

1986

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Recommended Citation

Christopher A. Stump & Jill A. Hanken, *Virginia Should Open Its Courthouse Doors to Review Administrative Decisions Involving Public Assistance*, 21 U. Rich. L. Rev. 161 (1986).

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VIRGINIA SHOULD OPEN ITS COURTHOUSE DOORS TO REVIEW ADMINISTRATIVE DECISIONS INVOLVING PUBLIC ASSISTANCE

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I. INTRODUCTION

The framers of the Constitution agreed from the outset upon a tripartite system of government.¹ The separation of powers doctrine was adopted to preclude the exercise of arbitrary power.² James Madison wrote that "accumulation of all powers, legislative, executive, and judiciary, in the same hands may justly be pronounced the very definition of tyranny."³ This distribution of powers among the three governmental branches checks abuses within federal and state governments.⁴

Administrative law has been problematic for the separation of powers doctrine.⁵ Administrative agencies are part of the executive branch, and are often delegated legislative authority in order to effectuate agency functions and objectives.⁶ When agency case decisions are insulated from judicial review, there is an increased likelihood of inequitable and unjust agency actions.⁷ This lack of

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1. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 136 (2d ed. 1983) [hereinafter CONSTITUTIONAL LAW].

2. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). See generally J. BARRON & C. DIENES, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 267-68 (2d ed. 1982).

3. J. BARRON & C. DIENES, *supra* note 2, at 267 (quoting THE FEDERALIST No. 47, at 324 (J. Madison) (J. Cooke ed. 1961)).

4. See U.S. CONST. arts. I, II & III; VA. CONST. art. III, § 1.

5. See K. DAVIS, ADMINISTRATIVE LAW TEXT § 1.08, at 23-25 (3d ed. 1972); see also *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (discussing the roles of the Federal Trade Commission).

6. See VA. CONST. art. V, § 9.

7. See *infra* notes 125-28 and accompanying text.

judicial review exists in Virginia with respect to agency denial of public assistance funds.⁸

Recent Virginia decisions interpreting the Virginia Administrative Process Act⁹ (VAPA) have interpreted the subject exemption section of VAPA to include agency actions regarding public assistance,¹⁰ thereby prohibiting judicial scrutiny of administrative decisions which grant or deny public assistance.¹¹ This statutory interpretation effectively closes the courthouse door to persons denied public assistance. Virginia is one of only three states which fail to provide judicial review of public assistance eligibility hearings.¹²

However, Virginia courts may review a wide range of other administrative decisions, including issues regarding permits for septic tanks,¹³ zoning classifications,¹⁴ and automobile license plates.¹⁵ The interest of an indigent individual in public assistance benefits is certainly as significant as the interests people have in septic

8. For purposes of this article, "public assistance" shall refer to those programs enumerated in VA. CODE ANN. § 63.1-87 (Cum. Supp. 1985). The programs include the following:

(1) Fuel assistance. *See* VA. CODE ANN. § 63.1-8 (Cum. Supp. 1985); 42 U.S.C. § 8621 (1982 & Supp. 1985).

(2) Auxiliary grants to the aged, blind, and disabled. *See* VA. CODE ANN. § 63.1-25.1 (Repl. Vol. 1980 & Cum. Supp. 1985).

(3) Medical assistance. *See id.* § 63.1-25.2; 42 U.S.C. § 2011 (1982 & Supp. 1985).

(4) Social services. *See* VA. CODE ANN. § 63.1-55 (Repl. Vol. 1980 & Cum. Supp. 1985); 42 U.S.C. § 1397 (1982 & Supp. 1985).

(5) Aid to needy families with children. *See* VA. CODE ANN. § 63.1-105 (Repl. Vol. 1980 & Cum. Supp. 1985); 42 U.S.C. § 602 (1982 & Supp. 1983).

(6) General assistance. *See* VA. CODE ANN. § 63.1-106 (Repl. Vol. 1980).

9. VA. CODE ANN. §§ 9-6.14:1 to :25 (Repl. Vol. 1985).

10. As originally adopted in 1975, article five of VAPA contained subjects exempted from the entire Act. *See infra* note 20. VA. CODE ANN. § 9-6.14:20 (Repl. Vol. 1978), provided in pertinent part that "[t]here shall be exempted from the operation of this chapter any agency action relating to the following subjects: . . . (ii) grants of State or federal funds or property." *Id.* In July, 1985, VA. CODE ANN. § 9-6.14:20 was repealed by 1985 Va. Acts 602, and the subject exemptions recodified at VA. CODE ANN. § 9-6.14:4.1(B) (Repl. Vol. 1985). This recodified version provides in pertinent part that "[a]gency action relating to the following subjects is exempted from the provisions of this chapter: . . . 4. Grants of state or federal funds or property." *Id.*

11. *See, e.g., Harris v. Lukhard*, 733 F.2d 1075 (4th Cir. 1984). For the purposes of this article, any reference to agency decisions "denying" or "regarding" public assistance is actually applicable to any agency action denying, modifying, granting, or terminating public assistance.

12. *See infra* notes 142-46 and accompanying text for authorities for all fifty states.

13. *See, e.g., Forbes v. Kenley*, 227 Va. 55, 314 S.E.2d 49 (1984); *State Bd. of Health v. Godfrey*, 223 Va. 423, 290 S.E.2d 875 (1982).

14. *See, e.g., Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975).

15. *See* VA. CODE ANN. § 46.1-61 (Repl. Vol. 1980).

tanks and automobile license plates.¹⁶ Virginia's failure to provide adequate judicial redress worsens the plight of some of the commonwealth's most needy citizens and increases the possibility that public assistance benefits may be wrongfully withheld by arbitrary and capricious agency actions.¹⁷

This article advocates an interpretation of VAPA which would permit judicial review of public assistance cases. This article also will highlight the constitutional and public policy rationales which require the implementation of such review procedures in Virginia. Part II of the article traces the legal development of the present interpretation and advocates a statutory construction which permits judicial review under the present language of VAPA. Part III addresses supremacy clause and due process concerns supporting judicial review, and public policy arguments mandating it.

II. INTERPRETATION OF VAPA

A. *Present Interpretation*

Although the issue of judicial review of agency decisions denying public assistance has not been addressed by the Virginia Supreme Court,¹⁸ several Virginia circuit courts¹⁹ have rejected judicial review of agency decisions under Virginia Code section 9-6.14:20(ii), the subject exemption section of VAPA.²⁰ Section 9-6.14:20(ii) was replaced in 1985 by section 9-6.14:4.1(B)(4), which contains the same language as that of the former section.²¹ These circuit courts have held that administrative agency decisions denying general relief,²² hospitalization assistance,²³ food stamps, aid to families with dependent children (AFDC),²⁴ and decisions canceling Medicaid

16. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court stated that "[b]y hypothesis, a welfare recipient is destitute, without funds or assets." *Id.* at 261 (quoting *Kelly v. Wyman*, 294 F. Supp. 893, 899 (S.D.N.Y. 1968)).

17. See *infra* notes 85-140 and accompanying text.

18. See *Harris v. Lukhard*, 733 F.2d 1075, 1082 (4th Cir. 1984).

19. See *infra* notes 22-25 and accompanying text.

20. VA. CODE ANN. § 9-6.14:20 (Repl. Vol. 1978). This section clearly provides that *grants of state or federal funds or property* are exempted from the chapter. See *supra* note 10.

21. See *supra* note 10.

22. *Taylor v. Virginia Dep't of Welfare*, Ch. Order Book 12 at 257 (Greene County Cir. Ct. Jan. 16, 1979) (dismissing appeal of denial of general relief).

23. *Nesselrodt v. Virginia Dep't of Welfare*, Ch. No. 80-C-82 (Culpeper County Cir. Ct. Sept. 28, 1982) (upholding denial of application for hospital assistance).

24. *Redd v. Virginia Dep't of Welfare*, Law No. LE-1636 (Richmond City Cir. Ct. Sept. 2, 1982) (holding that a court is without jurisdiction to grant an appeal of a denial of AFDC and food stamp benefits because these are exempt from judicial review).

benefits²⁵ are all decisions which relate to grants of state or federal funds²⁶ and are therefore exempted from judicial review under VAPA by section 9-6.14:20(ii) of the Virginia Code.²⁷

In 1984, the United States Court of Appeals for the Fourth Circuit had its opportunity, in *Harris v. Lukhard*,²⁸ to decide whether VAPA had any application to public assistance matters. *Harris* involved a class action challenge to real estate assessment procedures used in determining the eligibility of applicants for Medicaid.²⁹ Relying partially upon circuit court cases,³⁰ and partially upon an opinion of the Virginia Attorney General,³¹ the court ruled that matters related to public assistance are exempted from VAPA by virtue of the subject exemption section.³² The subject matter exemption exempts from VAPA any agency decision that grants state or federal funds or property. While acknowledging that the Virginia Supreme Court might have adhered to the statutory interpretation advocated by the parties seeking public assistance,³³ the Court of Appeals held that its best judgment was exercised by following the circuit court decisions.³⁴

25. *White v. Madison County Dep't of Social Servs.*, Ch. No. 16-1710 (Madison County Cir. Ct. Aug. 17, 1982) (order canceling Medicaid benefits sustained upon demurrers of respondent).

26. See cases cited *supra* notes 22-25.

27. See *supra* note 20. Although all of these actions involve state or federal funds, the authors opine that these programs are specifically controlled by VA. CODE ANN. § 9-6.14:4.1(D)(3) (Repl. Vol. 1985) (formerly § 9-6.14:10(iii)), which "excludes" grants or denials of public assistance from VAPA article three (Case Decisions). This necessarily would include grants or denials of public assistance in the remainder of VAPA (including article four (Court Review)).

28. 733 F.2d 1075.

29. *Id.* at 1076-77. This article will not address the substantive merits of the challenges to the assessment procedures used, but rather will focus on the right to have the resulting denials of public assistance judicially reviewed.

30. *Id.* at 1082; see *supra* notes 22-25 and accompanying text.

31. *Harris*, 733 F.2d at 1082. There are three Virginia Attorney General Opinions on point. The first, 1977-78 Op. Va. Att'y Gen. 1-3 (1977), issued by former Attorney General Anthony F. Troy, favored an interpretation of VAPA which permitted judicial review of administrative agency hearings in public assistance cases. This position was reversed in two separate 1982 opinions by Attorney General Gerald Baliles. 1982-83 Op. Va. Att'y Gen. 11-12 (1982); 1982-83 Op. Va. Att'y Gen. 757-60 (1982). These opinions were issued by the Attorney General during the period between the district court's decision in *Harris* and the case's appeal to the Court of Appeals for the Fourth Circuit. Interestingly, the Attorney General's office was representing the appellee in the pending appeal.

32. *Harris*, 733 F.2d at 1081-82. For content of VA. CODE ANN. § 9-6.14:20(ii) (Repl. Vol. 1978) see *supra* note 10 and accompanying text.

33. This statutory construction will be advanced in Part II, Section B of this article. See *infra* notes 44-70 and accompanying text. It should be noted that co-author Jill A. Hanken served as co-counsel for plaintiffs in *Harris*.

34. *Harris*, 733 F.2d at 1082; see *supra* notes 22-25 and accompanying text.

The plaintiffs in *Harris* argued that if the general "grant-of-funds" exemption exempts grants of public assistance from VAPA articles two, three and four,³⁵ then the specific exclusion of public assistance under article three serves no function. The court recognized that the plaintiff's argument was "plausible as a matter of statutory construction," but the court nevertheless declined to accept it.³⁶ Instead, the court stated that "[i]t seems most unlikely that the Legislature intended judicial review of denials of public assistance, and the only apparent way to avoid such review is to apply the grant-of-funds exemption as the circuit courts have done."³⁷ In reaching this conclusion, the Court of Appeals ignored established principles of statutory construction in favor of what it perceived to be legislative intent. The resultant denial of judicial review is inequitable and violative of the legislative purpose.³⁸

Where questions of state law have not been addressed by the state's highest court, federal courts necessarily must forecast what the state supreme court would hold if presented with the issue.³⁹ While federal courts should give "proper regard" to decisions of state trial courts, federal courts are not obligated to follow those decisions.⁴⁰ However, federal courts interpreting VAPA are required to use principles of statutory construction that the Virginia Supreme Court would use in construing VAPA.⁴¹

In reaching its decision in *Harris*, the Court of Appeals chose to follow closely the pertinent decisions of Virginia's circuit courts.⁴² However, the court failed to adhere to principles of statutory con-

35. *Harris*, 733 F.2d at 1082.

36. *Id.* (noting that no Virginia Supreme Court cases addressed the issue; further no Virginia circuit court cases followed the plaintiffs' construction).

37. *Id.*

38. For a more detailed analysis of the authors' opinion complete with factor analysis, see *infra* notes 120-21 and accompanying text.

39. *Wilson v. Ford Motor Co.*, 656 F.2d 960 (4th Cir. 1981) (citing *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1976); *McChung v. Ford Motor Co.*, 492 F.2d 240 (4th Cir. 1973)). Under such circumstances, it also may be appropriate for the federal court to abstain from adjudicating the issue until the state supreme court has had an opportunity to do so. See C.A. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 52 (3d ed. 1976). A discussion of federal abstention doctrines is beyond the scope of this article.

40. *Estate of Bosch*, 387 U.S. at 464-65.

41. See *United States v. Guyette*, 382 F. Supp. 1266, 1268 (E.D. Va. 1974).

42. *Harris*, 733 F.2d at 1082. For a discussion of these circuit court cases, see *supra* notes 22-25 and accompanying text.

struction. If the court had applied statutory construction principles followed by the Virginia Supreme Court, it would have concluded that VAPA does indeed provide for judicial review of agency hearings related to public assistance.⁴³

B. *Proposed Interpretation*

VAPA was adopted in 1975⁴⁴ to replace the General Administrative Agencies Act (GAAA), which had governed administrative procedures in Virginia since 1952.⁴⁵ GAAA specifically exempted "the receipt of public assistance" from all of its provisions.⁴⁶ Under the express language of GAAA, agency decisions denying public assistance were not subject to judicial review.⁴⁷

However, when VAPA was adopted, the total public assistance exclusion was not retained.⁴⁸ Instead, VAPA excluded denials of public assistance only from article three of the Act, which governed case decisions.⁴⁹ Amendments adopted in 1985 recodified this section.⁵⁰ Actions of the General Assembly must be deemed intentional, and provisions which are omitted in a revised act may not be revived by statutory construction.⁵¹ In revising the law, the

43. See *infra* notes 55-70 and accompanying text. As previously stated, the majority in *Harris* admitted that this argument "is plausible as a matter of statutory construction." *Harris*, 733 F.2d at 1082.

44. 1975 Va. Acts 503.

45. VA. CODE ANN. §§ 9-6.1 to .14 (Cum. Supp. 1954). The repeal of the GAAA is noted under the heading *General Administrative Agencies Act*, VA. CODE ANN. §§ 9-6.1 to .14 (Repl. Vol. 1978).

46. VA. CODE ANN. § 9-6.2(d) (Cum. Supp. 1954).

47. *Id.*

48. Compare VA. CODE ANN. § 9-6.2 (Cum. Supp. 1952) with VA. CODE ANN. § 6.14:20 (Repl. Vol. 1978) (enumerating subjects exempted from the act).

49. VA. CODE ANN. § 9-6.14:10(iii) (Repl. Vol. 1978) provided that "[t]his article [article three (Case Decisions)] shall not apply to case decisions respecting . . . (iii) the grant or denial of public assistance."

50. This section is presently codified at VA. CODE ANN. § 9-6.14:4.1(D)(3) (Repl. Vol. 1985).

51. See *Godlewski v. Gray*, 221 Va. 1092, 277 S.E.2d 213 (1981). The court stated:

We invoke the elementary rule of statutory construction that when, as here, a statute . . . is revised, or when, as here *one act is framed from another*, and portions of the former are omitted, *the missing part will not be revived by statutory construction* but will be considered as annulled and revoked. A contrary holding would have to be based on a presumption that the omission was inadvertent and *would require us to impute to the legislature gross carelessness, or ignorance, an exercise in which we will not engage.*

Id. at 1096, 277 S.E.2d at 215-16 (emphasis added) (citing *Combined Saw & Planner Co. v. Flournoy*, 88 Va. 1029, 1034, 143 S.E. 976, 977 (1892) (quoting *Ellis v. Paige*, 18 Mass. (1 Pick.) 43, 45 (1823))).

General Assembly specifically and deliberately removed "public assistance" from the overall subject exemption section and instead excluded "public assistance" from the operation of article three only.

In *Harris*,⁵² the Fourth Circuit Court of Appeals interpreted VAPA as exempting grants or denials of public assistance from the entire VAPA by the subject exemption clause.⁵³ This rendered the exemption in article three superfluous and without effect.⁵⁴ This result is unsupportable under established rules of statutory construction.

Principles of statutory construction require that every word and clause of a statute be given effect where possible.⁵⁵ In *VEPCO v. Board of County Supervisors*,⁵⁶ the Virginia Supreme Court held that "[w]henver possible, . . . it is our duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal."⁵⁷ The two sections interpreted by the court in *Harris*, sections 9-6.14:20(ii) and 9-6.14:10(iii),⁵⁸ can be read together without conflict. To give both of the VAPA provisions effect, it is clear that the "exemption" in section 9-6.14:20(ii)⁵⁹ and the "exclusion" in section 9-6.14:10(iii)⁶⁰ must address two independent VAPA issues: grants of state or federal

52. *Harris v. Lukhard*, 733 F.2d 1075, 1082 (4th Cir. 1984).

53. VA. CODE ANN. § 9-6.14:20(ii) (Repl. Vol. 1978) provided that "[t]here shall be exempted from the operation of this chapter [VAPA] any agency action relating to the following subjects: . . . (ii) grants of State or federal funds or property." The subject exemption clause was later recodified. *See id.* § 9-6.14:4.1(B)(4) (Repl. Vol. 1985). For a more detailed discussion of this new codification, see *infra* notes 62-70 and accompanying text.

54. If VA. CODE ANN. § 9-6.14:20(ii) is interpreted as exempting "public assistance" cases from the totality of VAPA (including article three (Case Decisions)), then § 9-6.14:4.1(D)(3), which specifically excludes public assistance cases from article three provisions, is rendered absolutely meaningless. It is unlikely that the General Assembly would specifically remove "public assistance" cases from one article of VAPA when it was going to completely remove them from every article of the Act.

55. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *see also United States v. Snider*, 502 F.2d 645, 652 (4th Cir. 1974). In *Snider*, the Court of Appeals held that "all parts of the statute must be read together, neither taking specific words out of context, nor interpreting one part so as to render another meaningless." *Snider*, 502 F.2d at 652 (emphasis added) (citation omitted) (citing *United States v. American Trucking Ass'n*, 310 U.S. 534, 542-43 (1940)); *Helvering v. Morgan's Inc.*, 293 U.S. 121, 126 (1934).

56. 226 Va. 382, 309 S.E.2d 308 (1983).

57. *Id.* at 387-88, 309 S.E.2d at 311. The court further stated that "a statute is not to be construed by singling out a particular phrase." *Id.* at 388, 309 S.E.2d at 311 (citing *VEPCO v. Citizens for Safe Power*, 222 Va. 866, 869, 284 S.E.2d 613, 615 (1981)).

58. *See Harris*, 733 F.2d at 1081-82.

59. *See supra* note 10.

60. *See supra* note 49.

funds and grants or denials of public assistance, respectively.⁶¹

Recent organizational and substantive alterations to VAPA support this interpretation.⁶² As of July 1, 1985, both exemptions and exclusions from VAPA were provided for in a single statute: section 9-6.14:4.1(B)(4) of the Virginia Code.⁶³ This section continues to exempt grants of state or federal funds or property from the entire Act.⁶⁴ Subsection D of this section provides that "[t]he following agency actions otherwise subject to [VAPA] are excluded from the operation of Article 3 [Case Decisions] . . . of [VAPA]: . . . [t]he grant or denial of public assistance."⁶⁵ The addition of the explanatory phrase "agency actions otherwise subject to [VAPA]" expressly indicates that actions excluded from article three are otherwise subject to VAPA, including article four.⁶⁶

This addendum removes any ambiguity that may have existed in

61. The Reviser's Note to VA. CODE ANN. § 9-6.14:20 (Repl. Vol. 1978) refers to the differentiation between the exemption contained therein and other provisions: "Article 5 makes obvious self-explanatory exemptions from the whole chapter. Note, however, that there are other kinds of exceptions."

62. VA. CODE ANN. §§ 9-6.14:20(ii), :10(iii) (Repl. Vol. 1978) have been consolidated into a single section of VAPA. See VA. CODE ANN. § 9-6.14:4.1 (Repl. Vol. 1985).

63. This consolidation should aid the court in interpreting the intent of the sections together.

64. VA. CODE ANN. § 9-6.14:4.1(B) (Repl. Vol. 1985) provides that "[a]gency action relating to the following subjects is exempted from the provisions of this chapter: . . . 4. Grants of state or federal funds or property." It should be noted that the phraseology of former § 9-6.14:20 is substantially the same as the phraseology of the present statute. See *supra* note 10 for context of VA. CODE ANN. § 9-6.14:20 (Repl. Vol. 1978).

65. VA. CODE ANN. § 9-6.14:4.1(D) (Repl. Vol. 1985) (emphasis added). Other agency action precluded from the operation of VAPA article three includes: the award or denial of claims for workers' compensation; the award or denial of individual student loans by the Virginia Education Loan Authority; and the determination of applications for guaranty of individual student loans or the determination of default claims by the State Education Assistance Authority. VA. CODE ANN. § 9-6.14:4.1(D) (Repl. Vol. 1985). Agency decisions regarding awards or denials of workers' compensation and student loans certainly involve "grants of state or federal funds." Therefore, using the statutory construction employed in *Harris*, the above-mentioned actions would be exempt from all of VAPA. See *Harris*, 733 F.2d at 1075; see also *supra* notes 28-43 and accompanying text. It seems to run counter to common sense to believe that the General Assembly expressly excluded from article three several types of agency actions otherwise subject to VAPA, since within the *same* section the General Assembly already had exempted those agency actions from the entire VAPA. This statutory construction is not acceptable under present law. See *infra* notes 66-70 and accompanying text.

66. Compare VA. CODE ANN. § 9-6.14:10 (Repl. Vol. 1978) (stating that "[t]his article shall not apply to case decisions respecting . . . (iii) the grant or denial of public assistance) with *id.* § 9-6.14:4.1(D) (Repl. Vol. 1985) (citation omitted) (stating that "[t]he following agency actions otherwise subject to this chapter are excluded from the operation of Article 3 of this chapter: . . . [t]he grant or denial of public assistance").

the earlier statute, and must be deemed intentional.⁶⁷ Reading section 9-6.14:4.1⁶⁸ as a whole,⁶⁹ and giving the plain and ordinary meaning to its words where the words are unambiguous,⁷⁰ it is clear that denials of public assistance are subject to judicial review under VAPA. Future litigation on this issue should be decided accordingly.

III. CONSTITUTIONAL AND PUBLIC POLICY RATIONALES IMPLORING JUDICIAL REVIEW

If the statutory interpretation advocated in Part II of this article⁷¹ is rejected by the courts, several constitutional and public policy rationales mandate that the Virginia General Assembly provide for judicial review of administrative agency decisions regarding public assistance. From a constitutional perspective, the present interpretation of Virginia law contradicts an implementing regulation of at least one federally funded public assistance program⁷² and violates, at a minimum, the spirit of the United States Supreme Court decisions addressing due process rights arising from public assistance programs.⁷³ The present interpretation is inequitable because it fails to protect those members of our society who are most vulnerable to arbitrary or unlawful exertions of power.⁷⁴

A. Constitutional Concerns

Federal courts have invalidated state public assistance statutes when the statutes contradict federal requirements and thus violate

67. See *Godlewski*, 221 Va. at 1096, 277 S.E.2d at 216; see also *supra* note 51.

68. VA. CODE ANN. § 9-6.14:4.1 (Repl. Vol. 1985).

69. See *Board of County Supervisors*, 226 Va. 382, 309 S.E.2d 308 (1983); see also *supra* notes 55-57 and accompanying text.

70. See *Temple v. City of Petersburg*, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944) (stating that "[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it regardless of what courts think of its wisdom or policy"); see also *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Ambrogi v. Koontz*, 224 Va. 381, 297 S.E.2d 660 (1982).

71. See *supra* notes 44-70 and accompanying text.

72. For a discussion of the 1982 Food Stamp Act, see *infra* notes 76-77 and accompanying text.

73. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (holding that welfare benefits, as a matter of statutory entitlement for persons qualified to receive them, are not subject to termination without due process). For a more in-depth discussion of this proposition, see *infra* notes 85-97 and accompanying text.

74. This proposition is the predominant concern of the authors and serves as the motivating factor behind the drafting of this article.

the supremacy clause.⁷⁵ A regulation governing the Food Stamp Program⁷⁶ specifically addresses judicial review of agency decisions. Section 273.15(q)(3)(i) of the Code of Federal Regulations provides that “[a]fter a State level hearing decision which upholds the State agency action, the household *shall be notified of the right to pursue judicial review* of the decision.”⁷⁷ This regulation presupposes the existence of a right to judicial review.⁷⁸ Accordingly, the present interpretation of VAPA precluding judicial review⁷⁹ violates the federal regulations⁸⁰ to the extent that agency hearings denying food stamp benefits are involved, and concomitantly violates the supremacy clause of the United States Constitution.⁸¹ At a minimum, Virginia should be compelled to adhere to this federal law and provide for judicial review of agency hearings denying food stamp benefits.

A second constitutional objection to the denial of judicial review is that such a denial violates due process of law. The fourteenth amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property without due process of law.”⁸² Two questions must be answered to ascertain whether the denial of judicial review constitutes a due process violation. First, do the rights of individuals eligible for public assistance constitute “interests” which are protected by the fifth and fourteenth amendments?⁸³ Second, do the procedures presently employed by Virginia satisfy due process requirements?⁸⁴

The answer to the first inquiry is yes. The “property” protected by the fourteenth amendment has never been interpreted as being

75. See, e.g., *King v. Smith*, 392 U.S. 309 (1968) (invalidating Alabama “substitute father” regulation under which mother who cohabitated lost AFDC benefits); *J.A. v. Riti*, 377 F. Supp. 1046 (D.N.J. 1974) (invalidating New Jersey statute which granted an administrative agency discretionary power to remove persons convicted of welfare fraud from AFDC programs, because a state cannot remove otherwise eligible individuals from federal relief programs); *Lawson v. Brown*, 349 F. Supp. 203 (W.D. Va. 1972) (invalidating a Virginia AFDC eligibility statute because it imposed higher requirements than the federal statute).

76. 7 U.S.C. § 2011 (1982).

77. 7 C.F.R. § 273.15(q)(3)(i) (1985) (emphasis added).

78. It should be noted that the regulation does not contain any language implying that the right of judicial review is contingent upon state law providing for such.

79. See *supra* notes 22-25, 28.

80. 7 C.F.R. § 273.15(q)(3)(i) (1985).

81. See *supra* note 73 (state violation of federal requirements violates supremacy clause).

82. U.S. CONST. amend. XIV; see also U.S. CONST. amend. IV.

83. For a discussion of this question, see *infra* notes 85-108 and accompanying text.

84. For a discussion of this question, see *infra* notes 116-40 and accompanying text.

restricted to rights of undisputed ownership.⁸⁵ Instead, this protection extends to "any significant property interest,"⁸⁶ including statutory entitlements.⁸⁷ In *Goldberg v. Kelly*,⁸⁸ the United States Supreme Court attached this "statutory entitlement" status to the continued receipt of welfare benefits by eligible persons.⁸⁹

Goldberg involved a due process challenge to a New York statute which permitted federal aid to families with dependent children (AFDC) to be terminated without prior notice and hearing.⁹⁰ The Court held that the state termination procedures were unconstitutional,⁹¹ and declared that public assistance benefits are important rights, not merely privileges.⁹² More importantly, the Court held that "[welfare] benefits are a matter of statutory entitlement for persons qualified to receive them,"⁹³ and that procedural due process is therefore applicable to their termination.⁹⁴

85. See *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) (involving rights to property acquired under conditional sales contracts).

86. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

87. *Fuentes*, 407 U.S. at 86.

88. 397 U.S. 254 (1970).

89. *Id.* at 262.

90. *Id.* at 255-60. It should be noted that New York law did provide for judicial review of a hearing decision which did not restore the AFDC benefits. See N.Y. CIV. PRAC. LAW §§ 7801-7806 (McKinney 1963).

91. *Goldberg*, 397 U.S. at 266-68 (holding that the existing posttermination "fair hearing" and informal pretermination review were insufficient).

92. *Id.* at 262 (citing *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969)).

93. *Goldberg*, 397 U.S. at 262. It is sometimes presumed that due process guarantees apply only when a property interest is "presently enjoyed." See J. BARRON & C. DIENES, *supra* note 2, at 380. However, the Court of Appeals for the Ninth Circuit found the expectation of benefits by an applicant to be a sufficient interest to deserve due process protection. See *Griffith v. Detrick*, 603 F.2d 118 (9th Cir. 1979), *cert. denied*, 445 U.S. 970 (1980). The court emphasized the mandatory language of the authorizing statute and the very limited discretion of agency officials in granting assistance due to the definite eligibility criteria established by the implementing regulations. *Griffith*, 603 F.2d at 121-22. This decision suggests that enabling statutes and implementing regulations "may be so specific as to create an expectation that should be accompanied by . . . due process rights." J. BARRON & C. DIENES, *supra* note 2, at 380.

Virginia's enabling statutes for assistance programs and, more particularly, its implementing regulations, are extremely detailed and specific. They create a legitimate claim of entitlement and expectancy of benefits in persons claiming to meet the eligibility requirements. Arguably, the interest in such benefits is a property interest and may not be denied without due process. See, e.g., VA. CODE ANN. § 32.1-310 to -320 (Repl. Vol. 1985); *id.* § 63.1-105 to -106 (Repl. Vol. 1980); Virginia Department of Social Services Medicaid Manual (1975) (enabling statute and implementing regulations for Medicaid program); Virginia Department of Social Services, ADC Policy and Procedure Manual (1974) (enabling statute and implementing regulations for AFDC).

94. *Goldberg*, 397 U.S. at 262-63.

If an individual has a protected *statutory entitlement* in the continued receipt of welfare benefits, then that individual has a "quasi-property"⁹⁵ interest in the receipt of such benefits.⁹⁶ The individual's interests in, and the government's functions pertaining to, the initial extension and continued receipt of welfare benefits are identical.⁹⁷ Since the continued receipt of welfare benefits merits procedural due process protection, the initial extension of the same benefits merits the same procedural protections.⁹⁸

In addition to public policy rationales justifying identical treatment, several recent Supreme Court cases appear to require identical treatment. In *Board of Regents v. Roth*,⁹⁹ the Supreme Court identified certain attributes of property interests, within the purview of due process protection, which have evolved from earlier Court decisions.¹⁰⁰ For a property interest to arise from a claim to a benefit, the individual must have more than a unilateral expectation of receiving the benefit. He must have "a legitimate claim of entitlement to it."¹⁰¹ The Court in *Roth* stated that the entitle-

95. See *id.* at 262 n.8 (Brennan, J.) (citing Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L.J.* 1245, 1255 (1965)).

96. See *supra* note 93. See generally Dolzer, *Welfare Benefits as Property Interests: A Constitutional Right to a Hearing and Judicial Review*, 29 *AD. L. REV.* 525 (1977).

97. See Dolzer, *supra* note 96, at 526-37.

98. This conclusion has been reached by federal courts. See, e.g., *Parker v. Califano*, 644 F.2d 1199 (6th Cir. 1981) (holding that administrative res judicata may constitute a denial of due process when a colorable constitutional question has been raised); *Gosnell v. Harris*, 521 F. Supp. 956 (S.D. Ohio 1981), *aff'd.*, 703 F.2d 216 (6th Cir. 1983) (holding that once an individual applies for Social Security benefits, he has a procedurally protected interest in obtaining them). *But see Ortwein v. Schwab*, 410 U.S. 656, 659-60 (1973) (indirectly suggesting that administrative actions do not give rise to a constitutional right to judicial review); *Dandridge v. Williams*, 397 U.S. 471, 484 (1970) (refusing to classify welfare benefits as fundamental interests). See generally Brudno, *Fairness and Bureaucracy: The Demise of Procedural Due Process for Welfare Claimants*, 25 *HASTINGS L.J.* 813 (1974).

99. 408 U.S. 564 (1972). *Roth* involved a state university teacher who had not been re-hired at the end of a fixed term employment contract, without explanation. The Court held that no due process protection need be given since no property or liberty interest was involved. *Id.* at 579.

100. *Id.* at 576-77. The earlier Court decisions include: *Connell v. Higginbotham*, 403 U.S. 207 (1971) (implied promise of continued employment gives rise to due process protection); *Goldberg*, 397 U.S. 254 (statutory entitlement in welfare benefits requires pretermination hearing); *Flemming v. Nestor*, 363 U.S. 603 (1960) (no accrued property rights in Social Security benefits).

101. *Roth*, 408 U.S. at 577. The Court stated:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Id.

ment of the welfare recipients in *Goldberg* was "grounded in the statute defining eligibility thereby creating a property interest."¹⁰² Although the claimants in *Goldberg* had not yet proven their statutory eligibility, they had a "right to a hearing at which they might attempt to do so."¹⁰³ By analogy, individuals satisfying statutory eligibility requirements for other forms of public assistance likewise have a legitimate claim of entitlement grounded in the statute defining eligibility, and therefore should have a right to a hearing to prove their legitimate claim.

The most recent United States Supreme Court case on point does not differentiate between property rights in the initial and continued receipt of public assistance. *Atkins v. Parker*¹⁰⁴ involved notice requirements necessary to effectuate food stamp benefit reductions. The Court stated that, like welfare benefits, food stamp benefits are a matter of statutory entitlement for persons qualified to receive them.¹⁰⁵ *Atkins* unconditionally held that these "entitlements are appropriately treated as a form of property protected by the Due Process Clause";¹⁰⁶ thus, the procedures used to determine continued eligibility must comply with the requirements of the United States Constitution.¹⁰⁷ It is suggested here that, under *Atkins*, an eligible individual has an entitlement "property" interest in the initial receipt, as well as the continued receipt, of public assistance benefits.¹⁰⁸

The second question to answer is whether the procedures used in Virginia satisfy due process requirements.¹⁰⁹ The United States

102. *Roth*, 408 U.S. at 577. The same statutes define initial eligibility and continued eligibility. *Id.*

103. *Id.*; see also *Singer v. Schweiker*, 694 F.2d 616, 618 (9th Cir. 1982) (holding that the rejection of a second application for survival benefits under the Social Security Act without an opportunity to present its merits constituted a denial of due process).

104. 105 S. Ct. 2520 (1985).

105. *Id.* at 2529 (citing *Goldberg*, 397 U.S. at 262).

106. *Atkins*, 105 S. Ct. at 2529.

107. *Id.* See generally CONSTITUTIONAL LAW, *supra* note 1, at 549-50; Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

108. This article addresses judicial review of administrative agency decisions denying, modifying, granting, or terminating public assistance. See *supra* note 11. Virginia's preclusion of judicial review encompasses all of these types of agency actions. Thus, even if Virginia rejects the interpretation of *Atkins* advocated herein, agency actions modifying or terminating benefits are absolutely entitled to due process protection under *Goldberg*. Therefore, at a minimum, some Virginia administrative agency actions not subject to judicial review involve "property" rights protected by the due process clause.

109. See *supra* note 84 and accompanying text. While the administrative hearing proce-

Supreme Court has articulated a balancing of interests test to ascertain the procedural protections applicable to a particular situation. In *Mathews v. Eldridge*,¹¹⁰ the Court emphasized three factors which should be considered in identifying the specific requirements of due process:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹¹¹

An explanation of the present agency hearing procedures is merited before the *Mathews* test is analyzed. The State Board of Social Services (the "Board")¹¹² has authority to review any decision granting, denying, changing, or discontinuing public assistance upon appeal of the aggrieved applicant or recipient.¹¹³ The Board may delegate its review responsibilities to hearing officers who preside over administrative hearings and render subsequent decisions. Any party dissatisfied with a hearing officer's decision may request review by the Board.¹¹⁴ The Board's decision is final, and not subject to further review or appeal, except on the Board's own motion.¹¹⁵

However, administrative review of agency decisions concerning Medical Assistance (Medicaid) is handled independently by the Department of Medical Assistance Services.¹¹⁶ A team of hearing officers presides over the hearings, makes findings of fact, and recommends a decision to the Medical Assistance Program Appeals

dures could be altered to satisfy due process, the authors feel that judicial review is a superior avenue. It is worth noting that 47 states addressing the due process questions in similar situations have provided for judicial review. See *infra* notes 142-46 and accompanying text.

110. 424 U.S. 319 (1976).

111. *Id.* at 335.

112. VA. CODE ANN. § 63.1-14 (Cum. Supp. 1985). The Board is comprised of nine members who are appointed by the Governor.

113. VA. CODE ANN. § 63.1-116 (Repl. Vol. 1980).

114. *Id.* Such review is conducted by a three member committee of the Board. *Id.*

115. *Id.* § 63.1-119 (Repl. Vol. 1980).

116. The Department of Medical Assistance Services was established by VA. CODE ANN. § 32.1-323 (Repl. Vol. 1985).

Board (the "Appeals Board").¹¹⁷ The Appeals Board has the options of accepting the recommendations of the hearing officer, reaching its own conclusions, or referring the matter back to the hearing officer for continuation of the hearing.¹¹⁸ Although the Appeals Board may reconsider its decision if new evidence becomes available, no other administrative reviews of Appeals Board decisions are allowed.¹¹⁹

The *Mathews* analysis is comprised of three components. The first component, the private interest that will be affected,¹²⁰ is clearly an important interest to both the individual and society. To the individual, public assistance represents minimal subsistence support for the essentials of life.¹²¹ To society, "welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity."¹²² The degree of procedural due process protection merited in a particular situation depends upon the extent to which an individual will be "condemned to suffer grievous loss."¹²³ Therefore, from the perspective of the private interest affected, agency actions impacting on minimum subsistence support should be afforded a high degree of procedural protection, including judicial scrutiny.¹²⁴

The second component, the risk of error and the value of additional procedural safeguards,¹²⁵ also merits judicial review. Risk of error is increased by the lack of total impartiality in the agency determination. This does not suggest any moral or ethical deficiency on the part of the hearing officials, but instead recognizes the fundamental differences between an agency hearing official and a judge. An agency official attempts to serve three roles: (1) impartial decisionmaker; (2) representative of the claimant; and (3) rep-

117. Virginia Department of Social Services, *The Virginia Medicaid Manual* § 806 (1985).

118. *Id.* § 806.5.

119. *Id.*

120. *Mathews*, 424 U.S. at 335; see *supra* note 102 and accompanying text.

121. See *Goldberg*, 397 U.S. at 265. This assistance can provide the poor with the same opportunities that are available to others, allowing them to participate meaningfully in community life. *Id.*

122. *Id.* The *Goldberg* court also stated that "[p]ublic assistance . . . is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'" *Id.*

123. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

124. Dolzer, *supra* note 96, at 558-59. The function of judicial review is to ensure that the agency correctly applies the statutes in specific cases.

125. *Mathews*, 424 U.S. at 335.

representative of the agency.¹²⁶ Because of these multiple roles, the agency official's perspective tends to be more society-oriented, whereas judges are more concerned with the rights of individuals.¹²⁷ Since due process demands impartiality of those who function in judicial capacities,¹²⁸ the potentially conflicting concerns of an agency hearing official encourage the implementation of judicial review procedures.

In this respect, Virginia's system of administrative review of agency actions is particularly inadequate. The final decisionmaker for the Department of Social Services is a board composed of nine political appointees.¹²⁹ In Medicaid cases, a team of state employees and policy makers issue the only decision, without the benefit of observing witnesses or the hearing proceedings.¹³⁰

The final component to the *Mathews* test is the interest of the government, including the fiscal and administrative burdens of additional procedures.¹³¹ One governmental interest is to promote societal harmony by providing minimal subsistence support to individuals.¹³² In *Goldberg*, the Supreme Court addressed the fiscal and administrative concerns that relate to the administration of public assistance.¹³³ The Court in *Goldberg* stated that "these governmental interests are not overriding in the welfare context."¹³⁴ Moreover, judicial review would increase the burden on agencies and courts only slightly. In South Carolina, for example, where public assistance cases are subject to judicial review, only thirty-three client appeals were filed between 1982 and 1985.¹³⁵

126. See Marshaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 788 (1974).

127. See Dolzer, *supra* note 96, at 561. This article further suggests that the individual's interests are protected by an "enlightened" element on an administrative level, and by the impartiality of the judge on the judicial level. See *id.* at 543-59.

128. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (applying to judicial and quasi-judicial hearings); see also *Goldberg*, 397 U.S. at 271.

129. See *supra* notes 116-19 and accompanying text.

130. See *supra* notes 116-19 and accompanying text.

131. *Mathews*, 424 U.S. at 335; see *supra* note 111 and accompanying text.

132. See *supra* notes 121-22 and accompanying text.

133. See *Goldberg*, 397 U.S. 254 (specifically addressing those fiscal and administrative concerns relating to welfare benefits).

134. *Id.* at 266. The Court noted that the state could employ various techniques to minimize the increased cost, including prompt determinations and efficient use of personnel and facilities. *Id.*

135. See 4 South Carolina Legal Services Association, *The Support Report* (1985) (monthly update for South Carolina Legal Services staff).

Balancing the three components of the *Mathews* test—the vital individual interests at stake,¹³⁶ the significant protection which judicial review would provide against the arbitrariness,¹³⁷ and the nominal fiscal burdens which would ensue¹³⁸—makes it apparent that procedural due process requires Virginia to provide judicial review of administrative agency decisions affecting public assistance benefits.¹³⁹ Although the procedures utilized by Virginia do provide some degree of due process protection,¹⁴⁰ the decisions in *Goldberg* and *Mathews* indicate that more extensive protection is required. This additional protection is best provided by a system of judicial review.

B. *Concerns of Fairness and Equity*

In addition to the due process basis for requiring judicial review of administrative decisions regarding public assistance, several public policy considerations dictate the implementation of judicial review. The interests analyzed in the previous section¹⁴¹ are applicable to this proposition. However, the magnitude of the individual interests at stake, the absence of any judicial check on the potential for abuses of discretion, and traditional notions of fairness and equity require that judicial review be provided.

An examination of the procedures utilized in other states is instructive in ascertaining which procedures satisfy “traditional notions of fairness” and advance positive public objectives. Such an examination reveals that Virginia, Texas, and Ohio are the only states which do not provide for judicial review of administrative agency hearings in public assistance cases.¹⁴² Thirty-six states and

136. See *supra* notes 120-24 and accompanying text.

137. See *supra* notes 125-30 and accompanying text.

138. See *supra* notes 131-35 and accompanying text.

139. It has been suggested that the nature of the interests at stake render appellate review an ineffective check on abuses of power. See *Marshaw, supra* note 126, at 812-15 (suggesting that a management system is needed to assure adjudication safeguards).

140. See *supra* notes 112-19 and accompanying text.

141. See *supra* notes 75-140 and accompanying text.

142. In Texas, public assistance cases are specifically exempted from the Texas Administrative Procedure Act. TEX. REV. CIV. STAT. ANN. Art. 6252-13A (Vernon Supp. 1986). Texas courts have not assumed jurisdiction of these cases. See, e.g., *Hackney v. Meade*, 466 S.W.2d 341, 342 (Tex. Civ. App. 1971).

In Ohio, the Court of Claims has no jurisdiction to review denials of public assistance benefits. See *Bolin v. White*, 51 Ohio App. 2d 92, —, 367 N.E.2d 63, 65 (1976). However, when money damages are incurred as a result of an agency's failure to meet its statutory obligations, a claim is permitted. See *Morris v. Creasey*, Law No. 79AP-410 (Ct. App., Franklin County, Va., February 14, 1980).

the District of Columbia provide for judicial review of public assistance cases through their state's administrative process acts.¹⁴³ Six states utilize judicial review statutes outside of their administrative process acts.¹⁴⁴ Two states provide for judicial review through court rules.¹⁴⁵ Three states provide review through a certiorari procedure.¹⁴⁶

The fact that Virginia is one of only three states which does not provide for judicial review demonstrates that its position is out of synchronization with contemporary thought. Virginia's position in the extreme minority does not in and of itself mandate an alteration. However, Virginia's deviation from mainstream practice does indicate that Virginia's procedures do not meet traditional notions of fairness in the view of the overwhelming majority of states. Vir-

143. These 36 states include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Washington, Wisconsin, and Wyoming. See ALA. CODE § 41-22-20 (Repl. Vol. 1982); ALASKA STAT. § 44.62.300 (1982); ARIZ. REV. STAT. ANN. §§ 12-901 to -910 (1982); ARK. STAT. ANN. § 5-713 (Cum. Supp. 1985); CAL. WELF. & INST. CODE § 10962 (West 1980); COLO. REV. STAT. § 24-4-106 (Repl. Vol. 1982); CONN. GEN. STAT. § 4-183 (West Supp. 1985); D.C. CODE ANN. § 3-210.13 (Cum. Supp. 1985); FLA. STAT. ANN. § 120.68 (West Supp. 1986); GA. CODE ANN. § 50-13-19 (1982); HAWAII REV. STAT. § 91-14 (Repl. Vol. 1976 & Supp. 1984); IDAHO CODE § 67-5215 (Cum. Supp. 1985); ILL. ANN. STAT. ch. 110, § 3-101 to -112 (Smith-Hurd 1983 & Supp. 1985); IND. CODE ANN. § 4-22-1-14 (Burns Supp. 1985); KAN. STAT. ANN. §§ 77-606 to -623 (1984); LA. REV. STAT. ANN. § 46:107(D) (West 1982); ME. REV. STAT. ANN. tit. 5, § 11001; *id.* tit. 22, § 4322 (Cum. Supp. 1985); MD. STATE GOV'T CODE ANN. § 10-215 (1984); MASS. GEN. LAWS ANN. ch. 30A, § 14 (Michie/Law. Co-op. 1983); MICH. COMP. LAWS ANN. § 400.37 (West 1976 & Supp. 1986); MINN. STAT. ANN. § 256.045 (West 1982); MO. REV. STAT. § 536.100 (1982); MONT. CODE ANN. § 2-4-701 (1984); NEB. REV. STAT. § 84-917 (1981); N.Y. CIV. PRAC. LAW § 7801 (McKinney 1981); N.C. GEN. STAT. § 108A-79(k) (Cum. Supp. 1985); N.D. CENT. CODE § 28-32-15 (Cum. Supp. 1985); OR. REV. STAT. § 183.480 (1985); 42 PA. CONS. STAT. ANN. § 762(a) (Purdon Cum. Supp. 1985); R.I. GEN. LAWS § 42-35-15 (Cum. Supp. 1985); S.C. CODE ANN. § 1-23-150 (Law. Co-op. 1984); S.D. CODIFIED LAWS ANN. § 1-26-30.2 (1980); TENN. CODE ANN. § 4-5-322 (Repl. Vol. 1985); WASH. REV. CODE § 34.04.130 (Cum. Supp. 1986); WIS. STAT. ANN. § 227.15 (West Supp. 1985); WYO. STAT. § 16-3-114 (Cum. Supp. 1985).

144. These six states include Delaware, Kentucky, Nevada, New Mexico, Oklahoma and Vermont. See DEL. CODE ANN. tit. 31, § 520 (Repl. Vol. 1985); KY. REV. STAT. § 205.234 (Cum. Supp. 1985); NEV. REV. STAT. § 422.294 (1979); N.M. STAT. ANN. § 27-3-4 (Repl. Vol. 1984); OKLA. STAT. ANN. tit. 56, § 168(c) (West Supp. 1985); VT. STAT. ANN. tit. 3, § 3091(f),(g) (1985).

145. These two states are New Jersey and Utah. See N.J. CT. R. 2:2-3(a)(2); UTAH R. APP. P. 14.

146. These three states are Mississippi, New Hampshire and West Virginia. See *Harrison v. Ginsberg*, 286 S.E.2d 276, 282-84 (W. Va. 1982); MISS. CODE ANN. § 11-51-95 (Cum. Supp. 1985) (review limited to errors of law); N.H. REV. STAT. ANN. § 541-A:16 (Cum. Supp. 1986) (review limited to errors of law); W. VA. CODE § 53-3-1 (Repl. Vol. 1981).

ginia should provide for judicial review, not for the purpose of relinquishing its minority status, but rather to provide its indigents deserved additional protection.

Insulating administrative agency decisions from judicial review vests the agency with executive, legislative, and judicial functions, and thus violates the separation of powers doctrine. Without judicial review to help prevent arbitrary decisions and abuses of power, there are no systematic external procedures to check the agency's exercise of authority in specific cases.¹⁴⁷ An individual faced with a denial of benefits based on misapplication of the law or a misunderstanding of the facts by the agency is without redress. Furthermore, one of the functions of the judiciary, enhancing conformity and predictability in the application of the law, is absent.¹⁴⁸

IV. CONCLUSION

The importance of the interests of individuals in need of, and eligible for, public assistance cannot be overemphasized. Unwarranted deprivation of public assistance benefits may deprive an eligible claimant of the means for survival.¹⁴⁹ The potential for injustice is simply too significant to ignore or reject because of nominal fiscal burdens.¹⁵⁰ If Virginia can justify providing judicial review for persons dissatisfied with agency decisions regarding automobile license plates and septic tank permits,¹⁵¹ it should provide the same for decisions affecting the lives of public assistance claimants.

Virginia must alter, either judicially or legislatively,¹⁵² its position of precluding judicial review of administrative agency decisions in public assistance cases. Such a change is necessary to conform Virginia's procedures with the policies of fairness, as evidenced by the overwhelming majority of sister states. Allowing judicial review of agency decisions affecting public assistance

147. See *supra* notes 112-19 and accompanying text.

148. See Dolzer, *supra* note 96, at 558-59.

149. *Id.* at 559.

150. See *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970); see also *supra* text accompanying notes 135-39.

151. See *supra* notes 13 & 15 and accompanying text.

152. Although it did not make any recommendations, the 1985 Regulatory Reform Advisory Board did encourage the Virginia General Assembly to consider this issue. See *The Governor's Regulatory Reform Advisory Board Final Report 2* (1985). Such a bill was presented to the General Assembly in 1986, S.266, 1986 Sess., but the bill was dismissed in committee.

claimants will help guarantee the commonwealth's indigents all the protections provided by state and federal law.