



1998

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S. Candice Hoke

Cleveland State University, s.hoke@csuohio.edu

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Original Citation

Candice Hoke, State Discretion Under New Federal Welfare Legislation: Illusion, Reality, and a Federalism-Based Constitutional Challenge, 9 Stanford Law & Policy Review 115 (1998)

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Citation: 9 Stan. L. & Pol'y Rev. 115 1998

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State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge

by
Candice Hoke

Echoing a widely-held opinion of state options under the new Welfare regime, Peter Edelman recently wrote that under the new federal welfare statute,¹ the states "can now do almost anything they want."² Edelman resigned from his federal administrative office in protest over President Clinton's signing of the legislation. Edelman's resignation was an expression of the degree of concern that he felt not only about substantive changes in the federal welfare law but also about the delegation of significant policy and procedural control to

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the states. He joins many others in expressing grave concern over the prospect of state governments' exercising this broad discretion over the interests of indigent families.³ This apprehension may be well-founded, as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the "PRWORA" or the "Act") does, at least on its face, grant the states scores of options in structuring programs that substitute for more traditional welfare measures.⁴

The extent, however, to which the federal government has in fact

Candice Hoke is an Associate Professor of Law at Cleveland Marshall College of Law, Cleveland State University, and received her J.D. from Yale Law School in 1983. She served as a law clerk to the Honorable Hugh Bowmes of the U.S. Court of Appeals for the First Circuit. Her primary research focuses on constitutional federalism issues and has included numerous studies on federal preemption, the Tenth Amendment, the Supremacy Clause and the Spending Clause. This article benefited from the reflective responses offered by other panelists and program organizers of the American Bar Association's Section on State and Local Government Law, Panel on Devolution of Power at the ABA Annual Meeting, August 6, 1997, namely Mary Massaron Ross, William P. Marshall, David DeVries, Robert Freilich, and Steve Szlay. For beneficial critical commentary, she would like to thank Jim Wilson, Alan Weinstein, Pat McCoy, George Taylor, and Mel Durchslag. Maurice Graham provided effective research assistance.

structured state choices under welfare reform has received far less attention. These restrictions may, unfortunately, have more impact upon former welfare recipients than the Act's alleged latitude because the most significant and fundamental policy decisions have already been dictated at the federal level through incentive structures embedded in the Act. State discretion is largely located in the implementation of federal policy norms, in the handling of peripheral matters, or in the creation of "segregated" state programs permitted to achieve different objectives without federal funding.⁵ Where the PRWORA grants states what appears to be more meaningful policy discretion, careful analysis reveals that these options are weighted by substantial financial or other penalties. The Act limits state's decision-making process so as to ensure that states must exercise discretion in accordance with policy norms

embedded in the federal legislation. For this reason, the PRWORA should *not* be understood as a neutral federal block grant program that cedes the important decisions to states in an impartial manner. Rather, through its technical, financial detail, the Act operationally transfers control of new and important areas of policy traditionally left to the state to the federal government.

This article challenges the common characterization of the 1996 welfare reforms. States do not have the ability to do "almost anything they want."⁶ Most notably, states with more compassionate political leadership who wish to counter the national trend may seek areas of flexibility in vain. The Act's mandates and penalties will force all states into particular policies that they may not have chosen had Edelman been correct about the range of their discretionary powers.

Edelman's critique typifies the standard assessment of the Act.⁷ According to the prevailing view, the Act's policies are objectionable because the federal government has capped the money it will make available for welfare spending, while concomitantly eliminating the personal entitlement to assistance.⁸ In so doing, the nation has ceded programmatic responsibility to the states via block grants so that states may structure and operate welfare programs as they choose.⁹

This article first provides a descriptive outline of the structure of the PRWORA, emphasizing provisions that accord the states new discretionary powers. In contrast, this article then shows by close attention to the details of the Act that the discretion afforded states is often illusory. In practice, the Act constrains states by subjecting their purportedly discretionary policy decisions to conservative policy norms.¹⁰ Given the length of the Act, this examination must be illustrative rather than exhaustive.

Finally, this article demonstrates that states and their citizens need not passively accept these normative federal policy choices. Concerned state governments may make at least two distinct types of efforts to mend the social safety net. The first type of effort makes use of opportunities embedded in the interstices of the Act itself, e.g., the statutory waivers granted under the previous Aid to Families With Dependent Children ("AFDC") regime.¹¹ The second type of effort consists of legal challenges to the Act. Some jurisdictions and individuals have already filed claims predicated upon individual rights theories such as Equal Protection and Fifth Amendment Due Process.¹² Because these areas of legal analysis have already received attention, this article focuses instead on Tenth Amendment and Spending Clause claims. Such analysis reveals that significant portions of the Act may be subject to invalidation under the Spending Clause,¹³ as informed by the values of the

Tenth Amendment, which reserves for the states those powers not expressly delegated to the federal government.¹⁴

I. OVERVIEW OF THE PRWORA

In 1996, the federal government abolished its half-century commitment to income and other support for indigent families. The PRWORA states Congress's desire to "promote" the interests of children, of "responsible motherhood and fatherhood," and of a "successful society."¹⁵ It is certainly worth questioning whether the Act can achieve its broadly stated political objectives without causing significant negative consequences.¹⁶ Stripped of its rhetoric, the Act achieves the following: (1) sharp reductions in federal financial commitments for indigent families and individuals, including children; (2) the creation of a federally supervised, state-based automated system for ensuring payment of child support, and federal reimbursement for outlays to an unsupported family; (3) the termination of individual entitlements to federal welfare benefits program, the creation of a lifetime maximum period of federally funded benefits, and a legal requirement that recipients work; and (4) the elimination of federal financial support for disabled and impoverished legal immigrants.

A. TITLE I: TANF'S "TOUGH LOVE" OR "TOUGH LUCK"

The Temporary Assistance for Needy Families program ("TANF")¹⁷ replaces AFDC.¹⁸ AFDC provided cash payments to indigent families based upon national eligibility standards and a uniform federal definition which created an entitlement for recipients. While the states did provide vastly different benefit levels to indigents, they were forbidden from tinkering with the qualifications for eligibility. Before the passage of the PRWORA, deep political opposition to AFDC existed, in part due to widespread media images of "welfare queens" accused of welfare fraud and other forms of abuse of tax dollars.

In its substantive provisions, TANF eliminates national eligibility standards and abolishes the national entitlement to aid. It replaces the AFDC's open-ended federal financial liability with finite grants awarded to states upon submission of a complete "State Plan."¹⁹ States are not required to provide cash payments, as they were under AFDC, but may instead employ new programs to assist indigent families.²⁰

With TANF, Congress seeks to create a work-based support system that will facilitate the movement of families with minor children out of the welfare system and into unsubsidized, self-supporting employment. To

this end, the Act authorizes states to use funds for traditional forms of support such as cash and other assistance for housing, utilities, and other necessities of life.²¹ Unlike under the previous system, however, the states may also choose to fund programs providing job skills training, job search skills, child care services, and other activities designed to help indigent families become self-sufficient. The specific features of state programs that may be funded in part by TANF monies appear to be matters of broad state discretion. Indeed, the Act provides that a state may use the TANF grant "in any manner . . . reasonably calculated to accomplish the purpose of this part."²² Commentators often overlook the significance of the multiple restrictions that are imposed upon the states.

Like AFDC, TANF is structured as a "cooperative federalism" program, in which the federal and state governments contribute to the programmatic standards, procedures, and funding.²³ A state desiring to receive federal monies must file a plan outlining its programs and the manner in which they achieve TANF's express objectives.²⁴ A state must also continue to provide substantial funding of its own, which is measured by any financial reductions in a state's "historic effort."²⁵ The plan must include state decisions regarding various policy options that TANF explicitly accords the states, such as whether to require recipients to perform "community service" within two months of receiving assistance.²⁶

Many states already have authorization for innovative, experimental programs that significantly depart from the historic AFDC program through permissions, or "waivers," granted by the Department of Health and Human Services ("HHS").²⁷ If a state's waivers for its current welfare programs had previously released it from the strictures of federal law, its plan must indicate which waivers, if any, it has chosen to continue to enforce.²⁸ The state's plan must also address how the waivers may be "inconsistent" with TANF statutory provisions.²⁹ TANF explicitly accords states operating under previously approved waivers the ability to continue such programs until their expiration, regardless of inconsistency with TANF.

B. TITLE III: A FEDERALLY MANDATED APPARATUS FOR COLLECTING CHILD SUPPORT

The nonpayment of child support orders is a significant cause of poverty for a single-parent families.³⁰ Title III of the PRWORA details a mandatory child support collection structure that must be established and operated if a state is to remain eligible for the full TANF grant.³¹ Key features of Title III include the creation of automated State systems for entry of all support orders

and of employees who obtain new jobs; authority for income withholding; a requirement that states cooperate with the federal government and with other states in matching employees to outstanding support orders; mechanisms for speedy enforcement of support orders; and the enactment of certain laws and legal conditions, including the Uniform Interstate Family Support Act and the conferral of statewide jurisdiction on agencies and courts empowered to act in paternity and support proceedings.³²

The Act specifies that applicants for TANF assistance and Medicaid must assign support rights, including distribution, to the state and cooperate in establishing paternity.³³ The state *must* deduct a minimum of twenty-five percent from a family's cash assistance grant, and may end the family's eligibility for grants altogether, for "non-cooperation" in establishing paternity, or if a child support order is modified or unenforced without good cause.³⁴ Additionally, if the federal government finds that states are not enforcing non-cooperation sanctions against individuals, the state will be penalized up to five percent of the TANF block grant for the next fiscal year.³⁵ Finally, the federal government receives first priority for reimbursement from child support money collected from absent fathers, and the states may collect the remainder, or may return it to the indigent family.

C. TITLE IV: PROVISIONS GOVERNING IMMIGRANTS

Budget pressures, and political calculations about the inability of some AFDC recipients to vote, led Congress to target both legal and illegal immigrants for some of the sharpest restrictions and prohibitions on receipt of federally funded benefits.³⁶ Legal immigrants stood accused of taking advantage of preferences in immigration law to bring aging relatives to the United States, where entitlement programs paid the costs of their relatives' care. Additionally, Congress professed grave concern that generous benefit programs were attracting illegal immigrants. Welfare reform was designed, at least in part, to remove or reverse those perceived incentives, despite the law's profound and harsh effects upon the lives of immigrants. Not surprisingly, the provisions found in the immigration section of the Act have received sustained criticism. This criticism resulted in the partial restoration of benefits to some groups of immigrants under the Federal Budget Reconciliation Bill.³⁷

Title IV of the PRWORA bars legal aliens from receiving assistance from two federal programs that provide basic necessities of life: food stamps and Supplemental Security Income ("SSI"). SSI is frequently used to pay for disabled persons' living costs in nursing

or other group homes. The removal of SSI benefits means that these legal immigrants will also lose Medicaid coverage, unless their state is willing to include them in another eligibility category.³⁸ The law has some exceptions, such as for lawful permanent residents who have worked in the United States ten years or more.³⁹ The Act permits states the option to continue some benefits to legal immigrants who were in the country before the bill was passed.⁴⁰ Legal immigrants arriving here after enactment of the bill are prohibited from receiving means-tested public benefits funded partially or wholly with federal monies for the first five years of their residency.⁴¹ Thereafter, states may provide or deny services to this population in accordance with other restrictions on their provision of benefits.⁴²

D. THE BALANCE OF THE ACT: MECHANISMS TO REDUCE FEDERAL COSTS

While every title of the Act is aimed at least in part at reducing the federal financial commitment to entitlement programs, some portions are almost exclusively dedicated to this end. For instance, SSI for disabled children is now more stringent.⁴³ All new applicants, as well as some current beneficiaries, must be reassessed in light of new definitions of disabilities.⁴⁴ The Act also narrowed the availability of school lunch and other child nutrition programs, and the food stamp program.

II. UNI-DIRECTIONAL "FLEXIBILITY" FOR STATES

The radical revisions in federal welfare programs enacted in 1996 were explicitly predicated upon the normative objective of "increas[ing] the flexibility of states"⁴⁵ in designing and operating public assistance programs for indigent families.⁴⁶ In addition to supporting the Act's substantive programmatic changes, proponents underscored the devolution of significant regulatory power from the federal government to the states. Given the sharply reduced federal financial commitment to these programs over the six years of authorization,⁴⁷ and the rhetorical emphasis upon devolution of power, it is sensible to conclude that federal block grants do indeed provide states "flexibility" in fashioning programs, eligibility, and benefits. One might expect that the Act would remain neutral as to the states' efforts so long as certain basic goals, e.g., adequate child nutrition, were met.

The PRWORA systematically embraces particular normative values and policy choices, and weights these values for states through the imposition of substantial penalties. Furthermore, where the Act awards states greater flexibility, it typically permits them to move only

in a direction consistent with embedded, hard-nosed federal norms. In the Act, there *are* a few opportunities for states to move in a more compassionate direction. But before a state may exercise these opportunities, Congress has usually saddled them with onerous procedural hurdles or a risk of financial penalties.⁴⁸

A. IDEOLOGICALLY CONSERVATIVE FEDERAL MANDATES CONTROL THE WELFARE PROGRAMS ADMINISTERED BY STATES

Despite the much-heralded programmatic flexibility, the PRWORA imposes numerous burdensome and expensive federal requirements on the states. In the TANF program alone, restrictive mandates control the manner in which recipients may find and retain work.⁴⁹ TANF mandates that the "work participation" rate of recipient families increase over the six-year funding period, and culminates in a requirement that fifty percent of recipient families have one working adult by the year 2002.⁵⁰ State non-compliance with the work participation rates will result in sanctions in the form of reduced TANF grant monies.⁵¹

TANF also limits the kinds of activities that recipients may perform and be considered "working" for purposes of the state's participation rate. For example, some educational activities designed to prepare individuals to succeed in seeking and retaining work do not constitute "work" for satisfaction of the federal standard.⁵² TANF specifies the number of hours per month that an individual must work to be count as a "working" recipient.⁵³ States *must* require a parent or caretaker in a family receiving TANF aid to work within twenty-four months of receiving aid.⁵⁴ Unless it opts out, the state *must* also require a parent or caretaker to undertake community service within two months of receiving assistance.⁵⁵ Other key TANF provisions insist that states develop programs to reduce the incidence of various social problems identified by conservatives as causal factors for poverty. In particular, states *must* design programs to reduce out-of-wedlock pregnancies,⁵⁶ especially those of teenagers, and *must* attempt to reduce statutory rape.⁵⁷

In one of the most dramatic departures from prior policy, the PRWORA sets a maximum *lifetime* limit on TANF assistance to adults of sixty months, starting when the state plan takes effect.⁵⁸ The Act permits states to exempt families for hardship reasons, including battering, but the total number of exemptions may not exceed twenty percent of the total cases of families receiving TANF-funded assistance.⁵⁹ The lifetime maximum includes not only cash assistance but also any assistance provided under the range of innovative programs that states are encouraged to provide.

Participation in any state program even partially funded with TANF money, such as child care, job counseling or skills training, emergency assistance, and home heating will use part of an adult recipient's sixty-month allotment, even if the individual is satisfying all work requirements and still receives an income below the poverty range. If, however, the assistance derives from a "segregated" state or local program exclusively funded by nonfederal monies, the time enrolled in the program will not count toward the sixty-month maximum.⁶⁰ Importantly, if any adult in the family has reached the sixty-month limit, regardless of whether the debarred adult is seeking assistance, the entire family automatically becomes ineligible for any TANF-funded assistance.⁶¹

Thus, PRWORA contains a number of highly restrictive and punitive mandates that enforce compliance by state welfare programs receiving partial funding from the federal government.⁶² Although the work mandates are perhaps the most serious restrictions, other provisions also impose penalties that the states are required to assess against non-complying recipients.⁶³ For example, states "shall," subject to good cause or other exceptions the state may establish, reduce the amount of assistance payable to a *family*, or terminate the *family's* assistance altogether, for *adult* family members who are not complying with work requirements.⁶⁴ Additionally, the PRWORA imposes food-stamp work requirements for able-bodied adults, in addition to TANF work requirements,⁶⁵ denies eligibility for food stamps if a member of the household is an employee of the federal, state or local government and on strike,⁶⁶ and sets a maximum period of eligibility for food stamps on unemployed adults who are not raising children: three months in any thirty-six month period.⁶⁷ The welfare reforms also insist that teenage parents must attend high school or be barred from TANF assistance and live in "adult-supervised settings."⁶⁸ The PRWORA's restrictions extend to bar legal and illegal aliens from receiving many benefits and services.⁶⁹ The Act also invades the sanctity of poor families by mandating that states revise family law and procedural structures governing child support orders and enforcement according to the details prescribed in the Act, and requiring that any recipient entitled to receive child support assign that right to the state.⁷⁰

Whatever the merits of programmatic welfare reform may be, the timing of PRWORA made it impossible for Congress to receive either the evaluative studies of state innovations authorized by the HHS under its statutory waiver authority,⁷¹ or the results of experiments in the profoundly underfunded Job Opportunities and Basic Skills Training ("JOBS") program⁷² and Family Support Act of 1988.⁷³ The PRWORA incorporated more extreme versions of some

of the experimental state strategies, such as broad-based work requirements for recipients, but it adopted them before those programs had been adequately tested by experience.

B. STATE OPTIONS FOR MORE CONSERVATIVE POLICY DECISIONS

Although the federal policies articulated and mandated by the PRWORA are pervasively conservative,⁷⁴ the Act goes beyond simple mandates. The PRWORA is replete with both explicit invitations and authorization for states to embrace aggressively punitive policy positions. These policies may be grouped into five overlapping categories:⁷⁵ (1) the reduction or elimination of public assistance for a family as a result of the actions of one family member;⁷⁶ (2) restrictions prohibiting legal immigrants from receipt of public assistance;⁷⁷ (3) policies singling out felonious drug offenders for further restrictions;⁷⁸ (4) the imposition of additional intrusions upon the privacy of recipients, specifically in drug testing mandates;⁷⁹ and (5) financial incentives for reducing Medicaid eligibility.⁸⁰

In theory, the latitude allegedly granted to states under these authorizations represents the "devolution" of power in which states are granted authentic programmatic flexibility. One should query, however, why the options that are suggested and rewarded are consistently more parsimonious and punitive than the Act's default positions. States are rarely provided with incentives, encouragement or concrete suggestions to exercise compassion, or to allow consideration of a recipient's life circumstances, in excess of the bare minimum written into the Act.⁸¹

C. CONTROL OF STATE DECISIONS THROUGH ONEROUS PROCEDURAL HURDLES

The PRWORA typically does not specify which state officer or branch of government is empowered to speak for the state. If a state chooses to embrace a federally disfavored policy choice, however, the Act departs from this practice, requiring a decision by special enactment of state *legislation*.⁸² Thus, state legislative enactment is required for illegal immigrants⁸³ or convicted drug offenders⁸⁴ to receive any state or local welfare benefits. Thus, procedural mechanisms create political hurdles that make it difficult for state governments to provide these benefits.

D. CONTROL OF STATE DECISIONS THROUGH FUNDING RESTRICTIONS AND PENALTIES

Under the repealed AFDC law, the federal government assumed an open-ended financial responsibility for matching state expenditures for poverty

programs. The PRWORA's substitution of fixed federal block grants will have several effects on state policy-making. States will no longer have the promise of increased federal funds as an incentive for greater outlays of state dollars. Those primarily concerned about the fiscal soundness of the federal and state governments undoubtedly view this new policy as a salutary improvement. For those who are concerned about the steady shrinkage of welfare benefits relative to the cost of living over the past two decades, the loss of federal incentives for spending is worrisome.

The Act's new funding structure checks state impulses to reduce poverty funding by mandating that states must meet "maintenance of effort" ("MOE") funding requirements.⁸⁵ A state will not meet the MOE requirements if it spends less than seventy-five percent of the state's previous spending for the target period.⁸⁶ This requirement may help to prevent a "race to the bottom" between states, as they could compete for the lowest level of welfare benefits.⁸⁷ Under the new law, for instance, a state choosing to continue benefits for legal immigrants, may count these costs towards the satisfaction of its MOE.⁸⁸

Generally, states will not be free to use block grant money as they wish. Restrictions imposed by the Act assume two basic forms. First, state compliance with the federal mandates will be very expensive. Work participation rate requirements will be especially costly to meet. The administrative, training, and support apparatus required to identify and place recipients in jobs is notoriously expensive—much more costly than simply giving recipients a monthly benefit check.⁸⁹ Satisfaction of the work participation requirements, particularly as they increase over time, will require huge amounts of state investment. The Congressional Budget Office has estimated that federal funding is at least twelve billion dollars less than what is needed to fund the work requirements alone.⁹⁰ Child care, needed so that adults can work under the Act's mandates, is also federally underfunded by at least one billion dollars.⁹¹ In most states, qualification for the full TANF grant is likely to take priority over other types of benefits. Particularly during recessions, states' desire to comply with work requirements will likely result in substantial pressure for states to spend resources either to move recipients into paying jobs, a difficult task in economic downturns, or to artificially reduce the TANF population.

A second restriction on state use of block grant funds takes the form of financial penalties explicitly set forth in the PRWORA for state noncompliance with certain provisions. Chiefly, these penalties are exacted through reductions in the TANF block grant that would otherwise be available to the state.⁹²

If state governments succumb to federal pressure on key welfare policy decisions, we should acknowledge that the original, and fundamental, policy choices were in fact made by the federal government, and that these are enforced through a variety of sometimes indirectly stated, but very real, sanctions. A compassionate state is therefore forced to bargain with the devil: to qualify for the multi-million TANF funds, a state must accept the programmatic proscriptions of the federal government, however much the state may disagree with the policy determinations. No state could possibly support its anti-poverty programs without federal dollars, so each must instead try to find routes which minimize the impact of the most damaging, and politically directive, federal policies.

III. STATE OPTIONS FOR MENDING THE SAFETY NET

Obviously, states cannot completely repair the gaping hole left by the abolition of national eligibility standards for need-based poverty programs. But, they may undertake several strategies for sidestepping the federally imposed welfare requirements: first, by operating within powers that PRWORA accords to state governments and second, through mounting challenges to potentially unconstitutional aspects of the Act.⁹³

A. OPTIONS WITHIN PRWORA

State governments, ironically enough, are now the first line of defense against the incursion of simplistic, and potentially destructive, federal poverty policies. Due to disparities in their economies, the concentration of indigent advocacy groups, or the nature of political leadership, some states are now better positioned than others to mend the holes in federal welfare safety nets.

It is not necessary to belabor the point that states *may* reject federal invitations for more punitive policies than the mandates require. Indeed, a National Governor's Association study demonstrates that relatively few states have responded to a number of these punitive, conservative TANF options.⁹⁴ State plans may, of course, be freely amended. Thus, advocacy groups should not assume that these battles have been won with any finality.

A second method for bypassing some of the Act's requirements is the continued operation of section 1115 waivers approved by HHS prior to August 22, 1996.⁹⁵ A waiver, as discussed earlier, preempts any "inconsistent" PRWORA provisions.⁹⁶ Many states have waivers in place which specify more generous time limits for location of work, for exemptions or exceptions from working, or which provide broader definitions of "work" activities.⁹⁷ States may continue waivers that provide

greater flexibility and more tools for addressing the complexities of poverty. Since the waiver system will not result in the disqualification of recipients or states from the federal program, the waiver system provides states the opportunity to take advantage of one of the few portions of the Act which truly, if grudgingly, supports state experimentation and initiative.⁹⁸

A third option for states stemming from language in the Act is the creation of "segregated" programs not funded by TANF or other federal dollars.⁹⁹ These programs will, obviously, be more expensive to states than those permitted to receive TANF dollars. States have the greatest programmatic latitude in this area.¹⁰⁰ Additionally, if these segregated programs assist TANF populations, or provide assistance towards goals specified in the Act, state expenditures will count, as noted above, towards the state's MOE requirement.¹⁰¹

B. LEGAL CHALLENGES TO PRWORA

Some litigation has already been filed which challenges the constitutionality of key portions of the PRWORA, such as those sections limiting the benefits eligibility of legal immigrants. These cases typically allege violations of the equal protection¹⁰² or due process clauses.¹⁰³ Thus far, however, there has been little attention to structural constitutional theories, which could potentially invalidate a larger portion of the Act than individual rights arguments. This article is particularly concerned with the structural claim that Congress exceeded its powers under the Spending Power, as informed by Tenth Amendment values.¹⁰⁴

In light of the Supreme Court's resuscitation of federalism and its revival of Tenth Amendment justiciability, significant constitutional issues may be raised by federal incursions upon the powers traditionally delegated to states.¹⁰⁵ Although the Court has yet to reconsider, and explicitly limit, its federally-deferential Spending Power doctrine, its demonstrated willingness to overturn other constitutional precedents that undermine federalism¹⁰⁶ suggest that the traditionally uncircumscribed scope of the Spending Power may soon be constricted in those cases where it impairs the autonomy or effective operation of state governments.

Before the recent case, *New York v. United States*, the Tenth Amendment was interpreted as a residuary clause.¹⁰⁷ The Supreme Court first examined whether a challenged federal statute fell within the scope of any power delegated to the federal government by the Constitution.¹⁰⁸ If, for instance, the statute implicated the commerce power, the Court then analyzed the potential for Commerce Clause challenge.¹⁰⁹ Federalist values, whether they were implied in the constitutional structure or embedded in the Tenth Amendment, did not

modify the inquiry. If the Court found that the statute was a valid exercise of a delegated power, the constitutional scrutiny ended without a separate Tenth Amendment inquiry. As this author explained in an earlier writing, "[a]s a residuary provision, the Amendment protected as powers reserved to the states and individuals all those not delegated to the nation; nothing further was left to adjudicate as a matter of the Tenth Amendment."¹¹⁰

The Court fundamentally altered this doctrinal inquiry in *New York*. Justice O'Connor's opinion for the Court held that the Tenth Amendment, like the First and Fifth Amendments, subjects even the enumerated federal powers to certain constraints.¹¹¹ The resulting inquiry is now "whether an incident of State sovereignty is protected by a limitation on an Article I power."¹¹² Although the Court did not explicitly acknowledge the constitutional transformation it effected through this subtle doctrinal modification, the result is that affirmative limits now exists upon the exercise of national powers, including those expressly delegated to the national government.¹¹³

Although *New York* dealt with intersection of the commerce power and Tenth Amendment, and not with the scope of the Spending Clause,¹¹⁴ its central proposition analogously applies to the Spending Clause. Under this analysis, congressional power under the Spending Clause may transgress constitutional values of state autonomy and sovereignty.

Under pre-*New York* Spending Clause precedent, the Supreme Court has cautioned that a regulatory program will offend the Constitution when its incentives to adopt national policy become so "coercive" of state participation that it "pass[es] the point at which 'pressure turns into compulsion.'"¹¹⁵ The PRWORA contains numerous features overtly designed to coerce state participation in compliance with its regulatory goals, and thus raises constitutional questions even under the existing inquiry. For instance, the sheer size of the block grants available to states, and the dependence of state budgets on federal anti-poverty monies, raise the specter of potentially unconstitutional "coercion."

Yet, despite repeated admonitions, the Court has not yet invalidated any federal regulatory program as *ultra vires* to the Spending Clause. Its deferential standards of review, articulated most directly in *South Dakota v. Dole*, remain intact.¹¹⁶ This doctrinal persistence may derive from the lack of justiciable standards regarding the point at which "carrots" become "sticks," that is, when incentives are sufficiently influential as to be unconstitutionally "coercive."¹¹⁷

Thus far, then, *Dole* seems merely a bark without a meaningful bite.¹¹⁸ But, in light of *New York*, *Printz v.*

United States,¹¹⁹ and other recent cases which establish the Court's new openness to enforcing limitations upon federal legislation which threatens federalism,¹²⁰ it seems reasonable to hope that the Court may reevaluate the Spending Power precedent.¹²¹ New scholarly arguments that offer judicially manageable criteria for demarcation of proper and improper uses of the Spending Power may also strengthen the Court's resolve to reassess this precedent.

Professor Lynn Baker has advanced a thoughtful approach grounded in the reconciliation of

two potentially conflicting goals. [The approach] must strive to safeguard state autonomy and the related principle of a federal government of enumerated powers by restricting Congress from using conditional offers of federal funds in ways that it could not directly mandate. [Yet] it must preserve for Congress a power to spend that is greater and broader than its power to regulate the states directly.¹²²

The doctrinal approach Baker suggests presumes the constitutional invalidity of a scheme in which a state's acceptance of the federal government's offer of funds allows the federal government to regulate states in ways that Congress cannot directly mandate under its Article I powers. Baker proposes that the presumption of invalidity be rebuttable—if the offer of funds were indeed found to be “reimbursement” rather than “regulatory” spending.¹²³ Reimbursement spending is permissible, and occurs through enactments that specify the purpose for which the states are to expend federal dollars, reimbursing the states, in whole or in part, for expenditures.¹²⁴ By contrast, regulatory spending is not narrowly tailored; it specifies conditions that states must fulfill to be eligible for federal funds, and permits virtually “any amount of money to be made contingent upon a state's compliance with a given condition.”¹²⁵

Some examples drawn from the PRWORA make the implications of this constitutional challenge more clear. To qualify for TANF funds, a state must certify that it “will operate a child support enforcement program” consistent with the requirements mandated by the PRWORA's Title III.¹²⁶ Title III itself offers little money for the states, but is pervaded by highly intrusive regulatory mandates requiring the complete restructuring of state administrative structures for issuance and modification of child support orders. Compliance with this portion of PRWORA requires at least thirty separate legislative changes in every State¹²⁷—a virtual “commandeering” of the states' legislative judgments as

to the best system for their adjudication and enforcement of child support.¹²⁸

Applying Professor Baker's test, we find that those TANF funding offers that Congress has made to the states that incorporate regulatory mandates, e.g., the creation and enforcement of a child support enforcement apparatus that complies with Title III, far exceed the enumerated powers that Congress may exercise pursuant to its Article I powers. This reasoning leads to the conclusion that much of TANF is invalid. The presumption of invalidity is rebuttable, however, and the second step in the inquiry is a two-prong inquiry of (1) whether the funds are offered for a particular purpose, and (2) whether federal monies are in fact reimbursement for state spending towards that goal.¹²⁹ TANF funds are offered for a wide range of regulatory purposes,¹³⁰ but reimbursement for the costs of overhauling and operating a state child support system so that it will become nationally uniform is not an articulated purpose of the funds.¹³¹ Rather, states are required to surrender an area of traditional state jurisdiction—the creation and maintenance of a system to determine, enforce and collect appropriate child support. Under this doctrinal approach, then, TANF may be viewed as an unconstitutional exercise of the Spending Power. Similarly, because some federal funds are offered to states under the Child Support Enforcement title, and are not tailored as a reimbursement for state spending that enables states to comply with federal mandates, Title III may also be invalid.

Thus, for states willing to assert the constitutional values of federalism and searching for mechanisms by which to slow the incursion of destructive and deplorable federal welfare rules, a Spending Clause challenge claim may be highly effective.¹³²

IV. CONCLUSION

The publicly vaunted *devolution* of federal responsibility for welfare programs is more a rhetorical ploy than reality. The federal government has, through explicit mandates, financial penalties and other mechanisms, ensured that pre-defined policy commitments must be the primary objectives of state programs. In addition, the PRWORA requires states to appropriate significant new funds to serve federally defined objectives. Depending upon the economic and political situation of an individual state, these funding requirements may deplete the monies available for state welfare programs chosen by its political institutions and citizens.

The continuation of waiver initiatives may provide one mechanism for avoidance of some of the Act's more troubling features. States may also wish to use non-

federal funds to create more compassionate, effective welfare programs than those specifically authorized by federal law. States should also consider a Spending Clause challenge, which, if successful, will relieve states and their recipients of the burden of compliance with the Act, in whole or part. Spending Clause litigation inspired by *New York* may also reduce the likelihood that future federal enactments could coerce states into adopting homogenous, political orthodoxy prescribed by the federal government.

NOTES

¹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

² Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, Mar. 1997, at 43, 49. Until his resignation in protest over the President's signing the PRWORA into law, Edelman was the Assistant Secretary for Planning and Evaluation at the Department of Health and Human Services, the federal department with primary jurisdiction over key indigent assistance programs.

³ See, e.g., Mark H. Greenberg, *No Duty, No Floor: The Real Meaning of "Ending Entitlements"* (visited Nov. 23, 1997) <<http://www.epn.org/clasp/cl duty-2.html>> (commenting on a version of welfare reform vetoed by the President on January 9, 1996). Greenberg's article nevertheless is valuable because most features of the vetoed bill he criticizes were retained and enacted in the PRWORA.

⁴ For a synopsis and critique of this statutory waiver process, see Lucy A. Williams, *The Abuse of Section 1115 Waivers: In Search of a Standard*, 12 YALE L. & POL'Y REV. 8 (1994).

⁵ 42 U.S.C.A. §604 (West 1997)

⁶ Edelman, *supra* note 2. In a subsequent conversation with me, Mr. Edelman clarified his comment, as indicative of his feeling that states may now do anything that they want "operationally." I remained in disagreement, as I believe that the PRWORA forces states into policy positions they might otherwise not have adopted. Edelman and I do agree, however, that the federal government has virtually abandoned its role as provider of a national welfare safety net, however "flimsy" this net may have been. Interview with Peter Edelman, University of Pittsburgh Law School, Pittsburgh, Penn. (Nov. 3, 1997).

⁷ See, e.g., Jason DeParle, *U.S. Welfare System Dies as State Programs Emerge; Emphasis on Work is the Common Thread in a Patchwork of Decentralization*, N.Y. TIMES, June 30, 1997, at A1. DeParle observes "If the emerging programs share a unifying

theme, it can be summarized in a word: work. States are demanding that recipients find it faster, keep it longer, and perform it as a condition of aid." *Id.* The more salient point, it would seem, is that unless a state requires work of recipients, and reaches the target percentages in the PRWORA, the state is subject to harsh financial penalties.

At this early date, a few legal commentators offer evaluations. Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996), refers to federal requirements of the welfare reform Act as mere "inducements." An article by Kathleen Kost and Frank Munger, *Fooling All of the People Some of the Time: 1990s Welfare Reform and the Exploitation of American Values*, 4 VA. J. OF SOC. POL'Y & LAW 3, 81 (1996), suggests that there is broad discretion for states under the Act, and that this will lead to inappropriate policies. See also Greenburg, *supra* note 3.

⁸ See DeParle, *supra* note 7; Kost and Munger, *supra* note 7; Pierce, *supra* note 7; see also Greenburg, *supra* note 3.

⁹ The particular policy arenas that should be subject to national control, rather than left to states and localities, is a subject of significant debate. Because welfare benefits and environmental policies inevitably have effects beyond a state's jurisdiction, these areas may be better suited for national policymaking. See Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE J. ON REG. 187 (1996).

¹⁰ The term "conservative policy norms" functions heuristically within this descriptive analysis, and stands for policies which implicitly make the following set of assumptions: indigents are authors of their destinies; and that indigents can support themselves economically if given the proper incentives and made subject to penalties; that the poor are morally less worthy. These political norms rarely acknowledge the structural economics of complex capitalism, such as the cyclical recessions that inhibit the success of unitary policy solutions to poverty. These "conservative" policies often seem hostile towards the poor and towards those who help the poor. Of course, not all self-styled conservative commentators embrace this set of policy norms, nor are these views restricted to those who call themselves political conservatives.

¹¹ 42 U.S.C.A. § 615 (a)(1) Title I of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (1996).

¹² See, e.g., *Shvartsman v. Callahan*, 1997 WL 573404 (N.D. Ill. Sept. 11, 1997) (ruling that the PRWORA did not violate plaintiffs' Fifth Amendment rights to due process for terminating the eligibility of lawful permanent aliens to certain federally assisted public benefits); *Abreau v. Callahan*, 971 F. Supp. 799 (S.D.N.Y.

1997) (evaluating claims raised by the New York City and a class of individual lawful permanent resident aliens, and ruling, *inter alia*, that the PRWORA did not violate Equal Protection Clause).

¹³ Article I expressly confers power on Congress to “lay and collect taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States.” U.S. CONST., art. I, § 8, cl. 1.

¹⁴ The Tenth Amendment provides that “The powers not delegated to the United States by the Constitution, nor prohibited it to the States, are reserved to the States respectively, or to the people.” U.S. CONST., amend. X.

¹⁵ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) at § 101.

¹⁶ See, e.g. Mary Jo Bane & Richard Wiessbourd, *Welfare Reform and Children*, 9 STAN. L. & POL’Y REV. Winter/Spring 1998 at 131; Liza Cristol-Deman & Richard Edwards, Note, *Closing the Door on the Immigrant Poor*, 9 STAN. L. & POL’Y REV. Winter/Spring 1998 at 141. The Act states additional policy objectives in other titles, see, e.g., 8 U.S.C. § 1601 (1997) (enumerating policies concerning immigrants’ access to welfare benefits).

¹⁷ TANF (pronounced “Tan-if”) generally takes the form of amendments to the Social Security Act and is codified in scattered sections beginning at 42 U.S.C.A. § 601 (West 1997).

¹⁸ Title IV, Part A of the Social Security Act. TANF also repeals and replaces the JOBS Program and the Emergency Assistance program, and substitutes a block grant for achieving these programs’ objectives under TANF.

¹⁹ 42 U.S.C.A. § 602 (West 1997).

²⁰ 42 U.S.C.A. §604 (West 1997).

²¹ *Id.*

²² 42 U.S.C.A § 604(a) (West 1997). Presumptively, this is the section Edelman relied upon for his argument that the states can now do anything they want.

²³ See, e.g., *Blessing v. Freestone*, 117 S.Ct. 1353, 1355 (1997) (referring to “cooperative federal-state welfare programs” and holding that Title IV-D of the Social Security Act, as amended by the PRWORA, does not confer on individuals a federal right to sue to force state agencies to comply with its provisions); see also *King v. Smith*, 392 U.S. 309, 316 (1968) (using the term “cooperative federalism”).

²⁴ 42 U.S.C.A §602(a).

²⁵ For an extensive review of state options for funding indigent family assistance, and their interrelation to federal maintenance of effort (“MOE”) requirements, see Steve Savner and Mark Greenberg, *The New Framework: Alternative State Funding Choices Under TANF* (last modified Mar. 8, 1997) <<http://epn.org/clasp/fnlfsfid.html>>.

²⁶ 42 U.S.C.A. 602(a)(West 1997).

²⁷ Forty-three states applied for and received welfare waivers by August 1996. For a range of descriptive and critical commentary regarding the approved waivers and their interrelation with the Act, consult the Internet sites of the National Governor’s Association, <<http://www.nga.org>>; the National Conference of State Legislatures, <www.ncsl.org/statefed>; and the Center for Law & Social Policy, <<http://www.epn.clasp.org>>.

Under former 42 U.S.C. § 1115 (repealed 1996), HHS was authorized to grant waivers for demonstrations projects. For a critical review, see generally Williams, *supra* note 5. None of these waivers included the creation of maximum lifetime limits for the receipt of welfare funds as does the federal TANF law. In addition, none of these waivers created mandatory work participation rates affecting state eligibility for grants under Title I of the Social Security Act. Telephone Interview with Susan Golonka, Director, Human Service Programs (previously Senior Policy Analyst) for the National Governors Association (Apr. 9, 1997).

²⁸ 42 U.S.C.A. §615(a)(1) (West 1997).

²⁹ *Id.*

³⁰ This problem led to the Federal Child Support Enforcement Act, 42 U.S.C. §§ 651-69 (1988 & Supp. V 1993).

³¹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2198-2260 (1996). Only modest monies are available to states directly under Title III. For fuller exploration, see Paula Roberts, *Relationship Between TANF and Child Support Requirements*, (last modified Sept. 1996) <<http://www.epn.org/clasp/clcsr.html>>.

³² 42 U.S.C.A. §666 (West 1997).

³³ For further details, see Paula Roberts, *A Guide to Implementing the Child Support Cooperation Policies: Provisions of the “Personal Responsibility and Work Opportunity Reconciliation Act of 1996”* <http://www.epn.org/clasp/cooperat.html> (last modified Nov. 1996).

³⁴ 42 U.S.C.A. §608(a)(2) (West 1997).

³⁵ 42 U.S.C.A. §609 (West 1997).

³⁶ The Congress also was spurred in this direction by the tide of anti-immigrant sentiment manifest particularly in California and Texas. For a brief discussion, see Note, *Welfare Reform—Treatment of Legal Immigrants—Congress Authorizes States to Deny Public Benefits to Non-citizens and Excludes Legal Immigrants from Federal Aid Programs*, 110 HARV. L. REV. 1191 (1997).

³⁷ See, e.g., *id.*; Todd G. Cosenza, *Preserving Procedural Due Process for Legal Immigrants Receiving Food Stamps in Light of the Personal Responsibility Act of 1996*, 65 FORDHAM L. REV. 2065 (1997). Perhaps surprisingly for Congress, some legal immigrants statutorily terminated from federal aid have received substantial political support. The latest political developments include the U.S. Senate's unanimous consent to a declaration that "elderly and disabled legal immigrants who are unable to work should receive assistance essential to their well-being." The declaration directs "the President, Congress, the States, and faith-based and other organizations should continue to work together toward that end." 143 Cong. Rec. S3078-01, S3084 (daily ed. Apr. 14, 1997) (statement of Sen. Wellstone). The Federal Budget Reconciliation Bill, enacted August 5, 1997, restored some of the benefits to legal immigrants and refugees. See National Conference of State Legislatures & National Governors' Association, *Comparison of Welfare Provisions in H.R. 2015, S. 947, and the Final Conference Agreement*, part X. (Aug. 4, 1997) <<http://www.ncsl.org/statefed/finalbud.html>>.

³⁸ See Medicaid (Provisions in Welfare Reform), at <<http://www.apwa.org/reform/medicaid.html>>.

³⁹ 8 U.S.C.A. § 1622(b) (West 1997). Technically, the Act requires 40 "qualifying quarters" of work from lawful permanent residents. Beginning in 1997, for a quarter to qualify, the individual must not have received any federal means-tested benefit, such as the food stamp program, during the quarter. Refugees, asylees, and those who would have been deported but for a withholding of the deportation order, have eligibility for only five years. The five year period is counted from the time they first entered the country under one of these classifications. Veterans and those in active reserve are also excepted from the bar.

⁴⁰ This provision applies to benefits under TANF, Medicaid, and services authorized under the Social Service Block Grant, such as child care. 8 U.S.C.A. § 1621(d) (West 1997). States may also make lawful aliens eligible for state and local means-tested programs, so long as federal rules are respected. A state has the power to make unlawful aliens eligible for state and locally funded benefits but only if the state passes a law authorizing such benefits at a date after the federal enactment. Notably, states may not make food stamps available to legal immigrants.

⁴¹ Some of the provisions analyzed here have recently been

modified by the Budget Reconciliation Act Pub. L. No. 105-33, 111 Stat. 251e (Aug. 5, 1997). Close analysis of these legislative changes are beyond the scope of this article. PRWORA's treatment of immigrants remains relevant to an evaluation of the Act's constriction of state discretion even though later enacted legislation modified certain especially harsh provisions.

⁴² So that future legal immigrants will not become wards of taxpayers, the PRWORA requires "sponsors" of immigrants to promise their income and resources in support of the immigrant until he or she becomes a citizen. These promises, made in writing in a federal affidavit, are taken into account when evaluating an immigrant's resources for virtually all federally means-tested programs. States may also "deem" the sponsor's resources available to the immigrant when evaluating the applicant for state and local benefits. If the sponsor does not pay to support the immigrant, the government entity footing the benefit bills has cause for a legal action against the sponsor for reimbursement and attorneys' fees. See 8 U.S.C.A. §§ 1631-32 (West 1997).

⁴³ 42 U.S.C.A. § 1383 (West 1997).

⁴⁴ See, e.g., *Brown v. Callahan*, 120 F.3d 1133 (10th Cir. 1997) (applying revised standards for determining child eligibility for disability benefits under SSI).

⁴⁵ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2113.

⁴⁶ Other commentators also doubt the sincerity of the Republicans' professed primary goal of securing greater state flexibility. One author, for instance, questions whether the goal was actually "diversity and flexibility in the administration of state welfare programs" or it was, more simply, to "cut federal spending and downsize welfare programs in all states." See Note, *Devolving Welfare Programs to the States: A Public Choice Perspective*, 109 Harv. L. Rev. 1984, 1999-2000 (1996).

⁴⁷ The total reduction has been estimated to be 55 billion dollars over six years. Charles Sennott, *Liberals Finding the Aid System is Broken*, BOSTON GLOBE, May 17, 1994, at 1.

⁴⁸ 42 U.S.C.A. § 609 (West 1997).

⁴⁹ 42 U.S.C.A. § 607 (d) (West 1997).

⁵⁰ 42 U.S.C.A. § 607(a)(1).

⁵¹ 42 U.S.C.A. § 609 (West 1997).

⁵² See 42 U.S.C.A. § 607(d) (West 1997).

⁵³ See 42 U.S.C.A. § 607(a) (West 1997). TANF separates the

“all-families” work participation rate, which includes single-parent families, from “two-parent” families when specifying required rates of work. The work participation rate for all-families begins at 25% in 1997, slowly rising to 50% by the year 2002. States are required to have a work participation rate for two-parent families of 75% in 1997, rising to reach 90% in 1999 and for all years thereafter. See Deparle, *supra* note 7.

⁵⁴ 42 U.S.C.A. §602 (West 1997).

⁵⁵ See 42 U.S.C.A. § 602(a)(1)(A)(iv) (West 1997). All states which require community service of recipients are permitted to specify the minimum hours per week and tasks to be performed. Certain parents and caretakers are exempt from the community service requirement. TANF accords the Governor the power to opt out of the mandate.

⁵⁶ 42 U.S.C.A. § 603(a)(2) (West 1997). The Act offers “bonus” monies of up to 25 million dollars each for the five states most successful in reducing out-of-wedlock pregnancies while also not increasing the abortion rate. These and related provisions have led some commentators to fear the Act will incite some states to adopt legislation that “would seriously harm children and raise grave constitutional concerns.” Paula Roberts, *Relationship Between TANF and Child Support Requirements* 3 (Sept. 1996) <<http://www.epn.org/clasp/clcsr.html>>. Roberts believes the Act contains incentives that may result in State policies that: (1) limit eligibility for assistance to two parent families; (2) provide assistance to single and two-parent families, but preferential treatment and more generous benefits and services to two-parent families; (3) assist single parent families only when paternity has been established for all children in the family; and (4) establish very strict child support cooperation requirements and/or severely limiting exceptions to the paternity cooperation agreements that recipient mothers must sign to make it easier for states to meet the federal paternity establishment regulations; (5) force marriage on young pregnant teens in general, and TANF-eligible pregnant teens in particular. *Id.*

⁵⁷ *Id.*

⁵⁸ 42 U.S.C.A. §608(a)(1)(B) (West 1997).

⁵⁹ 42 U.S.C.A. §608(a)(7)(C) (West 1997).

⁶⁰ For a fuller exploration of the different types of programs states may fund, see Savner and Greenberg, *supra* note 25.

⁶¹ See 42 U.S.C.A. § 608(a)(7) (West 1997).

⁶² Funding penalties are specified for different types of noncompliance. See 42 U.S.C.A. § 609 (West 1997). The Budget Reconciliation Bill (Aug. 5, 1997) specifies new penalties for some

noncompliance, *Compare* summaries by the NGA and the NCSL, *supra* n.37, part VI. Prior to this 1997 legislation, the one truly noteworthy exception to the imposition of penalties for noncompliance was the bar on state sanctions directed toward non-working parents with children under six, given a showing that adequate child care is unavailable. A federal penalty of up to five percent of the TANF grant may be assessed for state noncompliance with this mandate. 42 U.S.C. A. § 609(a)(11) (West 1997).

⁶³ 42 U.S.C.A. §608 (West 1997).

⁶⁴ 42 U.S.C.A. § 608(b)(3) (West 1997).

⁶⁵ 7 U.S.C.A. § 2015 (West 1997).

⁶⁶ *Id.* at § 2015(d)(1)(D)(iv).

⁶⁷ *Id.* at § 2015(o)(2).

⁶⁸ 46 U.S.C.A. § 608(a)(1)(B)(4) (West 1997).

⁶⁹ See 8 U.S.C.A. § 1621 (West 1997).

⁷⁰ 42 U.S.C.A. § 657 (West 1997).

⁷¹ See 42 U.S.C. § 615 (repealed 1996). For a critical view of waivers granted under this authority, see Williams, *supra* note 5. Although the waivers granted by the Clinton Administration, in particular, had been authorized specifically to test innovative and sometimes problematic welfare strategies, most of these had barely begun at the time the PRWORA was enacted, and the congressional leadership did not wait to receive the wisdom of their experiences and mandatory studies.

⁷² See 42 U.S.C.A. § 681 (West 1997) and scattered sections therein.

⁷³ Pub. L. No. 100-485, 102 Stat. 2343 (1988).

⁷⁴ See *supra* note 10, defining “conservative policy norms” for purposes of this paper.

⁷⁵ Some of these policies and permissions have technical exceptions and qualifications which are not recounted here. Among the punitive policies that states are encouraged to adopt, but do not fit into one of the five categorical groupings include the following: reducing the maximum time limits that an adult can qualify for TANF-funded benefits to a period less than 60 months; disqualifying for food stamps an adult who is delinquent in court-ordered child support, 7 U.S.C.A. § 2015(n)(1) (West 1997); declining to distribute to the family any child support payments received by assignment even after the federal and state governments have been paid the reimbursements to which they are entitled; and

retarding the likelihood that welfare recipients will travel to states with more favorable benefits, applying the benefit levels of the former State to "interstate immigrants" for the first 12 months of their residency, 42 U.S.C.A. § 604(c) (West 1997).

⁷⁶ Examples include reductions in a *family's* level of benefits if a minor dependent child fails to attend school, or if the family includes an adult who lacks a high school diploma and is not working toward receiving it or its equivalent. 42 U.S.C. § 604(i); reductions in a *family's* benefits for an adult's non-compliance with the individualized plan for obtaining work, 42 U.S.C. § 608(b)(2)(B)(3) (West 1997); termination of the *family's* eligibility for food stamps because the head of the household failed to comply with food stamp work requirements, 7 U.S.C.A. § 2015(d)(1)(B) (West 1997). For a household *member* who fails to perform an action required under a means-tested federal, state or local assistance program, a state is specifically permitted to disqualify him/her for food stamps 7 U.S.C.A. § 2017(d) (West 1997), and to reduce the *family's* food stamp allotment by up to 25%. *Id.* at § 2017(d)(1)(B).

⁷⁷ For instance, 8 U.S.C. A. § 1622(a) (West 1997) invites states to bar legal immigrants from eligibility for Medicaid and for state and local public benefits. This ineligibility would be in addition to the federal bar on benefits, and subject to the same exclusions, for instance, for veterans and those who had worked a minimum of 40 quarters.

⁷⁸ The Act mandates that those convicted of drug-related felonies are ineligible to receive TANF benefits or food stamps unless the state enacts legislation to opt out of the proscription after the date the PRWORA was passed. 21 U.S.C. § 862a (1997).

⁷⁹ The Act encourages states to undertake drug testing of welfare recipients and "sanction" them in unspecified ways if they should test positive. 21 U.S.C. § 862(b)(1)(A)(ii).

⁸⁰ States may narrow the eligibility for Medicaid by lowering the permissible income levels, 42 U.S.C. § 1396u-1(a), and may terminate eligibility for Medicaid for failure to comply with work requirements, *id.* at § 1396u-1(b)(3).

⁸¹ Two noteworthy exceptions to the encouragement of decidedly conservative and harsh policies are the Act's suggestion that states disregard for work participation rates the parent of an infant (for a maximum of 12 months), see 42 U.S.C.A. § 607(b)(5) (West 1997), and the state's option to request a waiver from food stamp work requirements for high unemployment areas, see 7 U.S.C.A. § 2015(o)(4)(A) (West 1997). Each of these exceptions, however, are economically beneficial to the state, and so may not properly be examples of encouraging more compassionate policy than the Act requires.

⁸² 21 U.S.C.A. § 862a (West 1997)

⁸³ 8 U.S.C.A. § 1621(d) (West 1997).

⁸⁴ 21 U.S.C.A. § 862a(d)(1)(A) (West 1997).

⁸⁵ 42 U.S.C.A. § 609 (West 1997).

⁸⁶ A state is permitted to comply with the lower MOE percentage if it meets the TANF work participation rates prescribed for a given year. *See* 42 U.S.C.A. § 609(a)(7)(B)(ii) (West 1997).

⁸⁷ Crediting the likelihood of a race to the bottom in welfare benefits, and the movement of greater numbers of recipients into states with more generous benefit levels, *see* Note, *Devolving Welfare Programs to the States: A Public Choice Perspective*, 109 HARV. L. REV. 1984, *passim* (1996). For other perspectives, *see* Mark Greenberg, *Racing to the Bottom? Recent State Welfare Initiatives Present Cause for Concern* (1996) (last visited Nov. 23, 1997) (available at <<http://www.epn.org/clasp/clrace.html>>) (suggesting that imposing a maximum cap of years on receiving benefits will probably spur a greater movement of recipients between states than has previously been seen); *see* Lucy Williams, *supra* note 5 (citing literature establishing that recipients do not migrate between states for higher benefits).

⁸⁸ *See* Temporary Assistance for Needy Families Policy Announcement, No. TANF-ACF-PA-97-1 at 9 (Jan. 31, 1997) <<http://www.acf.dhhs.gov/programs/ofa/guidej31.htm>>. This policy announcement allayed many concerns about whether the federal government would exercise programmatic control over states regarding which programs would count towards a state MOE requirement. The policy reserves control over work participation rates, but is more inclusive about permitting states to count in their efforts towards federally disfavored population groups, such as legal and illegal immigrants.

⁸⁹ The annual cost of requiring a recipient to engage in community service work has been estimated to average \$6000, including administrative costs and child care. Perhaps it is not surprising, then, that states have not chosen to require community service in exchange for benefits eligibility, as it would require substantial net increases in funding to do so.

⁹⁰ *See* Edelman, *supra* note 2, at 50. In light of the August 1997 appropriations, this estimated shortage may have changed somewhat.

⁹¹ *Id.* In light of the August 1997 appropriations and technical corrections to the PRWORA, this figure may have diminished somewhat.

⁹² All of the following penalties are found in 42 U.S.C.A. § 609

(West 1997). Failure to satisfy minimum work participation rates will result in an initial reduction of five percent in the TANF grant and an increase in MOE expenditures from 75% to 80% of a state's historic effort. There will be a reduction of up to 21% for succeeding failures, § 609(a)(3). The Secretary of HHS is permitted some discretion in assessing the size of the penalty, based on the degree of noncompliance and whether the offender qualifies as a "needy" state. See 42 U.S.C.A. § 603(b)(6) (West 1997). Failure to establish the child support enforcement apparatus and to comply with the rules for establishing paternity and collecting and distributing child support receives a reduction of five percent. 42 U.S.C.A. §609(a)(5) (West 1997). Failure to maintain MOE spending, results in up to a five percent loss. *Id.* at §609(a)(7). Failure to comply with the five year maximum lifetime limit on TANF benefits for adults, results in a reduction of up to five percent. *Id.* at § 609(a)(9). Failure to maintain assistance for an adult with a child under six who lacks child care results in a reduction of up to five percent. *Id.* at §609(a)(11).

⁹³ A third strategy is to press for federal statutory change through the various organizations of state governments, e.g., the National Governor's Association, the National Conference of State Legislatures, the Council of State Governments, and other pressure groups.

⁹⁴ See National Governors Association, *Summary of Selected Elements of State Plans for Temporary Assistance for Needy Families (TANF)*, Apr. 3, 1997 <<http://www.nga.org>>. The summary reviews 41 State Plans submitted under TANF, 38 of which had been certified as "complete," the last step in the HHS review process before disbursement of the block grant. Of these, only three states had chosen to implement a community service requirement after two months of benefits. Eighteen states have adopted time limits for TANF benefits shorter than the 60 months permitted under federal law but most of these states include extensions and exemptions more liberal than federal law, thus relaxing the severity of the time limits. With regard to interstate migrants, 30 states chose to apply their own benefit standards. Legal immigrants ("qualified aliens") are entitled to continue their TANF benefits in 38 states; only three states have decided not to provide benefits to non-citizens. Drug testing of applicants will not be performed in 33 of the states, and only two states have chosen to test applicants; the balance have either not decided this policy point or did not relate the decision in their State Plan.

⁹⁵ A "section 1115 waiver" refers to the authority granted under the Social Security Act for the federal executive branch to waive state obligation to comply with certain federal statutory and administrative provisions so that the state may conduct a demonstration project. See 42 U.S.C. § 1315(a)(Supp. III 1993). See generally Williams, *supra* note 5 (discussing the history of the waiver provision and its use by the Clinton Administration to undercut federal entitlements and particularly the AFDC program).

⁹⁶ See 42 U.S.C.A. § 615(a)(1)(A) (West 1997) (specifying that if the state chooses to continue the waiver, the amendments to the Social Security Act made by the PRWORA shall not apply to the state before the expiration of the waiver "to the extent such amendments are inconsistent with the waiver"). Waivers granted prior to August 22, 1996, the date of the PRWORA's enactment, have the ability of overriding virtually all of the PRWORA provisions, including work participation requirements; the only exception pertains to certain child care rules. Waiver applications pending on the date of enactment but granted prior to July 1, 1997 may override inconsistent PRWORA provisions except for the work participation rules if the state demonstrates that the waiver is cost-neutral to the federal treasury. Applicable technical requirements are codified at 42 U.S.C.A. § 615 (West 1997) and scattered sections therein.

⁹⁷ Connecticut's State Plan provides an example, and may be found at the State of Connecticut Governmental Website <<http://www.dss.state.ct.us/welfare.html>>.

⁹⁸ For a detailed examination of state waivers and considerations as to their continuance, including the thicket of legal questions surrounding when a waiver provision is "inconsistent" with the PRWORA, see Mark Greenberg & Steve Savner, *Waivers and the New Welfare Law: Initial Approaches in State Plans* (Nov. 1996), <<http://www.epn.org/clasp/newwelf.html>>.

⁹⁹ See HHS Policy Announcement, *supra* note 88.

¹⁰⁰ In the HHS Policy Announcement, *supra* note 88, at 2, HHS clarified the discretion it would accord states in fashioning programs that qualify for MOE purposes, and stated some concerns about states using segregated programs to undercut the work participation requirements. No interpretive rules have yet been issued, however, and the HHS' announcement generally takes the position that only violations of the express statutory provisions will cause a state to incur penalties until the rules are issued, and that the rules will have a prospective effect only. Elsewhere, HHS affirms that it desires to "encourage states to implement effective and innovative program designs . . . which will produce the best outcomes for families Before federal regulations are in effect, states will not be subject to penalties under the new law so long as they implement programs which are related to the intent of the statute and operate within a reasonable interpretation of the statutory language. *Id.* at 4.

¹⁰¹ HHS Policy Announcement, *supra* note 88.

¹⁰² For instance, the City of New York filed an Equal Protection Clause challenge to parts of Title IV governing the provisions of benefits to legal immigrants, but the district court held that under the rational relation standard of review, the City failed to establish a violation. See *Abreu v. Callahan*, 971 F. Supp. 799 (S.D.N.Y.

1997). For an overview of the likely Equal Protection violations embedded in Title IV, see *Welfare Reform—Treatment of Legal Immigrants—Congress Authorizes States to Deny Public Benefits to Noncitizens and Excludes Legal Immigrants from Federal Aid Programs*, 110 HARV. L. REV. 1191 (1997). Another individual rights theory of relief, that predicated upon the unconstitutional conditions doctrine, was explored in detail in Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 FORDHAM URB. L.J. 1051 (1995) (evaluating provisions of earlier versions of the Personal Responsibility Act, many of which were enacted, and concluding they are constitutionally insufficient).

¹⁰³ See *Shvartsman v. Callahan*, 1997 WL 573404 (N.D. Ill. Sept. 11, 1997) (ruling that the PRWORA did not violate plaintiffs' Fifth Amendment rights to due process for terminating the eligibility of lawful permanent aliens to certain federally assisted public benefits); *Abreau v. Callahan*, 971 F. Supp. 799 (S.D.N.Y. 1997) (evaluating claims raised by the New York City and a class of individual lawful permanent resident aliens, and ruling, *inter alia*, that the PRWORA did not violate Equal Protection Clause).

¹⁰⁴ U.S. CONST. Art. I, § 8, cl. 1 (conferring the power on Congress to "lay and collect Taxes. . . , to pay the Debts and provide for the common Defence and general Welfare of the United States").

¹⁰⁵ See *New York v. United States*, 505 U.S. 144 (1992) (ruling, *inter alia*, that the Tenth Amendment prohibited Congress from forcing states to take title to nuclear waste as a penalty for noncompliance with the federal effort to establish low-level radioactive waste facilities); accord *Printz v. U.S.*, 117 S.Ct. 2365 (1997) (interpreting and applying the *New York* decision, invalidating the Brady Act's commands to states). See also, *Seminole Tribes v. Florida*, 116 S.Ct. 1114 (1996) (ruling Congress lacked the power under the Commerce Clause to waive states' immunity to federal court jurisdiction under the Eleventh Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating federal legislation as beyond exceeding the permissible range of the Commerce power); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (discussing the constitutional values of federalism).

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(1995) (invalidating federal legislation as beyond exceeding the permissible range of the Commerce power); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (discussing the constitutional values of federalism).

¹⁰⁷ The Tenth Amendment provides "The powers not delegated to the United States by the Constitution, nor prohibited to the States, are reserved to the States respectively, or to the people." U.S. CONST., amend. X.

¹⁰⁸ See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Darby v. United States*, 312 U.S. 100 (1941).

¹⁰⁹ U.S. CONST. art. I, § 8.

¹¹⁰ Candice Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 HASTINGS CONST. L. Q. 489, 543 (1994).

¹¹¹ *New York v. United States*, 505 U.S. 144

¹¹² *New York v. United States*, 505 U.S. 144, 158.

¹¹³ In *Printz v. United States*, 117 S.Ct. 2365 (1997), the Court reaffirmed *New York* and struck down portions of the Brady Act which mandated certain activities for local police officers.

¹¹⁴ Although the federal Act at issue in *New York* was technically a conditional federal grant program pursuant to the Spending Clause, the Petitioners did not present a constitutional challenge to the existing Spending Clause doctrine. Rather, they raised a technical question of whether the release of trust funds held in escrow for the states could properly be evaluated as a conditional grant under the spending power. *New York*, 505 U.S. 144, 172. The Court answered in a cursory fashion that no constitutional infirmities resulted from the escrow technicality, but thereby left unanswered questions of how the Tenth Amendment might affect the operative scope of the Spending Clause.

¹¹⁵ *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

¹¹⁶ The four-part test requires that (1) the federal expenditure be for the general welfare; (2) the conditions imposed on the states' receipt of the Federal grant be unambiguous; (3) "the conditions imposed are reasonably related to the purpose of the expenditure"; and (4) the conditions imposed by the Federal act do not violate any independent constitutional provision. See, e.g., *New York*, 505 U.S. at 172; *South Dakota*, 483 U.S. at 207-08 (1987).

¹¹⁷ Some states have continued to demonstrate concern via litigation that some constitutional limits should be recognized and

enforced to reduce the coercion of federal conditional grant programs. For instance, Nevada brought in an attempt to have the federally-mandated 55 miles per hour highway speed limit invalidated as unconstitutionally coercive, as noncompliance barred it from the Highway Trust Fund, and 95% of Nevada's annual highway budget was derived. In response, the Ninth Circuit held it was unable to fashion a "principled definition" of unconstitutional "coercion." See *Nevada v. Skimmer*, 884 F.2d 445, 448 n.5 (9th Cir. 1989). The Ninth Circuit and commentators have agreed that a coercion inquiry is unworkable. See, e.g., Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1420 (1989); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1122-23 (1987).

¹¹⁸ See generally Suzanna Sherry, *The Barking Dog*, 46 CASE W. RES. L. REV. 877 (1996).

¹¹⁹ 117 S.Ct. 2365.

¹²⁰ See *New York v. United States*, 505 U.S. 144 (1992) (ruling, *inter alia*, that the Tenth Amendment prohibited Congress from forcing states to take title to nuclear waste as a penalty for noncompliance with the federal effort to establish low-level radioactive waste facilities); accord *Printz v. U.S.*, 117 S.Ct. 2365 (1997) (interpreting and applying the *New York* decision, invalidating the Brady Act's commands to states). See also, *Seminole Tribes v. Florida*, 116 S.Ct. 1114 (1996) (ruling Congress lacked the power under the Commerce Clause to waive states' immunity to federal court jurisdiction under the Eleventh Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating federal legislation as beyond exceeding the permissible range of the Commerce power); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (discussing the constitutional values of federalism).

¹²¹ For instance, in *Printz*, the Court stated that other federal acts

that require the participation of State officials in implementing Federal regulatory schemes can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the states . . . We of course do not address these of other currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case.

Printz, 117 S.Ct. at 2376.

¹²² Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1916 (1995).

¹²³ *Id.*

¹²⁴ *Id.* at 1962-65.

¹²⁵ *Id.* at 1967.

¹²⁶ 42 U.S.C.A. § 602(a)(2) (West 1997).

¹²⁷ See Sheri Steisel, *Testimony on Behalf of the National Conference of State Legislatures Regarding Implementation of P.L. 104-193, before the U.S. House of Representatives Committee on Ways and Means, Subcommittee on Human Resources (Sept. 17, 1996)* <<http://www.ncsl.org/statefed/testimony/weltes96.htm>>.

¹²⁸ See *New York*, 505 U.S. 144, 206.

¹²⁹ Baker, *supra* note 122, at 1916.

¹³⁰ See, e.g., 42 U.S.C. § 601 (1997).

¹³¹ See *id.*

¹³² Given that no case since the New Deal has held Congress to have transgressed the limits of the Spending Power, no direct authority exists as to what types of parties are empowered to bring Spending Power challenges. Taxpayer standing is generally unavailable for challenging the federal government's exercise of its powers. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* 454 U.S. 464 (1982). The best party for initiation of this revisiting of established precedent would be a state, for it can also invoke the background values of the Tenth Amendment inspiring the new federalism precedent. See generally Candice Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 HASTINGS CONST. L.Q. 489, 545-49 (1994).