prohibitions on political advertising in public transportation facilities); James B. Toohey, Note, *A Standard with No Moxie: The Supreme Court in Arkansas Educational Television Commission v. Forbes Allows Govern-*

C. *The Public Forum Doctrine and First Amendment Claims of Access to Welfare Center Waiting Rooms*

Welfare centers serve as particularly appropriate places for the exercise of the expressive and associational rights recognized by *Button* and its progeny. They provide a forum for outreach to clients practically impossible to reach by telephone or mail due to circumstances such as homelessness, frequent changes of address, and inability to afford a telephone. Since many potential clients know neither of their legal rights nor of the availability of legal services, they depend on advocate-initiated contact to vindicate their rights and obtain benefits.¹¹³ Even for applicants aware of their rights, welfare centers' physical presence requirements and long waits make travel to an advocate's office extremely difficult.¹¹⁴ Additionally, advocacy at welfare center waiting rooms facilitates immediate correction of agency errors, thus preventing harm to clients and the costs of retroactively correcting mistakes. Furthermore, by directly observing the practices at welfare center waiting rooms, legal advocates may obtain useful information in both preparing future applicants for the process and detecting systemic violations that would otherwise remain unnoticed.¹¹⁵

Though such advocacy arguably assists the efficiency and accuracy of the work of welfare agencies, welfare administrators have resisted legal advocates' efforts to conduct outreach at welfare centers.¹¹⁶ Legal advocates therefore have resorted to the courts in order to vindicate their First Amendment rights to speak and associate.¹¹⁷ These cases reveal the lower courts' struggle to weigh compet-

ment Actors to Choose Candidates for Television Debates with Little Restriction, 30 Loy. U. Chi. L.J. 765, 778 (1999) (describing "growing confusion" over application of public forum doctrine to public broadcasters' numerical limitations on political candidates' access to television debates).

¹¹³ See, e.g., Sanchez Complaint, *supra* note 60, ¶ 27 ("The complexity of the welfare system makes it difficult for many claimants, and impossible for some, to navigate without the aid of an advocate.").

¹¹⁴ See *supra* note 11 (describing lack of monitoring); *supra* notes 52-54 (describing various violations).

¹¹⁵ See *supra* notes 36-41 and accompanying text (discussing agency practices that result in denial and delay of benefits).

¹¹⁶ See cases cited *infra* note 117 and discussed throughout the rest of this Section.

¹¹⁷ See *Families Achieving Independence & Respect v. Nebraska Dep't of Soc. Servs.*, 111 F.3d 1408, 1414 (8th Cir. 1997) (en banc) (describing plaintiff's proposed remedy of permanent injunction against enforcement of policy prohibiting access); *New York City Unemployed & Welfare Council v. Brezenoff*, 742 F.2d 718, 719 (2d Cir. 1984) (*Brezenoff II*) (challenging regulations prohibiting solicitation by welfare rights organization in welfare centers); *New York City Unemployed & Welfare Council v. Brezenoff*, 677 F.2d 232, 234 (2d Cir. 1982) (*Brezenoff I*) (seeking injunction against enforcement of "regulations that restricted the rights of organizations to converse with, distribute leaflets to, and collect contributions from welfare recipients and applicants on the premise of the City's Income

ing First Amendment and proprietary interests, and reflect the misunderstanding that the public forum doctrine's evolution triggers absolute deference towards agency policies.

Claims of access to welfare center waiting rooms initially appeared in the lower courts during the height of the welfare rights movement, as branch offices of the National Welfare Rights Organization and other welfare advocates sought to mobilize welfare recipients and hold the welfare system accountable to their needs.¹¹⁸ Pre-*Perry* decisions demonstrate judicial efforts to balance First Amendment rights with recognized governmental proprietary interests, such as preventing obstruction and overcrowding,¹¹⁹ maintaining normal functioning of welfare centers,¹²⁰ protecting clients,¹²¹ and preserving ap-

Maintenance Centers. . ."); *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319, 1320-21 (2d Cir. 1974) (challenging restriction forbidding distribution of leaflets and conversation with applicants in welfare center waiting rooms); *LeClair v. O'Neil*, 307 F. Supp. 621, 623 (D. Mass. 1969) (attacking prohibition on setting up advocacy table at welfare center), *aff'd mem.*, 401 U.S. 984 (1971); *Hurley v. Hinckley*, 304 F. Supp. 704, 707 (D. Mass. 1969) (challenging trespass statute as applied both to sole distributor of leaflets at welfare center and to demonstration by group of welfare advocates), *aff'd mem. sub nom. Doyle v. O'Brien*, 396 U.S. 277 (1970); *cf. Washington Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 38-39 (D.C. Cir. 1997) (discussing homeless advocates' desire to speak with unrepresented homeless individuals in shelter office waiting room); *Massachusetts Welfare Rights Org. v. Ott*, 421 F.2d 525, 526 (1st Cir. 1969) (contesting validity of agency's policy for responding to demonstrations by welfare rights organization at welfare centers); *Unemployed Workers Union v. Hackett*, 332 F. Supp. 1372, 1374-75 (D.R.I. 1971) (describing limitations placed on Unemployed Workers Union attempt to engage in conversation and distribute flyers in state's Department of Employment Security waiting room); *Sanchez Complaint*, *supra* note 60, ¶¶ 66, 70, 79 (describing New York City Human Resources Administration's denial of plaintiffs' request to conduct legal advocacy at welfare centers).

¹¹⁸ See *Davis*, *supra* note 5, at 45-55 (describing mobilizing strategy of National Welfare Rights Organization); see also *Wyman*, 493 F.2d at 1320 (describing local organization's affiliation with National Welfare Rights Organization); *LeClair*, 307 F. Supp. at 623 (stating that Worcester Welfare Rights Organization is branch of "geographically larger organizations").

¹¹⁹ See, e.g., *LeClair*, 307 F. Supp. at 625 (holding that "it was within the discretion of the welfare officials to determine that a table occupied by nonapplicants unduly burdened the capacity of a room").

¹²⁰ See, e.g., *Brezenoff I*, 677 F.2d at 238 (describing government's interest in "ensur[ing] the proper functioning of the center's primary activities"); *Wyman*, 493 F.2d at 1323 ("Obviously the constitutional rights asserted may be the subject of regulations to protect . . . the conduct of the county's business."); *LeClair*, 307 F. Supp. at 624 ("Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State.").

¹²¹ See, e.g., *Brezenoff I*, 677 F.2d at 237 (reasoning that organization's activity is "appropriate" under First Amendment if it does not "infringe the rights of a captive audience"); *Wyman*, 493 F.2d at 1323 (recognizing government's interest in regulating to protect "public safety, peace, comfort or convenience" (internal quotation marks omitted)).

pearance of neutrality.¹²² Some courts have also factored in applicants' need for assistance and information,¹²³ as well as the relationship between the premises and the advocacy.¹²⁴ Although these cases do not establish a uniform principle of access, when considered together they reveal a pattern of overturning bans on leafletting and conversing with individual clients¹²⁵ while upholding content-neutral regulations pertaining to scheduling,¹²⁶ solicitation,¹²⁷ and demonstration in welfare centers.¹²⁸ These cases suggest that forbidding nondisruptive association between legal advocates and recipients,

¹²² See, e.g., *LeClair*, 307 F. Supp. at 625 n.5 (postulating that welfare recipients might view permission to table as welfare center endorsement of WRO advocacy, and that this message would constitute forced speech).

¹²³ See, e.g., *Wyman*, 493 F.2d at 1323 (taking "relevant audience" into account because of informational nature of activity); cf. *Unemployed Workers Union v. Hackett*, 332 F. Supp. 1372, 1380 (D.R.I. 1971) (emphasizing that "speech involved here breaks out of traditional molds of political speech . . . in that it involves attempts to associate recipients of unemployment compensation into an organizational structure that plaintiffs hope will effectively petition the State for changes in its unemployment compensation policies").

¹²⁴ See, e.g., *Wyman*, 493 F.2d at 1323 (holding restrictions impermissible and reasoning that "[p]rospective members of the [Albany Welfare Rights Organization] and persons who need information about public assistance are best found in the waiting rooms of County Welfare Centers. And it is in that best place that the restrictions on free speech have been imposed in this case."); *Hurley v. Hinckley*, 304 F. Supp. 704, 712 (D. Mass. 1969) (reasoning that plaintiff's activities "can be characterized as speech and conduct incidental to formulating a petition for redress of a grievance having its root in the functions of the welfare office and likely having a particular affect on most members of the general public who would visit that office"), *aff'd mem. sub nom. Doyle v. O'Brien*, 396 U.S. 277 (1970).

¹²⁵ See *Wyman*, 493 F.2d at 1322, 1325 (overturning "blanket and wholesale ban" on distribution of leaflets and holding that agency must allow at least one advocate to disseminate materials and associate with applicants in waiting room); *Hackett*, 332 F. Supp. at 1377 (enjoining agency from implementing regulation "prohibiting any and all handbilling within [its] offices"); cf. *LeClair*, 307 F. Supp. at 623 (noting that, other than installing table in welfare office waiting room, "no . . . strictures were placed upon" plaintiffs); *Hurley*, 304 F. Supp. at 711-12 (suggesting possible invalidity of trespass statute as applied to prevent individual's distribution of leaflets in welfare center waiting room, but rejecting facial attack on statute).

¹²⁶ See *Brezenoff I*, 677 F.2d 232, 234-36 (2d Cir. 1982) (upholding advance scheduling requirements for using advocacy table in welfare center waiting room and regulation limiting number of advocates from same organization); see also *Wyman*, 493 F.2d at 1325 n.2 (requiring admission of "at least one person" based on district court "findings that two or three individuals might create a disruptive influence").

¹²⁷ See *New York City Unemployed & Welfare Council v. Brezenoff*, 742 F.2d 718, 724 (2d Cir. 1984) (*Brezenoff II*) (affirming district court's dismissal of challenge to welfare center's complete prohibition on solicitation).

¹²⁸ See *Massachusetts Welfare Rights Org. v. Ott*, 421 F.2d 525, 529 (1st Cir. 1969) (upholding welfare center's demonstration policy); *Hurley*, 304 F. Supp. at 709-10 (affirming trespass conviction of welfare center demonstrators).

particularly through content-based restrictions targeting welfare activity, is unconstitutional.¹²⁹

Nonetheless, in 1997, the Eighth Circuit Court of Appeals read post-*Perry* developments in the public forum doctrine to require extreme judicial deference towards such agency regulations. In *Families Achieving Independence & Respect v. Nebraska Department of Social Services*,¹³⁰ the Eighth Circuit upheld a welfare agency's content-based refusal to allow representatives from a local legal aid society to converse with clients, distribute pamphlets, and post flyers in its waiting rooms.¹³¹ In doing so, the court validated the agency's unwritten policy allowing access only to "direct benefit" providers, as distinguished from advocacy organizations.¹³² Relying on *Perry* and the *ISKCON* decisions, the court classified the welfare center waiting room as a nonpublic forum,¹³³ even though the agency had opened this forum to direct benefit providers.¹³⁴ Consequently, the court applied a reasonableness inquiry to analyze both the general exclusion and the exception for direct benefit providers.¹³⁵ Affirming the agency rationales of preventing congestion and disruption, protecting clients, and appearing neutral, the court emphasized "the Local Office's expertise in the management of a welfare office."¹³⁶ Additionally, the court determined that the availability of "substantial alternative channels" further supported the reasonableness of the policy,¹³⁷ even though it only managed to identify sidewalks located outside the building and vaguely to refer to "other public fora."¹³⁸ In reaching its conclusion that the agency's policy was "clearly reasonable,"¹³⁹ the court referred only twice to the First Amendment interests

¹²⁹ See *Brezenoff I*, 677 F.2d at 237 (discussing content-neutral requirement of time, place, and manner regulations).

¹³⁰ 111 F.3d 1408 (8th Cir. 1997) (en banc).

¹³¹ See id. at 1413, 1421.

¹³² See id. at 1412 (detailing policy).

¹³³ See id. at 1418-20 (reviewing categories of fora and concluding that "[b]ecause the Lobby was neither a traditional public forum nor a designated public forum, the Policy must be analyzed under the standards set forth for nonpublic fora" (internal citations omitted)).

¹³⁴ The court reasoned that the agency had not created a designated public forum because these providers "were participating with the agreement of welfare officials in the welfare office's official business." Id. at 1420 (internal quotation marks omitted).

¹³⁵ See id. (stating that policy "must be reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view" (internal citations and quotation marks omitted) (emphasis deleted)).

¹³⁶ Id. at 1421.

¹³⁷ Id. at 1422.

¹³⁸ Id.

¹³⁹ Id. at 1421.

at stake.¹⁴⁰ This cursory discussion discarded, rather than engaged, the plaintiffs' First Amendment claims. Unlike previous welfare center access cases, in which characteristics of property served as one of many factors guiding the analysis of the reasonableness of the regulation,¹⁴¹ property characteristics and ownership considerations drove the analysis in *Nebraska Department of Social Services*.

As demonstrated by *Nebraska Department of Social Services*, the modern public forum doctrine may alter lower courts' evaluation of welfare access claims, elevating formalistic property characteristics over a thorough assessment of a regulation's infringement on constitutional rights and an agency's actual need for an infringing regulation.¹⁴² This emphasis will cause courts to overlook the reality of bureaucratic disenfranchisement by welfare agencies,¹⁴³ leading to the failure to vindicate First Amendment interests in a setting dramatically in need of a citizen check on governmental abuse.¹⁴⁴ The ramifications of this failure, however, will extend beyond the constitutional realm, exerting an immediate and direct impact on welfare applicants' ability to obtain desperately needed benefits and, ultimately, their ability to survive.¹⁴⁵ These consequences are not inevitable.

III

PUBLIC FORUM GROUNDS FOR CLAIMING ACCESS

Though the Eighth Circuit in *Nebraska Department of Social Services* adopted an extremely deferential role in evaluating advocates' claims to associate with and help clients in welfare centers, the mod-

¹⁴⁰ The court began its analysis by acknowledging the alleged expressive interest but stressing that such identification "only begins [the] analysis." *Id.* at 1418. The court made no further mention of the First Amendment interests until the end of its analysis, when it completed the section by stating that "[t]he First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message." *Id.* at 1422 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985)).

¹⁴¹ See discussion *supra* notes 116-29 and accompanying text.

¹⁴² Indeed, the New York City Human Resources Administration has relied on *Nebraska Department of Social Services* as evidence that changes in the Supreme Court's public forum doctrine has rendered irrelevant Second Circuit precedent requiring it to allow advocates to circle through welfare waiting rooms. See Letter from Judy E. Nathan, Deputy General Counsel, New York City Human Resources Administration, to David Udell, Director of Poverty Program, The Brennan Center for Justice 2 (Sept. 8, 1999) [hereinafter *Nathan Letter*] (on file with the *New York University Law Review*) (pointing out that district court in *Nebraska Department of Social Services* specifically noted change in law that had occurred after Second Circuit decision on allowing advocates in waiting room).

¹⁴³ For a discussion of bureaucratic disenfranchisement, see *supra* Part I.B.

¹⁴⁴ See *supra* notes 6-11 and accompanying text.

¹⁴⁵ See *supra* notes 57-58.

ern public forum doctrine does not require such deference. Instead, the doctrine provides three grounds for thorough judicial consideration of access claims. First, because the practices of many welfare centers render their waiting rooms designated public fora, courts should apply heightened scrutiny in evaluating agency restrictions. Second, prohibitions on advocacy often manifest viewpoint discrimination, a forbidden governmental practice in any forum. Finally, in instances when courts classify welfare centers as nonpublic fora, prohibitions on advocacy, when viewed as a component of bureaucratic disenfranchisement, should fail the reasonableness inquiry. This section considers each alternative.

A. *Waiting Rooms as Designated Public Fora*

The Supreme Court has recognized that by opening its facilities to First Amendment activity, a government may create a designated public forum. According to the Court, once a government has created a designated public forum, the strict standard of review applicable to traditional public fora applies.¹⁴⁶ Under this standard, general prohibitions must be "reasonable time, place, and manner regulations," and "content-based prohibition[s] must be narrowly drawn to effectuate a compelling state interest."¹⁴⁷

The broad array of associational, expressive, and information-gathering activities that take place in welfare center waiting rooms supports their characterization as designated public fora. In addition to hearing announcements regarding applicant responsibilities and available programs,¹⁴⁸ applicants have the opportunity to interact with caseworkers and to speak to one another about their respective situations. Furthermore, many welfare centers have actively opened up their facilities to outside organizations.¹⁴⁹ By allowing and encourag-

¹⁴⁶ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) ("Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.").

¹⁴⁷ *Id.*

¹⁴⁸ See, e.g., *Reynolds v. Giuliani*, 35 F. Supp. 2d 331, 335 (S.D.N.Y.) (describing announcements made by caseworkers to waiting applicants), modified, 43 F. Supp. 2d 492 (S.D.N.Y. 1999).

¹⁴⁹ For example, the agency in *Nebraska Department of Social Services* allowed organizations that were deemed direct benefit providers into its facilities, including the Volunteer Income Tax Assistance Organization, the Expanded Food and Nutritional Education Program, Head Start, and Southeast Community College. See *Families Achieving Independence & Respect v. Nebraska Dep't of Soc. Servs.*, 111 F.3d 1408, 1412-13 (8th Cir. 1997) (en banc). Similarly, the New York City Human Resources Administration (HRA) currently allows managed care providers and "contractors . . . perform[ing] services pursuant to anti-eviction contracts" to associate with clients at centers; HRA has allowed welfare

ing such expression and association, these welfare agencies have created designated public fora in their waiting rooms. General prohibitions on legal advocacy lack the compelling governmental interest and the degree of tailoring necessary to survive the applicable standard of review.¹⁵⁰

However, other doctrinal developments since *Perry* have complicated the designated public forum analysis in two ways. First, the Court has recognized a subcategory of limited public fora which includes any forum designated for certain types of expressive activity. A limited public forum is constitutional as long as its restrictions preserve the forum for "the limited and legitimate purposes for which it was created," rather than discriminate against certain points of view.¹⁵¹ Second, the Court now requires a showing of governmental

advocates to table at welfare centers as recently as 1982. See *New York City Unemployed & Welfare Council v. Brezenoff*, 677 F.2d 232, 235 (2d Cir. 1982) (describing tabling policy of HRA); Nathan Letter, *supra* note 142, at 1 (delineating agencies currently allowed access to centers); see also Sanchez Complaint, *supra* note 60, ¶82 ("In addition, the City allows Medicaid managed care companies and homelessness prevention organizations into the welfare centers to provide advice and assistance to welfare claimants regarding Medicaid and emergency shelter grants.").

¹⁵⁰ See, e.g., *United States v. Grace*, 461 U.S. 171, 181 (1983) (holding that prohibition against leafletting on Supreme Court premises did "not qualify as reasonable time, place, or manner restriction . . . because it [did] not sufficiently serve those public interests that [were] urged as its justification"); *Widmar v. Vincent*, 454 U.S. 263, 276-77 (1981) (holding that state's interest in separation of church and state is not "sufficiently 'compelling' to justify" content-based exclusion of religious speech in university designated forum); *City of Madison Joint Sch. Dist. v. Wisconsin Pub. Employment Relations Comm'n*, 429 U.S. 167, 176-77 (1976) (invalidating, as content-based, Wisconsin Employment Relations Commission's prohibition against employee speech pertaining to collective bargaining at board of education meetings).

¹⁵¹ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (maintaining that once state "has opened up a limited public forum . . . [it] must respect the lawful boundaries it has itself set"); see also *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998) (suggesting distinction between general and selective access in determining forum's public status because, "with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers"). This concept of limited public fora is not a completely new development, however, as it was recognized even in *Perry* and earlier cases. See, e.g., *Perry*, 460 U.S. at 48 (reasoning that "even if . . . by granting access to the Cub Scouts, YMCAs, and parochial schools, the School District has created a limited public forum, the constitutional right of access would in any event extend only to other entities of similar character"); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) ("The Minnesota State Fair is a limited public forum in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views."). While the Court seems to use the terms "designated public forum" and "limited public forum" interchangeably, lower courts and commentators distinguish these concepts. See, e.g., *Whiteland Woods v. Township of West Whiteland*, 193 F.3d 177, 182 n.2 (3d Cir. 1999) (noting question of whether "limited public fora are a subset of designated public fora or are a type of nonpublic fora" and stating Third Circuit rule applying designated public fora requirements to limited public fora); *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 683,

intent to designate property for expressive purposes in order to classify property as designated public fora.¹⁵² Under this intent-based standard, "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening up a nontraditional public forum for public discourse."¹⁵³ This interaction of the limited public forum idea and the government intent requirement may allow content-based regulations to escape strict scrutiny.¹⁵⁴ This development has been criticized for "turn[ing] [the] principles [of the public forum doctrine] on end"¹⁵⁵ and potentially eliminating the concept of a designated public forum.¹⁵⁶

Despite these developments, strict scrutiny should still apply to restrictions on advocacy in welfare center waiting rooms. By creating welfare centers for the administration of government assistance and the alleviation of poverty, state and local governments have created fora for speech and associational activities pertaining to the accurate dissemination of information on entitlements and the efficient distri-

692 (2d Cir. 1991) ("[W]e have identified a sub-category of the designated forum that we have styled the 'limited public forum.'"); Russell W. Galloway, *Basic Free Speech*, 31 Santa Clara L. Rev. 883, 955 n.392 (1991) ("'Limited public forums' are a subcategory of designated public forums."); Neveril, *supra* note 104, at 1194 (defining designated public fora as property "dedicated to broad speech uses by the general public" and limited public fora as "designated public forums that had been created for a limited purpose, i.e., for use by certain groups, or for discussion of certain subjects"); Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, 16 Const. Commentary 101, 123 n.78 (1999) (book review) (drawing distinction between "designated public forum" and "limited public forum").

¹⁵² See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (discussing requirement of intent to create public forum); cf. *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (stating that Postal Service regulations "prohibiting disruption . . . and a practice of allowing some speech activities on postal property do not add up to the dedication of postal property to such activities" (internal citations omitted)).

¹⁵³ *Cornelius*, 473 U.S. at 802.

¹⁵⁴ See Post, *supra* note 82, at 1753 (explaining that framework of *Perry* "imposes no first amendment constraints whatever on the government's ability to build discriminatory criteria into the very definition or purpose of the limited public forum, and thus as a practical matter the government remains as free to limit public access to a limited public forum as to a nonpublic forum").

¹⁵⁵ *Cornelius*, 473 U.S. at 820 (Blackmun, J., dissenting).

¹⁵⁶ See *id.* at 826 (Blackmun, J., dissenting) ("Obviously, if the government's ability to define the boundaries of a limited public forum is unconstrained, the limited-public-forum concept is meaningless."); see also Nathaniel "Than" Ladman, Comment, *Constitutional Law: The End of the Limited Public Forum?*, 25 Washburn L.J. 375, 384 (1986) (concluding that "the [*Cornelius*] Court arguably eliminates the concept of the limited public forum"); Lee Rudy, Note, *A Procedural Approach to Limited Public Forum Cases*, 22 Fordham Urb. L.J. 1255, 1279 (1995) (contending that *Perry* and *Cornelius* "rendered meaningless the limited public forum concepts that existed in prior Supreme Court precedent" because "[u]nder *Perry* and *Cornelius*, if the government opens the forum to only some groups, the forum remains 'nonpublic'").

bution of benefits.¹⁵⁷ The circuit courts of appeals have continued to recognize the category of designated public fora, and have required objective proof that a government has intended to limit the use of the forum.¹⁵⁸ These circuits have attempted to guard against the “dangers of post-hoc policy formulation” and abuse of discretion by considering official policy, past practices, and the compatibility of the attempted activity and the forum.¹⁵⁹ Moreover, these circuits have held that once a government has allowed a certain category of expression or association on its property, it can exclude other activity within that category only if the exclusion satisfies the strict scrutiny applicable to traditional public fora.¹⁶⁰

Even if a court were to find that a government had limited the use of welfare center waiting rooms, welfare advocacy directly relates to the administration of public assistance, the provision of services, and the alleviation of poverty, and therefore falls within any category of speech and association to which welfare centers neutrally could limit the use of waiting rooms.

Although the Court has held that selective access to governmental property does not automatically convert public property into a designated forum,¹⁶¹ the actions of welfare center administrators indicate,

¹⁵⁷ See *supra* note 149.

¹⁵⁸ See Bloom, *supra* note 112, at 728-29 (citing appellate cases requiring objective proof of intent). The Supreme Court also continues to endorse the concept of a designated public forum. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993) (viewing argument that school district created designated public forum through “heavy use[] by a wide variety of private organizations” as having “considerable force,” but declining to rule whether designated public forum was created).

¹⁵⁹ See *Air Line Pilots Ass'n Int'l v. Department of Aviation*, 45 F.3d 1144, 1153 (7th Cir. 1995); see also *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist.*, 941 F.2d 45, 47 (1st Cir. 1991) (considering school district's conduct and written policies in determining that district had created limited public forum in use of its facilities); *Stewart v. District of Columbia Armory Bd.*, 863 F.2d 1013, 1019 (D.C. Cir. 1988) (noting that in determining whether government attempted to create public forum at local stadium, consideration must be given to “compatibility of commercial purposes of stadium with expressive activity, consistent pattern of such activity at stadium, and/or ultimate reflection of intent in overseeing authority's policies and practices”); see also Bloom, *supra* note 112, at 728-36 (discussing lower court cases). This approach is consistent with the Supreme Court's language in *Cornelius* which referred to “the nature of the property and its compatibility with expressive activity” as relevant “to discern[ing] the government's intent.” *Cornelius*, 473 U.S. at 802.

¹⁶⁰ See *supra* notes 146-47 and accompanying text; see also *Cornelius*, 473 U.S. at 800 (“[W]hen the Government has intentionally designated a place or means of communication as a public forum, speakers cannot be excluded without a compelling governmental interest.”).

¹⁶¹ See *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) (“A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers.”); *ISKCON I*, 505 U.S. 672, 680 (1992) (“[T]he government does not create a public forum by inaction.”); *United*

at a minimum, the intentional creation of limited public fora pertaining to the administration of welfare and the alleviation of poverty. Such intent may be evidenced by present agency practices of admitting other organizations and by past agency practices of allowing such advocacy. Hence, any distinctions between classes of activity must seek to preserve the property for its "limited and legitimate purposes,"¹⁶² and any other activity must be allowed absent a compelling interest for exclusion.¹⁶³ Prohibitions on legal advocacy in welfare centers should rarely survive this review.

In *Nebraska Department of Social Services*, for example, the agency's express policy and practice of allowing direct benefit providers access to the center indicate its intent to create a public forum for speech and association that serves the basic needs of clients.¹⁶⁴ The court, therefore, should have considered whether the distinction between direct benefit providers and advocacy organizations objectively was intended to preserve the property for this use. Both legal advocacy and the provision of benefits involve speech and association pertaining to the forum's purpose of assisting clients and alleviating poverty. Because the dissemination of political and legal information regarding welfare rights is as compatible with these goals as the provision of tax assistance, education registration, and nutritional advice, the reviewing court should have overturned this regulation.¹⁶⁵

B. Welfare Center Waiting Rooms and Viewpoint Discrimination

Many restrictions on legal advocacy in welfare centers remain vulnerable to the challenge of viewpoint discrimination, regardless of the type of forum in which they take place. Though welfare centers

States v. Kokinda, 497 U.S. 720, 730 (1990) (holding that "a regulation prohibiting disruption and a practice of allowing some speech activities on postal property do not add up to the dedication of postal property to speech activities" (internal citation omitted)); *Cornelius*, 473 U.S. at 804 (reasoning that because charity fundraising drive required advance permission, relied on criteria "appropriate" in its participation guidelines, and involved participation of only 237 of 850,000 associations, it had permitted "selective access" rather than created designated public forum).

¹⁶² *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

¹⁶³ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (describing strict scrutiny standard of review for designated public forum).

¹⁶⁴ See *Families Achieving Independence & Respect v. Nebraska Dep't of Soc. Servs.*, 111 F.3d 1408, 1422 (8th Cir. 1997) (en banc) (stating that agency fulfills its mission by allowing groups into waiting area to meet client needs).

¹⁶⁵ While some of the activities proposed by *Nebraska Department of Social Services* may not fall within the permitted class of activities because they were political rather than service-oriented in nature, attempts to assist individuals in the application process arguably would fall within the service category. Thus, strict scrutiny would have served as the appropriate analysis.

assert an interest in appearing neutral,¹⁶⁶ restrictions on legal advocacy often serve to prevent association and expression challenging center practices. In this manner, such restrictions operate to stifle certain points of view.

Viewpoint discrimination in any forum violates the First Amendment, and courts should overturn welfare agency regulations that advance such discrimination. The Court repeatedly has forbidden viewpoint-discriminatory regulations, regardless of the classification of a forum or the seeming reasonableness of the regulations.¹⁶⁷ Though the Court has never explicitly defined viewpoint discrimination,¹⁶⁸ much of its First Amendment jurisprudence arguably effectuates an attempt to detect and scrutinize governmental efforts overtly or covertly to distort the democratic process by skewing public debate and suppressing ideas critical of the existing power structures in society.¹⁶⁹ Because advocacy at welfare centers threatens the official and

¹⁶⁶ See, e.g., *Nebraska Dep't of Soc. Servs.*, 111 F.3d at 1422 (reasoning that "the Local Office has a legitimate interest in not being misapprehended as supporting one advocacy cause or another"); *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319, 1325 n.3 (2d Cir. 1974) (authorizing injunction to require that "AWRO representatives clearly designate themselves in an appropriate manner as not being employees of the Albany County Welfare Department").

¹⁶⁷ See *Rosenberger*, 515 U.S. at 829-30 (discussing constitutional difference between content discrimination and viewpoint discrimination and explaining presumption of impermissibility attached to viewpoint discrimination); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (invalidating, as viewpoint discriminatory, school district's denial of religious group's application to show film at evening film series); *United States v. Kokinda*, 497 U.S. 720, 730 (1990) ("In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." (citing *Perry*, 460 U.S. at 46)); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985) ("While we accept the validity and reasonableness of the justifications offered by petitioner for excluding advocacy groups from the [Combined Federal Campaign], those justifications cannot save an exclusion that is in fact based on the desire to suppress a particular point of view."); see also Erwin Chemerinsky, *Court Takes a Narrow View of Viewpoint Discrimination*, Trial, Mar. 1999, at 90, 90 ("As the law has developed, . . . viewpoint restrictions never have been upheld.").

¹⁶⁸ See Chemerinsky, *supra* note 167, at 91 ("The Supreme Court never has defined what constitutes viewpoint discrimination.").

¹⁶⁹ See Chemerinsky, *supra* note 67, at 759 ("[T]he fear is that the government will target particular messages and attempt to control thoughts on a topic by regulating speech."). This purpose is furthered by the distinction between content-based and content-neutral regulations, low-value speech exceptions to the strict scrutiny standard of review, judicial protection of symbolic speech, and the public forum doctrine itself. See generally Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 425-26 (1996) (describing government-based model for detecting violations of First Amendment rights); Stone, *supra* note 90, at 198 (explaining that Court's differential treatment of content-based and content-neutral regulations is due to "first amendment . . . concern[], not only with the extent to which a law reduces the total quantity of communication, but also—and perhaps even more fundamen-

unofficial policies of welfare agencies, this form of speech and association is highly vulnerable to viewpoint discrimination.

Despite the Court's condemnation of viewpoint discrimination, it has yet to promulgate a test for its detection. The combination of the absence of a test and courts' general hesitation to inquire into governmental motives¹⁷⁰ makes difficult the articulation of viewpoint discrimination arguments. However, viewpoint-discriminatory regulations are particularly offensive to First Amendment principles,¹⁷¹ and the difficulty in detecting viewpoint discrimination should not lead a court to abrogate its responsibility to invalidate such regulations.

Notably, the caselaw does suggest relevant factors for detecting viewpoint discrimination. These include the agency's "open hostility" towards the policies of a forbidden group,¹⁷² the public's perception of bias on the part of the excluding agency,¹⁷³ the specific identification of groups in exclusionary materials,¹⁷⁴ a "clearly disparate impact of legislation, unexplainable on grounds other than unconstitutional motive,"¹⁷⁵ past practices that manifest "a pattern of discriminatory or censorious behavior,"¹⁷⁶ and the degree to which the regulation effec-

tally—with the extent to which the law distorts public debate"); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. Pa. L. Rev. 615, 676-96 (1991) (demonstrating that content discrimination undermines various theories of First Amendment).

¹⁷⁰ See *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter."); see also *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (expressing "reluctance to attribute unconstitutional motives to the states" in Establishment Clause context).

¹⁷¹ See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) (identifying free expression as principle "[a]t the heart of the First Amendment" and stating that laws that "stifle[] speech on account of its message contravene[] this essential right . . . [by] pos[ing] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion").

¹⁷² See *NAACP Legal Defense & Educ. Fund, Inc. v. Horner*, 636 F. Supp. 762, 769 (D.D.C.) (considering *Cornelius* plaintiffs' claims on remand and granting preliminary injunction because "plaintiffs have offered enough circumstantial and inferential evidence of such animus to raise serious questions concerning the sincerity of defendant's reasons for excluding plaintiffs from the CFC"), vacated mem., 795 F.2d 215 (D.C. Cir. 1986).

¹⁷³ See *id.* (discussing relevance of newspaper article asserting agency's bias).

¹⁷⁴ See *id.* (noting administrator's identification of plaintiffs by name in memorandum forming basis for exclusion order).

¹⁷⁵ *Goldberg v. Whitman*, 743 F. Supp. 943, 952-53 (D. Conn. 1990) (holding that "reasonable jury could conclude that the Town Council's vote [to enact facially neutral ordinance] was motivated by a desire to retaliate" against plaintiff for exercising First Amendment rights).

¹⁷⁶ *Id.* at 952.

tively targets the plaintiff.¹⁷⁷ Though not binding,¹⁷⁸ these factors offer a logical approach to detecting viewpoint discrimination. Additionally, content-based regulations increase the probability of an underlying illicit intent to discriminate against views.¹⁷⁹

Professor Laurence Tribe's suggestion that a reviewing court "should . . . treat as facially discriminatory . . . any evident pattern of official action that a reasonably well-informed observer would interpret as suppressing a particular point of view" offers a unifying framework for the consideration of these factors.¹⁸⁰ A "reasonably well-informed observer" likely would identify many restrictions on welfare center advocacy as attempts to suppress particular points of view.¹⁸¹ Many restrictions on access come in the form of content-based restrictions on speech,¹⁸² and the distinctions between prohibited and allowed speech may indicate viewpoint-discriminatory motives. Groups excluded under welfare centers' content-based policies usually include those most threatening to agency insularity; many of the admitted groups under these policies are unlikely to detect errors in the administration of assistance.¹⁸³ Furthermore, agency regulations explicitly may identify the discord between the policies of the prohibited groups

¹⁷⁷ See *id.* at 954 (noting that plaintiff was only individual affected by defendants' actions).

¹⁷⁸ *Horner* was vacated without a reported opinion, see *Horner*, 795 F.2d at 215, and *Goldberg* was a district court opinion. The Supreme Court, however, has indicated a willingness to overturn regulations lacking objective support. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (pointing to lack of "indication in the record before us that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective").

¹⁷⁹ See, e.g., *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) ("Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (setting forth presumption of invalidity for content-based regulations); *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972) (stating that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); *Stone*, *supra* note 90, at 196 (observing that "except when low value speech is at issue, the Court has invalidated almost every content-based restriction that it has considered in the past quarter-century").

¹⁸⁰ Laurence H. Tribe, *American Constitutional Law* 820 (1988).

¹⁸¹ But see *Velazquez v. Legal Servs.*, 164 F.3d 757, 767-73 (2d Cir. 1999) (upholding Legal Services Corporation funding restrictions on various forms of advocacy, including lobbying and welfare reform litigation, by reasoning that statute applies equally to all points of view), *cert. granted*, 120 S. Ct. 1553 (2000).

¹⁸² See, e.g., *supra* note 164-165 and accompanying text (discussing access policies).

¹⁸³ For example, the welfare policy challenged in *Nebraska Department of Social Services* allowed groups providing tax assistance, Head Start enrollment, and GED enrollment, to enter the waiting rooms of the welfare center; advocates were not allowed. See *Families Achieving Independence & Respect v. Nebraska Dep't of Soc. Servs.*, 111 F.3d 1408, 1417 (8th Cir. 1997) (*en banc*).

and agency practices and policies;¹⁸⁴ restrictions even may target welfare rights groups specifically. Finally, newspaper articles and public surveys could serve as evidence of the public perception of the contentious relationship between welfare administrations and advocates.¹⁸⁵ The documentation of these combined factors should persuade a court that restrictions on access to advocates serve viewpoint-discriminatory purposes.

C. *Advocacy Restrictions and Unreasonableness*

Even in nonpublic fora, agencies do not enjoy unbridled power to regulate First Amendment activity. In addition to the constitutional bar against viewpoint discrimination earlier discussed, the government's power to regulate the use of nonpublic fora is bound by reasonableness limitations and property rights. An examination of agency practices in light of relevant doctrine reveals that when welfare agencies prohibit or restrict advocacy at centers, they often exceed these limitations.

Regulations of expressive and associational activity in nonpublic fora must be "reasonable in light of the purpose which the forum at issue serves."¹⁸⁶ As demonstrated by the *ISKCON II* Court's invalidation of a ban on leafletting, this standard limits a government's power to restrict protected activity in all public spaces.¹⁸⁷ The burden imposed by the nonpublic forum reasonableness inquiry can be

¹⁸⁴ See, e.g., *Nebraska Dep't of Soc. Servs.*, 111 F.3d at 1423 ("They [plaintiffs] talk about welfare reform, and they are critical of welfare reform, and we are the ones doing welfare reform[.]") (quoting Administrator Wusk's testimony).

¹⁸⁵ See, e.g., DeParle, *supra* note 11, at 50 (quoting New York Mayor Rudolph Giuliani's accusation that welfare advocates have "a 'romantic and emotional' view of food stamps as anything more than welfare"); Tom Topousis, Rudy Fires Back at Critics of Plan, N.Y. Post, June 9, 1998, at A6 (relating contentious disagreement over city's work policies for disabled welfare recipients).

¹⁸⁶ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983).

¹⁸⁷ See *ISKCON III*, 505 U.S. 672, 687, 690 (1992) (O'Connor, J., concurring in judgment with *ISKCON II*) (reasoning that "[t]he determination that airports are not public fora thus only begins our inquiry," and that leafletting is not "naturally incompatible" with purpose of forum at issue). Although O'Connor stood alone in applying the reasonableness standard to reach this conclusion, her opinion served as the decisive vote in overturning the prohibition on leafletting. See *ISKCON II*, 505 U.S. 830, 831 (1992) (per curiam) (relying on reasoning of concurring opinions in *ISKCON III* in holding "ban on distribution of literature in the Port Authority airport terminals . . . invalid under the First Amendment"); see also *infra* notes 215-19 and accompanying text (discussing *Washington Legal Clinic for the Homeless v. Barry*, 107 F.3d 32 (D.C. Cir. 1997), as example of case using reasonableness standard to permit advocacy group access). But see *ISKCON II*, 505 U.S. at 831 (Rehnquist, C.J., dissenting) (finding airport leafletting ban to be reasonable); *ISKCON I*, 505 U.S. 672, 683 (1992) (upholding regulation under reasonableness inquiry); *United States v. Kokinda*, 497 U.S. 720, 731 (1990) (same); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985) (same).

viewed as analogous to "rational basis review with bite,"¹⁸⁸ for this standard requires a government to articulate property-based justifications for its regulations. The Court has recognized three such justifications: the preservation of property for its intended use,¹⁸⁹ the protection of users of governmental property,¹⁹⁰ and the availability of other channels of communication.¹⁹¹

Consideration of welfare center practices and policies reveal that none of these rationales should sustain complete prohibitions on advocacy in welfare center waiting rooms. Although welfare centers have invoked the property preservation rationale by asserting the necessity of preventing overcrowding and disruption,¹⁹² most welfare centers contain ample space for the association between applicants and advocates, and advocates can converse with applicants in a

¹⁸⁸ See Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 18-19 (1972) (describing Burger Court's pattern of finding "bite in the equal protection clause after explicitly voicing the traditionally toothless minimal scrutiny standard"); see also *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that state's constitutional prohibition on protective governmental action "lacks a rational relationship to legitimate state interests" because state failed to demonstrate connection "between the classification adopted and the object to be attained"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (invalidating zoning ordinance on equal protection grounds "[b]ecause in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests"); William K. Kelley, *Inculcating Constitutional Values*, 15 Const. Commentary 161, 170 (1998) (book review) ("Cases like *Cleburne* and *Romer* thus suggest the continued possibility that the Court might someday adopt as a general matter Professor Gunther's prescription of rational basis review with bite.").

¹⁸⁹ See *Adderley v. Florida*, 385 U.S. 39, 47 (1966) ("The State . . . has power to preserve the property under its control for the use to which it is lawfully dedicated."); see also *Kokinda*, 497 U.S. at 733-34 (discussing government's argument that solicitation on postal grounds disrupts business of United States Postal Service).

¹⁹⁰ See *ISKCON I*, 505 U.S. at 685 (validating Port Authority's purported concern for passengers); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (endorsing protection of "captive audience" rationale for regulating use of transit system placards). But see *Kokinda*, 497 U.S. at 748 n.4 (Brennan, J., dissenting) (disagreeing with applicability of protection of captive audience rationale and maintaining that "[a]lthough the Government, within certain limits, may protect captive listeners against unwelcome intrusions, in public locations 'we expect individuals to avoid speech they do not want to hear'" (quoting *Frisby v. Shultz*, 487 U.S. 474, 484 (1988))).

¹⁹¹ See *ISKCON I*, 505 U.S. at 684-85 (reasoning that because sidewalk area outside terminal "is frequented by an overwhelming percentage of airport users . . . the resulting access of those who would solicit the general public is quite complete"); *Perry*, 460 U.S. at 53 (identifying "substantial alternative channels" of expression as factor bolstering reasonableness).

¹⁹² See, e.g., *Families Achieving Independence & Respect v. Nebraska Dep't of Soc. Servs.*, 111 F.3d 1408, 1421 (8th Cir. 1997) (en banc) (deeming agency's rationale of "prevent[ing] additional congestion and the resultant disruption" to be reasonable).

nondisruptive manner.¹⁹³ Moreover, many agency policies themselves fail to evince genuine concern with preventing overcrowding or disruption. Rather than attempting to minimize the number of people in the waiting room by scheduling and abiding by appointments, agencies often force clients to sit in waiting rooms for an entire day.¹⁹⁴ Not surprisingly, welfare center waiting rooms rarely evince a quiet and focused atmosphere easily disrupted by conversation between an advocate and applicant; indeed, in many waiting rooms, there is simply no activity to disrupt—other than waiting. Consequently, agencies can reasonably control the number and location of advocates and their behavior without prohibiting advocacy in its entirety.¹⁹⁵

Nor do agency policies suggest an actual concern for protecting the users of welfare centers. Instead, disempowering policies manifest an adverse relationship between agencies and applicants.¹⁹⁶ Though welfare centers have asserted the goal of protecting applicants from fraud,¹⁹⁷ centers' failure to provide applicants with accurate information calls into question the sincerity of this concern.¹⁹⁸ Even when the concern is sincere, fraud prevention will often fail to provide a reasonable explanation for content-based regulations.¹⁹⁹ Nor do fraud concerns reasonably lead to complete prohibitions on advocacy. Agencies can protect clients while preserving their First Amendment rights by limiting access to only those advocates affiliated with certified organizations.

¹⁹³ See *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319, 1325 (2d Cir. 1974) (describing advocacy as involving "the orderly distribution of information, without coercion, to welfare recipients").

¹⁹⁴ For a discussion of forced presence requirements for applying for public assistance, see *supra* note 59.

¹⁹⁵ See, e.g., *New York City Unemployed & Welfare Council v. Brezenoff*, 677 F.2d 232, 235 (2d Cir. 1982) (describing New York City's previous policy regarding advocacy in welfare centers, which set forth scheduling requirements, limited number of advocates from "a particular organization" to two and restricted advocacy to designated areas).

¹⁹⁶ See *supra* Part I.B (discussing bureaucratic disempowerment).

¹⁹⁷ See *supra* note 62.

¹⁹⁸ See *supra* notes 52-55 and accompanying text (discussing agency practices of withholding information and providing false information).

¹⁹⁹ For example, the agency in *Nebraska Department of Social Services* never explained why the potential occurrence or consequences of tax fraud presented less of a danger to welfare recipients than agency-correctable dissemination of inaccurate information regarding benefits. See *Families Achieving Independence & Respect v. Nebraska Dep't of Soc. Servs.*, 111 F.3d 1408, 1421-22 (8th Cir. 1997) (*en banc*) (describing agency's goal of "shield[ing] its clients from a deluge of political propaganda that they are powerless to avoid," agreeing with district court that welfare center visitors "are peculiarly susceptible to coercion, whether subtle or overt, regarding, among other things, public-policy issues," but failing to explain why such individuals would not face coercion regarding immediate needs or available services).

The reality that welfare advocates simply have no other forum in which to reach out to welfare applicants effectively and that welfare recipients have few alternative means of obtaining the crucial information provided by legal advocates should also inform reasonableness review.²⁰⁰ Though agencies have maintained that such advocacy can take place on sidewalks outside welfare centers,²⁰¹ applicants often fear leaving centers and missing their turn to speak with a caseworker,²⁰² may feel stigmatized standing in front of a welfare center, and practically may be impaired from doing so as a result of inclement weather.

Despite these considerations, many courts have demonstrated a willingness to err in favor of agency interests by deferring to agency expertise.²⁰³ While agency administrators do have unique experience in welfare administration, courts have a role to play in protecting federal rights.²⁰⁴ Moreover, the extremely high error rate in welfare administration calls into question the expertise of agencies.²⁰⁵ Agency expertise should factor into a reviewing court's reasonableness analysis, but should not lead to a presumption of reasonableness.

Because the public forum doctrine premises the government's interest in regulating nonpublic fora on a private owner analogy,²⁰⁶ limi-

²⁰⁰ See, e.g., *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319, 1323 (2d Cir. 1974) ("Prospective members of the AWRO and persons who need information about public assistance are best found in the waiting rooms of County Welfare Centers."); *Unemployed Workers Union v. Hackett*, 332 F. Supp. 1372, 1376 (D.R.I. 1971) (discussing council's goals and finding that "[i]n order to achieve any of these goals, it is necessary for them to reach a wide audience of the unemployed").

²⁰¹ See *Nebraska Dep't of Soc. Servs.*, 111 F.3d at 1422 (holding agency policy reasonable because plaintiff "had access to the public sidewalks outside of the building . . . as well as other public fora" where plaintiff could alternatively disseminate its message).

²⁰² See Bennett, *supra* note 5, at 2158 (recounting desperate measures taken by applicants due to fear of leaving waiting rooms).

²⁰³ See, e.g., *Nebraska Dep't of Soc. Servs.*, 111 F.3d at 1421 ("In addressing the reasonableness of the Policy, we are not unmindful of the Local Office's expertise in the management of a welfare office."); *Massachusetts Welfare Rights Org. v. Ott*, 421 F.2d 525, 527 (1st Cir. 1969) (discussing need for "giv[ing] the person in charge of the office the necessary discretion to determine the advent of a large cohesive group that might create special problems").

²⁰⁴ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (discussing federal courts' role in protecting federal rights); *Bell v. Hood*, 327 U.S. 678, 684 (1946) (same).

²⁰⁵ See GAO Report, *supra* note 8, at 51 (discussing 44% reversal rate for erroneously issued sanctions in Wisconsin and reporting that figure reached 70% during transitional period); Green, *supra* note 46, at 25 (reporting that in 1996 "HRA . . . was proven to be mistaken or wrong" in resolution of 85% of issues raised by clients in fair hearings).

²⁰⁶ See *Adderley v. Florida*, 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."); see also *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (same); *Perry Educ. Ass'n v. Perry Local Educators'*

tations on state property rights should also inform reasonableness review. Notably, at least one court has recognized First Amendment limitations on private property ownership. In *State v. Shack*,²⁰⁷ the New Jersey Supreme Court considered legal advocates' claim of a right to associate with migrant workers on the private property where the laborers worked and resided.²⁰⁸ Holding that the attempted advocacy did not violate state trespass law,²⁰⁹ the court emphasized that "[p]roperty rights serve human values" and noted the common law maxim that "one should so use his property so as not to injure the rights of others."²¹⁰ In evaluating the owner's property right to exclude the advocates, the court considered migrant workers' physical isolation, rootlessness, unorganized status, economic and political powerlessness, and lack of awareness of their rights.²¹¹ Because of these factors, the court identified the necessity of advocates' "positive efforts" to vindicate the workers' legal rights.²¹² Factoring state constructions of property into the nonpublic forum reasonableness inquiry is consistent with its private owner premise.²¹³

Ass'n, 460 U.S. 37, 46 (1983) (same); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-30 (1981) (same); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 n.10 (1981) (same).

²⁰⁷ 277 A.2d 369 (N.J. 1971).

²⁰⁸ See *id.* at 371-72 (reasoning that "under . . . State law the ownership of real property does not include the right to bar access to governmental services available to migrant workers").

²⁰⁹ See *id.* at 371.

²¹⁰ *Id.* at 372-73.

²¹¹ See *id.* The court also noted the unequal bargaining strength of the parties. See *id.* at 374.

²¹² See *id.* at 373.

²¹³ This concept of property has also informed federal district court opinions. See *Folgueras v. Hassle*, 331 F. Supp. 615, 624 (W.D. Mich. 1971) (concurring with *Shack* court in concluding that "the property rights of the camp owner do not include the right to deny access to his camps to guests or persons working for any governmental or private agency whose primary objective is the health, welfare or dignity of the migrant workers as human beings"); see also *Velez v. Amenta*, 370 F. Supp. 1250, 1256 (D. Conn. 1974) (discussing First Amendment limits to private property ownership); *Francenschina v. Morgan*, 346 F. Supp. 833, 839 (S.D. Ind. 1972) (same); Michele Cortese, *Property Rights and Human Values: A Right of Access to Private Property for Tenant Organizers*, 17 Colum. Hum. Rts. L. Rev. 257, 269-82 (1986) (identifying First Amendment rationales for limiting private property ownership and suggesting strategies to secure First Amendment right to conduct tenant organizing activities on housing premises); cf. *Mid-Hudson Legal Servs. v. G & U, Inc.*, 437 F. Supp. 60, 62 (S.D.N.Y. 1977) (basing reasoning on "company town" rationale of *Marsh v. Alabama*, 326 U.S. 501, 511 (1946), which analogized company town manager to governmental actor). But see *Illinois Migrant Council v. Campbell Soup Co.*, 574 F.2d 374, 377-78 (7th Cir. 1978) (holding that migrant community is not company town under *Marsh* doctrine, and rejecting First Amendment claim of access); *Asociación de Trabajadores Agrícolas v. Green Giant Co.*, 518 F.2d 130, 138-41 (3d Cir. 1975) (rejecting First Amendment claim of access to migrant community given availability of other channels of communication).

A reasonableness inquiry governed by the nature of the property and informed by state property rights is both allowed by the modern public forum doctrine and analytically consistent with much of the welfare center access precedent. Though none of the cases prior to *Perry* considered welfare centers to be public fora, the centers' concerns with efficient administration and client service have consistently informed courts' evaluation of prohibitions on access.²¹⁴ *Perry* does not remove such consideration from reasonableness review.

*Washington Legal Clinic for the Homeless v. Barry*²¹⁵ exemplifies how complete prohibitions on advocacy may defy conceptions of reasonableness. In *Barry*, the D.C. Circuit Court of Appeals thoughtfully applied reasonableness review to vindicate homeless advocates' challenge to scheduling limitations on advocacy in an emergency shelter office waiting room.²¹⁶ Though the agency asserted an interest in preventing overcrowding, the court reasoned that the shelter's restriction on the number of advocates who could visit at any one time sufficiently advanced this interest.²¹⁷ In evaluating the agency's rationale that limiting advocates' presence to three days of the week protected clients from disruptive solicitation, the court questioned whether "applicants for shelter are somehow less vulnerable" on those days than other days of the week.²¹⁸ Finally, the court considered the agency's irregular enforcement of its policy.²¹⁹

Although reasonableness review may not provide ultimate protection from restrictions on speech and association,²²⁰ *ISKCON* and

²¹⁴ See *New York City Unemployed & Welfare Council v. Brezenoff*, 677 F.2d 232, 238 (2d Cir. 1982) (applying time, place, and manner analysis); *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319, 1322 (2d Cir. 1974) (describing legitimate goals of promoting public convenience, comfort, and safety); *Massachusetts Welfare Rights Org. v. Ott*, 421 F.2d 525, 527 (1st Cir. 1969) (describing "[t]he general standard" as allowing regulation "so as to prevent interference with the use to which the property is ordinarily put by the State," but insisting that "[t]he state cannot 'unwarrantedly abridge the right of assembly and the opportunities for the communication of thought'" (quoting *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941))); *Unemployed Workers Union v. Hackett*, 332 F. Supp. 1372, 1379 (D.R.I. 1971) (weighing "plaintiffs' expressive interests . . . against the right of the State to restrict demonstrations which substantially interfere with governmental operations or with the free flow of traffic").

²¹⁵ 107 F.3d 32 (D.C. Cir. 1997).

²¹⁶ See *id.* at 38-39 (overturning regulation). The plaintiffs had not appealed the district court's classification of the waiting room as a nonpublic forum. See *id.*

²¹⁷ See *id.* (reasoning that "the policy limiting unsolicited volunteers to one at a time in the waiting room completely guards against overcrowding").

²¹⁸ *Id.*

²¹⁹ See *id.* ("[M]oreover, we do not understand why it does not enforce the challenged policy.").

²²⁰ See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985) (declaring that government need not select most reasonable restriction on speech in restricting access to nonpublic forum).

Barry demonstrate that it does provide protection from illogical and arbitrary regulations. More important, these opinions also indicate that, even in nonpublic fora, courts have a responsibility to invalidate such unreasonable regulations.

CONCLUSION

Applicants for welfare often confront a brutal bureaucracy in which their rights mistakenly are ignored or manipulatively circumvented. Without the assistance of welfare advocates, countless applicants never manage to vindicate their rights to public assistance and due process. As a result, these individuals go without legislatively intended and desperately needed food, shelter, and medical assistance. Thus, in evaluating agency restrictions on access to welfare center waiting rooms, courts should avoid an automatic presumption of non-public forum status and governmental reasonableness. Instead, courts should consider carefully whether welfare agencies have created designated public fora in their waiting rooms, or, alternatively, whether practices of forbidding advocacy exceed reasonableness limitations and property rights, and instead reveal viewpoint-discriminatory motives. This thoughtful approach to legal advocates' claims of access to welfare center waiting rooms will enable a reviewing court to vindicate First Amendment rights in an area highly susceptible to governmental abuse and clearly in need of citizen checks on governmental activity.