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Principles of Non-Arbitrariness: Lawlessness in the Administration of Welfare

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PRINCIPLES OF NON-ARBITRARINESS: LAWLESSNESS IN THE ADMINISTRATION OF WELFARE

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I. INTRODUCTION

This article explores the question of whether constitutional principles exist to regulate arbitrary governmental action in the administration of welfare. The idea for the article developed from the recognition of problems associated with implementation of the 1996 Personal Responsibility Work Opportunity Reconciliation Act ("Welfare Reform Act" or "the Act").[1] Specifically, in the context of a devolved model of welfare administration, some local governments are administering welfare programs without rules, regulations, policies or procedures.[2] In the past, concerns about the lawless administration of welfare might have been resolved by application of procedural due process protections. While some scholars suggest that these protections continue to apply despite the existence of statutory language to the contrary,[3] recent cases call into question the scope of

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1. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C. (Supp. V 1999)) [hereinafter PRWORA]. This Article does not address the question of whether or not welfare reform has been successful in decreasing poverty. However, researchers at University of California at Berkeley, Columbia University, Stanford University and Yale University conducted a study that analyzes the success of welfare reform. *See* BRUCE FULLER ET. AL., GROWING UP IN POVERTY PROJECT, NEW LIVES FOR POOR FAMILIES? MOTHERS AND YOUNG CHILDREN MOVE THROUGH WELFARE REFORM (April 2002) (finding that while many women have moved into low-wage jobs, most still live below the poverty line).

2. Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 GEO. J. POVERTY L. & POL'Y 89, 125-32 (2002). This article describes Colorado's system of second order devolution and the problems of accountability that arose. Specifically, in a survey of all sixty-three counties it was found that thirty-six were operating without specific local policies or procedures. Of the thirty-six operating without written policies or procedures, thirty-four employed other incomplete tools, such as state plans, flow charts, or checklists to assist in the administration of the program; two counties had no written policies, no flow charts, no graphs, nor any inter-office memoranda to guide workers in the administration of the program; and five counties were using old AFDC policies to administer the new TANF program.

3. *See, e.g.*, Cynthia R. Farina, *On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act*, 50 ADMIN. L. REV. 591, 599 (1998) (explaining that once a statute is enacted, the question of whether there is a constitutionally protected interest is a question for the judiciary); Cimini, *supra* note 2, at 114-23 (arguing that certain statutory mandates support the finding of a property interest in the receipt of welfare benefits); Christine N. Cimini, *The New Contract: Welfare Reform, Devolution, and Due Process*, 61 MD. L. REV. 246 (2002) (arguing that the concept of a social contract and the existence of actual legal contracts between the

protections afforded by the procedural Due Process Clause.[4] Further, where local governments or private entities administer welfare programs, traditional administrative law remedies may be inapplicable.[5] In the absence of these checks on governmental action, this article examines whether non-statutory, constitutional principles limit arbitrary governmental action in the current administration of welfare programs. While this article does not propose that these constitutional principles, in and of themselves, resolve the problems associated with arbitrary governmental action, it does posit that such principles represent a necessary foundation for the assertion of rights.

Enactment of the Welfare Reform Act in 1996 fundamentally changed the long-standing structure and nature of public assistance to adults with dependent children. From its inception in 1935 until 1996, welfare to adults with dependent children was provided under Aid to Families with Dependent Children ("AFDC"),[6] a federal welfare program administered by the states.[7] Under AFDC's model of cooperative federalism, the federal government set eligibility criteria and states were provided open-ended funding based on the number of eligible recipients in their state.[8] No time limit on the receipt of

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government and individual welfare recipients create a property interest under the Due Process Clause) [hereinafter Cimini, *The New Contract*].

4. *Compare* State *ex rel.* K.M. v. W. Va. Dep't of Health and Human Res., 575 S.E.2d 393, 402 (2002) (holding that the welfare recipient's due process rights under the federal constitution do not require "a pre-termination hearing before ending TANF cash assistance" because Congress and the West Virginia Legislature found that recipients are no longer entitled to cash assistance), *with* Weston v. Cassata, 37 P.3d 469, 477 (Colo. 2002) (holding that although there is no longer an "absolute entitlement" to welfare benefits, "once welfare recipients have complied with statutory standards and have begun receiving benefits, the right to welfare becomes a property right which cannot be compromised without procedural due process protections").

5. *See infra* notes 295-96 and accompanying text.

6. Social Security Act of 1935, ch. 531, 49 Stat. 620, 627 (1935) (codified as amended at 42 U.S.C. §§ 1301-97ii (2000)) [hereinafter SSA].

7. Throughout its history, the AFDC program was administered based on a model of cooperative federalism. *See* King v. Smith, 392 U.S. 309, 316 (1968) (articulating, for the first time, the term "cooperative federalism" to describe government programs that are run with concurrent federal and state oversight). Under this model, the federal government provided money to the states which, in turn, administered the program in accord with federal and state rules and regulations. *Id.* at 316-17. *See also* Leonard Weiser-Varon, *Injunctive Relief From State Violations of Federal Funding Conditions*, 82 COLUM. L. REV. 1236, 1236-39 (1982) (describing the cooperative federalism model of administration used to administer public assistance programs).

8. MARK GREENBERG ET AL., CENTER FOR LAW AND SOCIAL POLICY, WELFARE REAUTHORIZATION: AN EARLY GUIDE TO THE ISSUES 3-4 (July 2000), *available at* http://www.clasp.org./publications/welfare_reauthorization_an_early_guide.pdf.

assistance existed and all eligible recipients received benefits.[9] Though recipients were subject to some work requirements, these requirements did not impact as large a portion of the welfare caseload as did the work requirements set forth under the 1996 Act.[10] Further, since the landmark case of *Goldberg v. Kelly*, welfare benefits have been considered a property interest for purposes of procedural due process protections.[11] Within this context, the potential for the arbitrary exercise of agency discretion was limited and the exercise of that discretion was subject to court review.

By contrast, the 1996 Welfare Reform Act replaced AFDC with a program entitled Temporary Assistance to Needy Families ("TANF"),[12] that devolved authority to the state level and permitted states to devolve authority down to local governments.[13] The Welfare

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9. 42 U.S.C. § 602(a)(1)(A) (1994) (amended 1996) (stating that all eligible recipients were entitled to receive assistance); *King*, 392 U.S. at 317 (emphasizing the statutory requirement that "aid . . . be furnished . . . to all eligible individuals").

10. *See* Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 STAN. L. & POL'Y REV. 19, 20, 32 n.7 (1998) (explaining that the most comprehensive of the work requirements was mandated by the 1998 Family Support Act).

11. 397 U.S. 254, 261-62 (1970) (stating that welfare benefits "are a matter of statutory entitlement for persons qualified to receive them").

12. 42 U.S.C. §§ 601-19 (1996) (titling the relevant portion of the statute as Block Grants to States for Temporary Assistance to Needy Families). A publication of the House Committee on Ways and Means described the shift from AFDC to TANF as follows:

> TANF greatly enlarges State discretion in operating family welfare, and it ends the entitlement of individual families to aid. Under TANF, States decide what categories of needy families to help (AFDC law defined eligible classes and required States to aid families in these classes if their income was below State-set limits). Under TANF, States decide whether to adopt financial rewards and penalties to induce work and other desired behavior. Also, States set asset limits (AFDC law imposed an outer limit) and continue to set benefit levels.

HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., 1998 GREEN BOOK 398 (Comm. Print 1998) [hereinafter 1998 GREEN BOOK].

13. 42 U.S.C. § 603(a) (providing block grant payments to states that allow each state to administer its own welfare program). At the same time the federal government has devolved authority to the states, it has retained very limited authority to regulate state conduct. *See* 42 U.S.C.§ 617 ("No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part."); *see also* MARK GREENBERG & STEVE SAVNER, CENTER FOR LAW AND SOCIAL POLICY, A DETAILED SUMMARY OF KEY PROVISIONS OF THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES BLOCK GRANT OF H.R. 3734-46 (Aug. 1996) (identifying the limited federal oversight and regulation of state and local governments implementing welfare); JULIE A. NICE & LOUISE G. TRUBEK, CASES AND MATERIALS ON POVERTY LAW: THEORY AND PRACTICE 193 (Supp. 1999) (detailing how the federal statute explicitly limits the Department of Health and Human Services' authority to regulate state implementation of TANF).

Reform Act also gave states wide discretion to create welfare programs to further the Act's broadly defined purposes.[14] Under TANF the federal government provides states with block grants of a pre-determined level of funding that does not guarantee coverage for all eligible recipients.[15] Unlike under AFDC, recipients of TANF are limited to sixty months of welfare benefits during their lifetime,[16] and must meet certain work requirements.[17] Additionally, the Act

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In terms of local devolution, see ANNA LOVEJOY & ELAINE M. RYAN, AMERICAN PUBLIC WELFARE ASS'N, DEVOLUTION OF ADMINISTRATIVE AUTHORITY TO THE LOCAL LEVEL: WELFARE REFORM EFFORTS IN FIVE STATES (1998) (explaining that five states, namely Maryland, North Carolina, Ohio, Colorado and Wisconsin, have devolved significant authority to local governments). For analysis of state inequities as a result of devolution, see Ingrid Phillips Whitaker & Victoria Time, *Devolution and Welfare: The Social and Legal Implications of State Inequalities for Welfare Reform in the United States*, 28 Soc. Just. 76 (2001). *See also* Shanta Pandey and Shannon Collier-Tenison, *Welfare Reform: An Exploration of Devolution*, 28 Soc. Just. 54, 69 (2001) (concluding that "the economic conditions of, and opportunities for, women living at the margins of society do not necessarily improve with decentralization of welfare programs from federal to state and local governments").

14. 42 U.S.C. § 604(a)(1) (Supp. V 1999) (providing that states have broad discretion to spend TANF funds in "a manner that is reasonably calculated to accomplish the purpose[s]" of the block grant or in any manner that was permissible under the program being replaced by the block grant). The stated purposes of the block grant are to:

> (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families.

Id. § 601(a)(1)-(4).

15. *Id.* § 603(a)(1); *see also* GREENBERG & SAVNER, *supra* note 13, at 10-19 (explaining that eligible states will receive a grant "in an amount intended to reflect recent federal spending" on AFDC and AFDC-related programs and some states will receive annual adjustments known as supplemental grants while other state funding amounts will include penalties or bonuses).

16. 42 U.S.C. § 608(a)(7)(A), (C)(ii) (1996) (prohibiting a state from using TANF funds to provide assistance to a family with an adult who has received assistance from any state TANF program for sixty months, whether consecutive or not). The statute includes a hardship exception that permits a state to exempt a family from the sixty month time limit if a hardship exists or if the family includes an individual who has been "battered or subjected to extreme cruelty," as defined by the statute. *Id.* § 608(a)(7)(C)(i), (iii). The statute permits states to exempt only twenty percent of their caseload. *Id.* § 608(a)(7)(C)(ii); *see also* 45 C.F.R. §§ 264.1-264.3 (2003); Temporary Assistance for Needy Families Program, 64 Fed. Reg. 17, 845-49 (Apr. 12, 1999) (preamble discussion).

17. 42 U.S.C. § 602 (a)(1)(A)(ii). States are required to ensure that the requisite percentage of recipients are participating in "work activities." The statute details twelve "work activities" which qualify toward the participation rate, including: unsubsidized employment; subsidized private sector employment; subsidized public

specifically states that welfare is no longer an "entitlement," calling into question the previously long-standing procedural due process protections afforded to welfare recipients.[18]

This new structure of devolved administrative authority and increased bureaucratic discretion raises numerous concerns about the accountability of welfare administrators,[19] especially if local governments are administering welfare programs without any rules, regulations, policies or procedures.[20] Prior to welfare reform, concerns about bureaucratic accountability and increased discretion in the welfare context could be addressed by limitations imposed by the procedural Due Process Clause.[21] In light of significant changes in the Welfare Reform Act, including its proclamation that welfare is no longer an entitlement, the procedural Due Process Clause may no longer provide welfare recipients the remedies it once did. While there is debate as to whether the statute's "no entitlement" language is controlling, courts that have addressed this question are split, or uncertain, as to the applicability of traditional procedural due

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sector employment; work experience; on-the-job training; job search and job readiness assistance; community service programs; vocational educational training not to exceed twelve months; job skills training directly related to employment; education directly related to employment if recipient does not have a GED or high school diploma; satisfactory attendance at secondary school; and provision of child care services to individuals participating in community service. *Id.* § 607(d). While the statute lists these activities, states are permitted to further define each category. *See* 45 C.F.R. §§ 261.30-261.36 (2003). Unless a state opts out, it must require a parent or caretaker receiving assistance under the program who is not exempt from the work requirement and not engaged in work to participate in community service. States determine the minimum hours per week required of individuals. *See* 42 U.S.C. § 602 (a)(1)(B)(iv).

18. 42 U.S.C. § 601(b) (stating that the statute "shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part"). *But see* sources cited *supra* note 3.

19. *See generally* Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000) (exploring the ways in which the new model of welfare administration, referred to as "entrepreneurial government," raises public accountability questions).

20. *See supra* note 2 and accompanying text.

21. *See* Goldberg v. Kelly, 397 U.S. 254, 266-269 (1970) (holding that procedural due process requires a pretermination evidentiary hearing be held when public assistance payments to a welfare recipient are discontinued); Atkins v. Parker, 472 U.S. 115, 128 (1985) (finding that food stamp benefits are statutory entitlements, thereby creating a property interest in eligible recipients); Mathews v. Eldridge, 424 U.S. 319, 331-32 (1976) (recognizing that a recipient's interest in the continuation of disability benefits constitutes a property interest for procedural due process purposes); Richardson v. Belcher, 404 U.S. 78, 80-81 (1971) (finding implicitly a property interest in benefits under the Social Security Act); Richardson v. Perales, 402 U.S. 389, 401-02 (1971) (finding implicitly a property interest in Social Security Disability benefits); Youakim v. McDonald, 71 F.3d 1274, 1288-89 (7th Cir. 1995) (finding that foster care benefits amount to an entitlement for eligible individuals to receive benefits under state law).

process protections.[22]

Within this context, the question this article explores is whether there exists a concept of non-arbitrariness that imposes limitations on the administration of welfare benefits without rules, regulations, policies or procedures. To address this question, the article explores the concept of non-arbitrariness within various jurisprudential doctrines and the potential applicability of the concept to limit arbitrary governmental action in the welfare context.[23]

The definition of arbitrariness employed here draws together common elements from numerous sources including judicial decisions, scholars and legal dictionaries. For the purposes of this article, I utilize the following definition of arbitrary: without adequate determining principle;[24] irrational, not based in reason;[25]

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22. *See supra* note 4 and accompanying text; *see also* Wash. Legal Clinic for the Homeless v. Barry, 107 F.3d 32, 38 (D.C. Cir. 1997) (doubting that "blanket 'no entitlement' disclaimers can by themselves strip entitlements from individuals in the face of statutes or regulations unequivocally conferring them"); Weston v. Hammons, No. 99-CV-0412, at 19 (D. Colo. Nov. 5, 1999) (Findings of Fact and Conclusions of Law) (rejecting the defendant's contention "that when Congress specified that benefits are not an entitlement, it intended to prevent the creation of a property interest and thereby prevent due process rights from attaching . . . [because] it is inconsistent with the mandatory nature of the program . . . [and] to the extent congress did intend to prevent due process rights from attaching, that would be constitutionally impermissible. Congress may not create a property interest by the substantive provisions of a statute but defeat the right to due process merely by reciting that there is no entitlement."); Reynolds v. Giuliani, 35 F. Supp. 2d 331, 341 (S.D.N.Y. 1999) ("Plaintiffs also have an overarching property interest in their continued receipt of food stamps, Medicaid and cash assistance."); Richardson v. Kelaher, No. 97-CIV-0428, 1998 WL 812042, at *4 (S.D.N.Y. Nov. 19, 1998) (holding that a welfare recipient who challenged the procedural adequacy of sanction notices issued for the reduction of her cash assistance had "a 'legitimate claim of entitlement' to any benefits provided under this policy, [i.e.,] she has a state created property interest which she may not be deprived of without due process of law.").

23. However, the inquiry is limited to the question of arbitrariness as it applies in the administrative regulatory context. Thus, this Article does not explore judicial or congressional arbitrariness in a general sense nor does it address prohibitions on arbitrariness provided by statutes such as the Administrative Procedures Act. 5 U.S.C. §§ 500-96 (2000).

24. *See, e.g.*, BLACK'S LAW DICTIONARY 104 (6th ed. 1990) ("Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously . . . ."); United States v. Carmack, 329 U.S. 230, 243 n.14 (1946) (defining arbitrary as "without adequate determining principle . . . [or] [f]ixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned") (internal quotes omitted); Flower Cab Co. v. Petitte, 658 F. Supp. 1170, 1179 (N.D. Ill. 1987) (defining arbitrary as a decision reached "without adequate determining principle or . . . unreasoned") (internal quotes omitted).

25. *See, e.g.*, BLACK'S LAW DICTIONARY 104 ("Without fair, solid, and substantial cause; that is without cause based upon the law, . . .; not governed by any fixed rules

tyrannical, despotic, oppressive or by caprice.[26] The definition is inclusive and incorporates both unintentional and intentional acts by government. While this article does not necessarily advocate so broad a definition for all purposes, the incorporation of both unintentional and intentional acts here accurately represents the myriad ways in which commentators and courts address concepts of arbitrariness and recognizes that courts tend to conflate as arbitrary both intentional acts of bias and prejudice as well as unintentional irrational governmental actions.[27]

The article generally presumes that the administration of

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or standard.") (internal citations omitted); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 498 n.168 (2003) (explaining that administrative law uses the word arbitrary to describe agency decisions that do not reflect reasoned deliberation and therefore likely reflect improper influences) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Corp., 463 U.S. 29 (1983)); *id.* at 496 (finding that arbitrary decision-making is irrational, unpredictable and unfair); Harry F. Tepker, Jr., *The Arbitrary Path of Due Process*, 53 OKLA. L. REV. 197, 216 (2000) (grouping "capricious, irrational and without 'fair, solid and substantial cause'" as one of two categories of arbitrariness).

26. *See, e.g.*, BLACK'S LAW DICTIONARY 104 ("tyrannical; despotic"); *Carmack*, 329 U.S. at 243 n.14 (incorporating "by caprice" into its definition of arbitrary); Tepker, *supra* note 25, at 216 (grouping "tyrannical, despotic or oppressive" as one of two categories of arbitrariness).

27. Judicially imposed prohibitions on arbitrary government conduct contemplate intentional and willful governmental actions in a variety of ways. In some contexts, intentional governmental action must be shown in order to demonstrate arbitrariness. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 836 (1998) ("The issue in this case is whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. We answer no, and hold that in such circumstances *only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.*") (emphasis added). Other times, prohibitions on arbitrariness exist to prevent willfully unfair applications of facially neutral statutes. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 366-67 (1886) (deeming a city ordinance "naked and arbitrary" because it gave supervisors unfettered discretion and "power . . . granted to their mere will"). The Supreme Court expressed its dissatisfaction with the ordinance by stating:

> [t]hough the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373-74. Also, where the government intentionally targets a particular person or group without a legitimate government interest, such actions are deemed impermissibly arbitrary. *See, e.g.*, Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (recognizing "successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment").

welfare without rules or standards to guide bureaucratic action can result in arbitrary decisions. I base this presumption upon the analysis that, without rules, regulations, policies or procedures in place, governmental decision-making is without adequate determining principle, that there is a significant risk that the actions of administrators will be irrational, unreasonable and unfair, and that the overall system can reasonably be described as tyrannical, despotic, oppressive and capricious. This article does not intend to suggest that the use of discretionary decision-making by administrative actors is inherently problematic.[28] Nor does the article suggest that the appropriate exercise of discretion is subversive of our fundamental values. Instead, the article posits that the creation and utilization of rules and standards is an important part of an overall system in which the exercise of discretion is employed. The purpose of this article is to examine the history of legal limits on arbitrary governmental action, to illustrate existing constitutionally based limits upon arbitrary governmental action, and to apply these concepts to the current administration of welfare benefits.

Historically, concepts of non-arbitrariness extend back to the Magna Carta,[29] and a general repudiation of governmental arbitrariness is evidenced in the many documents that form the foundation of our current legal system.[30] The prohibition against arbitrary governmental action also permeates modern constitutional doctrines, including due process, equal protection and First Amendment, as well as the topics of punitive damages, choice of laws, vagueness, nondelegation and prosecutorial discretion.[31] While

28. *See* Diller, *supra* note 19, at 1141-42 (explaining that all discretionary models have some rules and all rule-based models have some degree of discretion) (*citing* Evelyn Z. Brodkin, *Inside the Welfare Contract: Discretion and Accountability in State Welfare Administration*, 71 SOC. SERV. REV. 1, 4 (1997) ("[D]iscretion is axiomatically neither good nor bad but contingent on contextual conditions.")). *See also* GARY C. BRYNER, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 1-3 (1987) (stating that some discretion is an inevitable and often positive characteristic of effective governance); JOEL F. HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY 142-43 (1986) (reiterating the notion that discretion is necessary and discussing the difficulty of tailoring that discretion so as to avoid the potential for its abuse).

29. *See infra* notes 35-53 and accompanying text.

30. *See infra* notes 54-64 and accompanying text.

31. These are not the only areas where prohibitions on arbitrary governmental action exist. Broadly speaking I have limited the inquiry to constitutionally related doctrines and domestic law areas. Thus, though concepts of non-arbitrariness exist in the statutory context such as the Administrative Procedures Act, and in the international law context, in the interest of space and brevity I specifically excluded these areas from my analysis. *See* Heckler v. Chaney, 470 U.S. 821, 825-26 (1985) (explaining that there is "a general presumption that all agency decisions are reviewable under the Administrative Procedures Act, at least to assess whether the

courts acknowledge the existence of a limitation on arbitrary governmental action in these areas, there is no definitive or unifying judicial pronouncement of a prohibition on arbitrary governmental action. In fact, courts have been reluctant to police arbitrariness in a broad sense, in part because of the difficulty or impossibility[32] of the task.[33]

Despite these limitations, courts have used various doctrinal tests to achieve the general goal of prohibiting arbitrary governmental action. For example, in substantive due process jurisprudence, courts limit arbitrary governmental action by requiring that there be a rational relationship between the government's ends and the means it employs. Similarly, courts utilize the vagueness doctrine to limit arbitrary enforcement of laws that are unclear and nonspecific, and employ due process jurisprudence to limit grossly excessive, arbitrary punitive damages awards. In the choice of law context, courts limit the arbitrary application of a state's law by requiring that there be certain contacts between the state, the parties and the dispute. The nondelegation doctrine is designed to prevent arbitrary decision-making by unelected and unresponsive administrative agents. Equal protection jurisprudence prohibits the government from creating classifications that arbitrarily treat similarly situated people differently. In the context of prosecutorial discretion, equal protection doctrine is applied to assure that a prosecutor's decision is rationally related to a legitimate governmental interest and thus not arbitrary. Finally,

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actions were arbitrary, capricious, or an abuse of discretion"); Kurt J. Hamrock, Note, *The ELSI Case: Toward an International Definition of "Arbitrary" Conduct*, 27 TEX. INT'L L.J. 837 (1992) (exploring the meaning of "arbitrary" measures in a treaty).

Additionally, there are other constitutional law areas where concerns about arbitrariness arise, including ex post facto legislation, Fourth Amendment, and death penalty. Instead of addressing every possible constitutional law doctrine where questions of arbitrariness arose, I examine several areas that illustrate the underlying judicial concerns with government arbitrariness. *See* Buchanan v. Angelone, 522 U.S. 269, 275-76 (1998) (stressing the need to limit the jury's discretion so that the death penalty is not arbitrarily or capriciously imposed); Maryland v. Wilson, 519 U.S. 408, 411 (1997) (finding that the reasonableness of a governmental invasion "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers'") (citations omitted); Weaver v. Graham, 450 U.S. 24, 28-29 (1981) (finding that the prohibition of ex post facto laws "restricts governmental power by restraining arbitrary and potentially vindictive legislation").

32. Jodi Wilgoren, *Citing Issues of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at A1.

33. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 310-11 (1993) (explaining that courts have construed the substantive due process doctrine in a way to avoid the overarching requirement of arbitrariness and instead focus on the adequacy of the decision-making structures).

First Amendment doctrine in part polices arbitrary, content-based, limitations on free speech.

In each of the areas where courts regulate arbitrary governmental action, underlying judicial concerns give rise to jurisprudential principles. Four principles stand out. First, at a minimum, there must be a rational relationship between the government's ends and the means it chooses to reach those ends. Second, clear standards must exist so that individuals are able to conform their conduct according to a predictable system. Third, the rules and standards that do exist must be equally and fairly applied. And finally, the government must be accountable, and courts must be able to review governmental action to determine its legality.

Applying these principles and concerns to the context of a welfare system administered at the local level without rules, regulations, policies or procedures, a number of conclusions can be drawn. First, in the absence of any rules, regulations, policies or procedures, there is no way to determine the existence of a rational relation between the government's ends and the means it employs. Second, in the absence of such rules and standards there can be neither clarity nor predictability in the system, preventing individual welfare recipients from conforming their behavior in a way that creates or maintains eligibility for benefits. Third, without rules there can be no assurance of equal or fair application of the rules, creating the potential that similarly situated welfare recipients will be treated differently. Finally, in the absence of visible and clear rules there can be no accountability for administrative officials, and courts will be unable to meaningfully review agency action to determine legality. Thus, if courts were to regulate arbitrariness in the welfare context similarly to other doctrinal areas, local governments would, at a minimum, be required to create rational rules and standards and to apply them fairly and equitably.

In section two, the article historically roots concepts of non-arbitrariness in the Magna Carta as well as in subsequent historic documents and events. In section three, the article examines modern doctrinal areas in which courts address the issue of arbitrariness, identifying specific instances where courts regulate arbitrary governmental conduct and examining the judicial concerns underlying the proscriptions. This section concludes by grouping these concerns into a set of principles that are applied in various contexts to regulate arbitrary governmental action. Section four of the article utilizes welfare reform as an example of one context in which these principles could be used to regulate arbitrary governmental action, exploring why the new model of welfare administration results in increased governmental discretion and examining some of the practical concerns raised by this change. The

article proceeds to explain the ways in which neither constitutional procedural due process or administrative law protections adequately address the problems that exist when local governments operate without rules, regulations, policies or procedures. The article concludes by applying the set of principles derived from the analysis in section three to the welfare context.

The article's primary goal is to demonstrate that the concept of non-arbitrariness is foundational to American law and has some relevance for a welfare program that is administered without rules or standards. Specifically, the concept of non-arbitrariness and the requirement of rules and standards that are fairly and equitably applied create a necessary foundation from which other rights may flow.[34] Courts may not move toward a broad prohibition against

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34. While I do recognize that the creation of rules and standards may be a necessary first step, much more is required for the successful assertion of rights. Further, there exist a number of barriers to the assertion of rights. *See* Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs,* 58 SOC. SERV. REV. 3, 5 (1984) (discussing barriers to needy and eligible people getting the help they need which include: a belief that he/she is not likely to be aided in such an endeavor, the belief that asserting the right is not worth the cost, lack of knowledge of rights due to administrator failure to inform, and a belief that success is unlikely). *See also* Jerry L. Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependant Children in Virginia,* 57 VA. L. REV. 818, 833 (1971) (recognizing the lack of knowledge regarding both the rules and the rights provided under the welfare system as a substantial obstacle to realization of those rights); Joel F. Handler, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law,* 92 YALE L.J. 1270, 1272-73 (1983).

> The final cause of the ills of public assistance programs is the distribution of wealth and power. One can never forget that the people we are talking about are extremely dependent. They are ill-prepared to effectively participate in public programs, and, in particular, to understand the procedural systems designed to secure benefits and rights for them. The bureaucracy has control over the information, the resources, the staying power, the power of retaliation; workers, even if well-meaning, are pressed for time, short of money, and, in all honesty, feel that they know what is best for the clients. Discretion, in its lawful, positive sense (as distinguished from Professor Mashaw's examples from Virginia), implies, at the minimum, a discussion, a dialogue, a bargain of some sorts, a minimal sharing of power. But how are the poor, the really dependent poor, to participate in these decisions? And if they cannot cope when the administration of the program is benign and supporting, imagine their situation when it is hostile, abusive, and vindictive. The old system of public assistance was predicated on individualism, professionalism, and decentralization, but the caseload and working conditions forced routinization at best, and chaos and arbitrariness more often. In this situation, hostile attitudes toward the undeserving poor, combined with extreme dependency, led to widespread abuses.

Handler, *supra.* Some argue that the most effective way to overcome such barriers to welfare-dependant families actualizing their rights is to provide more formalized procedural protections. *See* Rebecca E. Zietlow, *Two Wrongs Don't Add Up to Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures,* 45 AM. U. L. REV. 1111, 1117 (1996) ("[T]he more formal the decision making process,

arbitrary action affecting welfare recipients any time soon, but they may be willing to regulate certain governmental action or inaction through concepts of non-arbitrariness. Ultimately, the analysis concludes that a welfare program being administered at the local level without any rules, regulations, policies or procedures is an instance where courts should be willing to regulate governmental arbitrariness. The appropriate remedy would be one that traditional constitutional procedural due process and administrative law remedies have not clearly provided - namely, a requirement that governments have rational rules and standards which are applied fairly and equitably.

II. THE HISTORICAL CONCEPTS OF NON-ARBITRARINESS

This section examines the historical roots of the concept that governments shall not act arbitrarily. Concepts of non-arbitrariness, even though not expressly in the federal Constitution, are deeply rooted in the historical development of our current system of justice. As set forth below, the prohibition against arbitrary action can be traced back to the Magna Carta with its concepts being invoked throughout the various stages of our country's legal development, from the American Revolution to the Federalist Papers, the Bill of Rights and current discourse of numerous jurisprudential concepts. Many of the specific prohibitions found in the Magna Carta have been incorporated into our current constitutional scheme. Courts and scholars also acknowledge that the Magna Carta was among the first documents to specifically prohibit arbitrary governmental action and that these concepts formed the basis of our current "rule of law" values.

A. The Magna Carta

The concept of non-arbitrariness not only permeates the Magna Carta, arbitrary governmental action was in fact at the root of its creation. In 1215, facing a potential rebellion by his barons and knights, King John signed the Magna Carta, in which he granted the English nobility certain legal rights.[35] The Magna Carta contains a number of provisions that prohibit the royal and judicial authorities from engaging in arbitrary actions. For example, sections of the Magna Carta: prohibit the arbitrary taking of property;[36] forbid the

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the better chance the poorer, less educated party has to prevail.").

35. *See* Jeffrey Brauch & Robert Woods, *Faith, Learning and Justice in Alan Dershowitz's the Genesis of Justice: Toward a Proper Understanding of the Relationship Between the Bible and Modern Justice*, 36 VAL. U. L. REV. 1, 55 (2001).

36. "No constable or other of [o]ur bailiffs shall take corn or other chattels of any man without immediate payment, unless the seller voluntarily consents to postponement of payment." MAGNA CARTA ch. 28 (1215), reprinted in A.E. DICK

arbitrary exercise of judicial power;[37] and guarantee application of the doctrine of proportionality.[38] Though never stating its direct repudiation of arbitrary governmental action, the Magna Carta's prohibition on arbitrary power is explicitly acknowledged vis-à-vis its protection of people's liberties[39] as well as its outline for the administration of justice.[40]

The Magna Carta is considered by scholars and courts to be among the first documents to have set forth in writing an understanding of the relationship between a government and its subjects that specifically prohibits arbitrary governmental action. Legal scholars have traced the origin of the concept of non-arbitrariness to the Magna Carta[41] and describe the Magna Carta as

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HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 41 (1964). "No sheriff or other of [o]ur bailiffs, or any other man, shall take the horses or carts of any free man for carriage without the owner's consent." *Id.* ch. 30. "Neither [w]e nor [o]ur bailiffs will take another man's wood for [o]ur castles or for any other purpose without the owner's consent." *Id.* ch. 31.

37. "[N]o bailiff shall upon his own unsupported accusation put any man to trial without producing credible witnesses to the truth of the accusation." *Id.* ch. 38. "No free man shall be taken, imprisoned, disseised [sic], outlawed, banished, or in any way destroyed, nor will [w]e proceed against or prosecute him, except by the lawful judgment of his peers by the law of the land." *Id.* ch. 39. "To no one will [w]e sell, to no one will [w]e deny or delay, right or justice." *Id.* ch. 40.

38. "A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position . . . ." *Id.* ch. 20. For a definition of the doctrine of proportionality in its contemporary application to the realm of international law, see Michael C. Bonafede, Note, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11 Attacks*, 88 CORNELL L. REV. 155, 168 (2002).

39. MAGNA CARTA, chs. 28, 30-31.

40. *Id.* chs. 38-40.

41. Brauch & Woods, *supra* note 35, at 55 ("Many of the Magna Carta's provisions required the king to end arbitrary royal actions that were very time and culture specific. [King John] agreed, for instance, to not steal the corn, wood, carts, and horses of his nobles. But John also agreed to some broad provisions that formed the basis for due process and the rule of law."); Randall Green, *Human Rights and Most-Favored-Nation Tariff Rates for Products from the People's Republic of China*, 17 U. PUGET SOUND L. REV. 611, 628 (1994) ("[I]n June 1215 certain barons in England forcefully negotiated the first issue of the Magna Carta with King John. They sought to ameliorate the arbitrary and extortionate methods of taxation being used at that time for supporting the King's foreign wars, to protect themselves from the ruthless and brutal reprisals against tax defaulters, and to provide redress for wrongs suffered."); Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 49 n.77 (1993) (quoting MAGNA CARTA, ch. 33) ("The Magna Carta's attempt to create a bulwark against arbitrary government dedicated itself 'to the honor of God, and the exaltation of Holy Church.'"); Brian L. Lahargoue, Comment, *The Need for Federal Legislative Reform of Punitive Damages*, 20 SW. U.L. REV. 103, 105 (1991) ("[A] magistrate over all the King's subjects, exercising arbitrary power, violating the Magna Carta, and attempting to destroy the

being established and valued for its prohibition against arbitrary government power.[42] Indeed, it stands at its very core for the principle that the government cannot act in an arbitrary manner against the people.[43] Many scholars link the Magna Carta's concepts

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liberty of the kingdom by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner.").

42. Raoul Berger, *Doctor Bonham's Case: Statutory Construction or Constitutional Theory?*, 117 U. PA. L. REV. 521, 535 (1969) ("[S]tates Gough, 'Fundamental laws (and Magna Carta itself) were valued for the protection they afforded against the arbitrary power of kings.'"); George Anastaplo, *Individualism, Professional Ethics, and the Sense of Community: From Runnymede to a London Telephone Booth*, 28 LOY. U. CHI. L.J. 285, 286 (1996) ("Magna Carta established the freedom of the Church of England, protected free men from the arbitrary use of royal power."); Melody A. Hamel, *Recent Decisions*, 33 DUQ. L. REV. 985, 992 ("[I]mportant guarantees of the Magna Carta included protection from arbitrary government confiscation of property."); Bernard H. Siegan, *Propter Honoris Respectum: Separation of Powers and Economic Liberties*, 70 NOTRE DAME L. REV. 415, 419 (1995) ("The Magna Carta did not deprive the king and his agents of all powers but only of arbitrary power over life, liberty and property."); John Norton Moore, *The United Nations Convention on the Law of the Sea and the Rule of Law*, 7 GEO. INT'L ENVTL. L. REV. 645, 645 (1995) ("[M]uch of the world's history of human progress has been a struggle to control arbitrary power. This struggle . . . began with the Magna Carta . . . ."); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 953, 969 ("The Magna Carta, then, was intended as a limit upon the king. Chapter 39 was not directed to his 'legislative' functions, if they could be distinguished, but to 'the arbitrary acts of imprisonment, disseisin, and outlawry in which King John had indulged . . . .' Given the common perception of Magna Carta as a protection against arbitrary government, it is not surprising that the colonists also resorted to the Great Charter in their controversies with king and Parliament, particularly over the right to tax."); Robert Lincoln, *Executive Decisionmaking by Local Legislatures in Florida: Justice, Judicial Review and the Need for Legislative Reform*, 25 STETSON L. REV. 627, 675 n.243 (1996) ("The principle that arbitrary or capricious action is outside the power of the sovereign has its roots in the Magna Carta and was discussed extensively by Locke.").

43. John Marquez Lundin, *The Law of Equality Before Equality Was Law*, 49 SYRACUSE L. REV. 1137, 1155 n.71 (1999) (citing Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Seldon, Hale*, 103 YALE L.J. 1651, 1687 (1994)) ("The language of Magna Carta was invoked as a symbol of the restriction of the arbitrary exercise of power."); Rob Cronan, Book Note, 41 SANTA CLARA L. REV. 287, 288 n.8 (2000) (reviewing PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, THE TYRANNY OF GOOD INTENTIONS: HOW PROSECUTORS AND BUREAUCRATS ARE TRAMPLING THE CONSTITUTION IN THE NAME OF JUSTICE (2000)) ("The Rights of Englishmen are a set of legal principles that ensure that the law protects people from arbitrary government power. These Rights of Englishmen originated with the Magna Carta in England and had the effect of empowering the people."); Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 8 (1992) ("The barons, like Robin Hood, were concerned with arbitrary seizures of people, property, and wealth. Because the barons were rich themselves, however, they were reluctant to redistribute wealth. Instead, they forced King John to limit his powers by adopting Magna Carta in 1215. In this manner, Magna Carta replaced Robin Hood as the guardian of the individual against the forces of arbitrary government.").

of non-arbitrariness to current rule of law concepts.[44] Likewise, Supreme Court Justices have noted that the Magna Carta was designed to secure individuals against the arbitrary power of government and that the Magna Carta is the basis of our current concept of the rule of law.[45]

Since 1819, the courts have affirmed that the Magna Carta was "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."[46] Many of the specific prohibitions originally set forth in the Magna Carta have been incorporated into the United States' constitutional scheme. For example, a considerable number of courts have argued that the concept of "due process of law," as written in the Fifth and Fourteenth Amendments, was born in the text of the Magna Carta. The specific clause identified as enunciating the concept of "due process of law" is as follows: "[n]o free man shall be taken, imprisoned, disseised [sic], outlawed, banished, or in any way destroyed, nor will [w]e proceed against or prosecute him, except by

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44. Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303, 307 (2001) ("This notion of reasoned judgment, as opposed to arbitrary abuse of power, is at the core of the notion of the rule of law and has roots that can be traced back to the Magna Carta."); Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005, 1011 (2001) ("England's emergence as a country governed by the rule of law rather than by the despotic and arbitrary power of a monarch lay in the principle, suggested in Magna Carta and made explicit by Coke, that Parliament, rather than the King's ministers, makes the law.").

45. Sandra Day O'Connor, *Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law: Keynote Address*, 96 AM. SOC'Y INT'L L. PROC. 348, 351 (2002) ("To the Western world of law, the great gift of the Magna Carta, signed in 1215, was the notion that no person, including the sovereign, is above the law and that all persons shall be secure from the arbitrary exercise of the powers of government. The Magna Carta is the spiritual and legal ancestor of the concept of the rule of law."); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 587 (1996) (Breyer, J., concurring) ("This constitutional concern [a reasonableness standard for judicial determination of a punitive damages amount], itself harkening back to the Magna Carta, *arises out of the basic unfairness* of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of *arbitrary* coercion.") (emphasis added).

46. Bank of Columbia v. Okely, 17 U.S. 235, 244 (1819) (noting that the idea of protecting the individual from the arbitrary exercise of governmental power originates with the Magna Carta). *See, e.g.*, Albright v. Oliver, 510 U.S. 266, 272 (1994) (arguing that "the words 'by the law of the land' from the Magna Carta were 'intended to secure the individual from the arbitrary exercise of the powers of government'"); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 270-71 (1989) ("The barons who forced John to agree to Magna Carta sought to reduce arbitrary royal power, and in particular to limit the King's use of amercements as a source of royal revenue, and as a weapon against enemies of the Crown.").

the lawful judgment of his peers or by the law of the land."[47] The original Latin version of the Magna Carta, issued in 1215, employed the term *"per legem terrae,"* meaning "law of the land," and it was subsequently understood by courts to mean "due process of law."[48] Additionally, courts have held that the words of the Magna Carta were intended to prevent the King from arresting individuals without a warrant[49] and from prosecuting an individual twice for the same crime.[50] These prohibitions were incorporated into the Fourth[51] and

47. MAGNA CARTA, ch. 39.

48. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992) (*citing* Poe v. Ullman, 367 U.S. 497, 541 (1961)) ("[T]he guaranties of due process, though having their roots in Magna Carta's 'per legem terrae' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'"); E. Enter. v. Apfel, 524 U.S. 498, 558-59 (1998) (Breyer, J., dissenting) ("To find that the Due Process Clause protects against this kind of fundamental unfairness—that it protects against an unfair allocation of public burdens through this kind of specially arbitrary retroactive means—is to read the Clause in light of a basic purpose: the *fair application of law,* which purpose hearkens back to the Magna Carta."); *In re* Winship, 397 U.S. 358, 384 (1970) (Black, J., dissenting) ("Our ancestors' ancestors had known the tyranny of the kings and the rule of man and it was, in my view, in order to insure against such actions that the Founders wrote into our own Magna Carta the fundamental principle of the rule of law, as expressed in the historically meaningful phrase 'due process of law.'"); Murray v. Hoboken Land and Improvement Co., 59 U.S. 272, 276 (1855) ("The words 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta [sic]. Lord Coke, in his commentary on those words says 'they mean due process of law.'"). *See also* Edward O. Correia, *Moral Reasoning and the Due Process Clause*, 3 S. CAL. INTERDISC. L.J. 529, 536 n.28 (1994) ("Early due process cases interpreted the due process clause of the Fourteenth Amendment to be a restatement of the Magna Carta's guarantee against arbitrary actions by government.").

49. State v. Mobley, 83 S.E.2d 100, 102 (N.C. 1954) ("[A]n arrest without warrant is deemed unlawful . . . . This foundation principle of the common law, designed and intended to protect the people against the abuses of arbitrary arrests, is of ancient origin. It derives from assurances of Magna Carta and harmonizes with the spirit of our constitutional precepts that the people should be secure in their persons.").

50. State v. Bowen, 224 N.J. Super. 263, 273 (App. Div. 1988) ("No one currently disputes the great worth of the constitutional safeguard against double jeopardy. The prohibition is of ancient origin and was one of the principal limitations upon arbitrary power confirmed by the Magna Carta of 1215."); State v. Labato, 80 A.2d 617, 620 (N.J. 1951) ("It is an ancient principle of the common law that one may not be twice put in jeopardy for the same offense. This is one of the limitations upon arbitrary power confirmed by King John's Magna Charta of 1215, in the provision (c. 29) ensuring the essentials of individual right and justice and the ancient liberties of the freeman against interference 'but by lawful judgment of his peers, or by the law of the land.'").

51. William W. Greenhalgh & Mark J. Yost, *In Defense of the "Per Se" Rule: Justice Stewart's Struggle to Preserve the Fourth Amendment's Warrant Clause*, 31 AM. CRIM. L. REV. 1013, 1020 n.26 (1994) (noting that the "[o]bject of [Clause 39] was to prevent in the future all such extra-legal procedure, to affirm the validity of feudal law and custom against arbitrary caprice and the indiscriminate use of force, and to prohibit

Fifth Amendments to the United States Constitution. Furthermore, according to courts and scholars, the Sixth and Eighth Amendments to the Constitution were directly founded upon the Magna Carta's rejection of arbitrariness.[52] In addition to the impact the document has had in this country, the Magna Carta has also formed the basis of other countries' protections against the arbitrary acts of government.[53]

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constituted authority from placing execution before judgment"); Elizabeth A. Faulkner, *The Right to Habeas Corpus: Only in the Other Americas*, 9 AM. U. J. INT'L L. & POL'Y 653, 654 n.4 (1994) ("The concept of freedom from arbitrary arrest and detention appeared in several early European documents, such as the Magna Carta, the Habeas Corpus Acts of England, and the French Declaration of the Rights of Man and the Citizen.").

52. Hoskins v. Wainwright, 485 F.2d 1186, 1189 (5th Cir. 1973) ("'[T]he accused shall enjoy the right to a speedy and public trial' . . . [this right] found expression in the Magna Carta, Coke's, Institutes, and the Sixth Amendment . . . ."); Nina Lempert, Note & Comment, *Punitive Damages - The Dischargeability Debate Continues*, 11 BANKR. DEV. J. 707, 712 n.26 (1994-95) ("In order to regulate the arbitrary imposition of amercements, which were awarded at the judge's discretion, several provisions of the Magna Carta were enacted to control abuses by the courts. The provisions of the Magna Carta required that there be a rational connection between the punishment and the infraction, and that the fine imposed should not destroy the defendant's means of earning a living in his occupation. The Eighth Amendment to the United States Constitution, which forbids excessive fines, was founded on those stipulations of the Magna Carta.").

Law scholars have also traced the origin of the doctrine of non-arbitrariness to the Magna Carta. Deana M. Hartley has noted:

> As a result of the arbitrary manner in which the courts imposed amercements, abuses developed in the system. Consequently, several provisions of the Magna Carta addressed limiting the amount of such penalties. Those sections of the Magna Carta 'required that there be a reasonable, proportional and sensible relationship between punishment and offense, and that the penalty exacted should not destroy the offender's means of making a living in his trade.' The Eighth Amendment to the United States Constitution forbidding excessive penalties was modeled after those sections of the Magna Carta.

Deana M. Hartley, *Torts - The Constitutionality of Punitive Damages in Wyoming: Can We Effectively Eliminate Brow-Raising Verdicts?* (Farmers Insurance v. Shirley, *958 P. 2d 1040* (Wyo. 1998)), 34 LAND & WATER L. REV. 213, 216 (1999) (footnotes omitted).

53. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 259-60 (1993) ("The protection against the arbitrary deprivation of freedom is expressed in the Magna Carta, the Bill of Rights of the United States Constitution, and the French Declaration of the Rights of Man.") (footnotes omitted); David Clark, *The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law*, 24 MELB. U. L. REV. 866, 869 n.12, 887 n.128 (2000) (quoting Mabo v. Queensland, (1988) 166 CLR 186, 226) ("Thus, the rejection of arbitrary detention in the New Zealand Bill of Rights Act 1990 (NZ) s 22 is said also to be supported by Magna Carta . . . 'long-established notions of justice that can be traced back at least to the guarantee of Magna Carta [1297] against the arbitrary disseisin of feehold.'") (alteration in original).

B. Other Historic Documents and Events

Subsequent to the creation of the Magna Carta, other documents evidence this same repudiation of governmental arbitrariness. For example, some four hundred years later, during the Glorious Revolution in England, King William and Queen Mary were required to sign the English Bill of Rights, which limited the royal family's powers by including a prohibition on the arbitrary suspension of Parliament's laws.[54] Former King James II was expelled, among other reasons, for prosecuting "in the Court of King's Bench . . . matters and causes cognizable only in Parliament, and by diverse other arbitrary and illegal courses . . . [and for] assuming and exercising a power of dispensing with and suspending of laws and the execution of laws, without consent of parliament . . . ."[55] Thus, as with the Magna Carta, the English Bill of Rights sought to prohibit the governing authority from engaging in arbitrary conduct.

Similarly, a major theme of the American Revolution was the colonists' disdain for arbitrary power. During the First Continental Congress in 1774, representatives of twelve colonies issued a "Declaration of Rights and Grievances" in response to the British Parliament's passage of the "Intolerable Acts."[56] The representatives claimed to be "justly alarmed at these arbitrary proceedings of parliament and administration [i.e., the Intolerable Acts], have severally elected, constituted, and appointed deputies to meet, and sit in general Congress, in the city of Philadelphia, in order to obtain such establishment, as that their religion, laws, and liberties, may not be subverted."[57]

The American colonists' rejection of arbitrary power also wove its way into the Declaration of Independence which accuses the English King of making "[j]udges dependent on his [w]ill alone, for the [t]enure of their [o]ffices, and the [a]mount and [p]ayment of their [s]alaries."[58] Thus, the text reveals that the American revolutionaries objected to an exercise of power that was subject to individual will or judgment without restriction.[59] The colonists also accuse the King of

54. ENGLISH BILL OF RIGHTS OF 1689, 1 W. & M., sess. 1, c. 2; *see also* DUHAIME.ORG, LAW MUSEUM, *at* http://www.duhaime.org/Law_museum/uk-billr.aspx (last visited Mar. 31, 2005) (noting effects of passage of English Bill of Rights).

55. ENGLISH BILL OF RIGHTS OF 1689, 1 W. & M., sess. 1, c. 2.

56. THE DECLARATION OF RIGHTS AND GRIEVANCES, *at* http://www.usconstitution.net/ intol.html (last visited Mar. 31, 2005).

57. *Id.*

58. THE DECLARATION OF INDEPENDENCE, *available at* http://www.archives.gov/national_archives_experience/charters/declaration_transcript.html (last visited Mar. 31, 2005) [hereinafter DECLARATION OF INDEPENDENCE].

59. *See id.* ("The history of the present King of Great Britian is a history of repeated injuries and usurpations . . . establish[ing] an absolute Tyranny over these

"abolishing the free [s]ystem of English [l]aws in a neighbouring [p]rovince,[60] establishing therein an arbitrary [g]overnment, and enlarging its [b]oundaries, so as to render it at once an [e]xample and fit [i]nstrument for introducing the same absolute [r]ules into these [c]olonies . . . ."[61] These repudiations of arbitrary government in the Declaration of Independence reflect the themes at the root of their grievance, and at the foundation of the American Revolution.

Several prominent authors of the Federalist Papers specifically objected to arbitrary governmental actions. In Federalist No. 47, James Madison argued that fusing legislative and executive powers would jeopardize citizens' life and liberty, because such a fusion of power would lead to "arbitrary control."[62] Likewise, in Federalist No. 78, Alexander Hamilton argued that in order to prevent the courts from having arbitrary discretion, judges "should be bound down by strict rules and precedents."[63] These documents point to the founders' fear of the inherent despotic nature of arbitrary power.[64]

Thus, concepts of non-arbitrariness stem back to the Magna Carta which was created in large part to provide citizens protection against the arbitrary will of the King. This concept of non-arbitrariness was central to the American colonists' movement to secure individuals against government lawlessness and have been noted by courts and scholars alike.

III. PRINCIPLES UNDERLYING THE REGULATION OF ARBITRARY ACTION

Modern American jurisprudence contains myriad limitations on arbitrary action by government officials. This section identifies and explores these limitations on arbitrary governmental action found in current constitutional jurisprudence. Specifically, the section focuses on concepts of non-arbitrariness that do not rely upon the finding of a constitutionally protected property interest[65] or the application of

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states.").

60. The province referred to is Quebec, recently surrendered by France.

61. THE DECLARATION OF INDEPENDENCE, *supra* note 58.

62. *See* THE FEDERALIST NO. 47 (James Madison) (citing Montesquieu).

63. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

64. *See* THE FEDERALIST NO. 83 (Alexander Hamilton) (Hamilton notes that he "cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases. *Arbitrary* impeachments, *arbitrary* methods of prosecuting pretended offences, and *arbitrary* punishments upon *arbitrary* convictions, have ever appeared to me to be the great engines of judicial despotism . . . .") (emphasis added).

65. Of course, courts use procedural due process doctrine to police arbitrary government deprivations of property. *See, e.g.*, Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) ("It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to

statutory protections under Administrative Procedure Acts. Instead, the limitations examined emanate from broad constitutional doctrines, such as due process and equal protection, as well as from more specific constitutional provisions such as the First Amendment.

Upon review, a number of themes emerge from these otherwise distinct substantive law doctrines. These themes revolve around judicial concern about fundamental concepts of rationality, clarity, predictability, fairness, equality, accountability and reviewability. Some scholars have characterized such themes as closely

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provide an opportunity for a person to vindicate those claims."). Courts also use procedural due process to police arbitrary deprivations of liberty. *See, e.g.,* Goss v. Lopez, 419 U.S. 565, 574 (1975) ("The [procedural] Due Process Clause also forbids arbitrary deprivations of liberty.") (citing Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)). The historical evolution of due process jurisprudence into its procedural and substantive components is replete with court concerns about policing arbitrary governmental action. *See, e.g.,* Dent v. West Virginia, 129 U.S. 114, 124 (1889) ("The great purpose of the [due process] requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen.").

Furthermore, the right to notice and a hearing in instances of government deprivations is axiomatic in procedural due process jurisprudence. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("There can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."); Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (articulating that such notice and hearings "must be granted at a meaningful time and in a meaningful manner"). Procedural due process notice and hearing requirements prevent arbitrary property and liberty deprivations to preserve fairness. *See* Fuentes v. Shevin, 407 U.S. 67, 81 (1971) ("The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions .... Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property .... The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property."); Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988) ("Hence, the procedures employed in a disciplinary action must be tested by the extent to which they comport with the requirement of fundamental fairness.") (citing William G. Buss, *Procedural Due Process For School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 551 (1971)); Dixon v. Ala. State Bd. Of Educ., 294 F.2d 150, 157 (5th Cir. 1961) (holding that government power to expel students from school "cannot be arbitrarily exercised" and should be restricted by fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense). In a welfare context, see White v. Roughton, 530 F.2d 750, 753 (7th Cir. 1976) ("[D]ue process requires that welfare assistance be administered to ensure fairness and freedom from arbitrary decision-making as to eligibility."); Carey v. Quern, 588 F.2d 230, 232 (7th Cir. 1978) ("In the context of eligibility for welfare assistance, due process requires at least that the assistance program be administered in such a way as to insure fairness and to avoid the risk of arbitrary decision making."); Baker-Chaput v. Gordon Cammett, 406 F. Supp. 1134, 1140 (D.N.H. 1976) ("The absence of standards creates a void in which malice, vindictiveness, intolerance or prejudice can fester.").

corresponding to the premises of liberal legalism.[66] These concerns give rise to a set of four legal principles. First, a rational relationship must exist between the government's ends and the means it employs. Second, laws must be clear enough to create a predictable system. Third, laws must be equitably and fairly applied. And, fourth, there must be a means to hold government accountable and to ensure reviewability of agency action.

This section begins with a discussion of due process and the various substantive areas where due process serves to limit arbitrary action including vagueness, punitive damages and choice of law. The article then proceeds to discuss limitations on governmental action in the following contexts: nondelegation, equal protection and First Amendment. In each area, both the general limitations placed upon arbitrary governmental action as well as the thematic judicial concerns that underlie these limitations are considered. The section concludes with a discussion of the fundamental principles of non-arbitrariness.

A. Modern Jurisprudential Concepts of Arbitrariness

1. The Due Process Clause

a. Substantive Due Process

One of the fundamental purposes of the Due Process Clause is to protect individuals from arbitrary governmental action, "whether the fault lies in a denial of fundamental procedural fairness, . . . or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective . . . ."[67] Despite the apparently

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66. Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 243-44 (1991) (describing the assumptions that have been characterized as the classic premises of liberal legalism). Specifically, the legal system supports the themes of rationality and predictability by creating laws that are comprehensible and predictable so that individuals can engage in rational decision-making. The legal system also supports the themes of equality, fairness and uniformity by creating laws that are general, impersonal and objective. Finally, the legal system supports themes of accountability and reviewability by creating a system that is determinate, stable and calcuable so that the boundaries of the law have clear import. *Id.* (citing JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 267 (1985)); Jerry L. Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433, 439-40 (1987) [hereinafter Mashaw, *Dignitary Process*]; Frank Michelman, *Procedural Due Process of Law, Civil, in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1472 (Leonard Levy et al. eds., 1986).

67. County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998) (citing Fuentes v. Shevin, 407 U.S. 67, 82 (1972)) (explaining that the procedural Due Process Clause protects against arbitrary takings). For support that protections against arbitrary action come from the Magna Carta, see Albright v. Oliver, 510 U.S. 266, 268 (1994); Daniels v. Williams, 474 U.S. 327, 331 (1986); Bank of Columbia v. Okely, 17 U.S. 235,

broad purpose behind the due process clause, courts appear reluctant to embrace expansive due process limitations and have historically struggled with the proper confines of the clause.[68] However, two areas of substantive due process jurisprudence have continually addressed concerns of arbitrariness. First, courts regulate arbitrary governmental action when there exists no rational relationship between the government's ends and the means it employs. This limitation is rooted in notions of rationality and requires that the government not utilize arbitrary or irrational justifications for laws. Courts will also regulate governmental action that is so arbitrary or oppressive that it "shocks the conscience" of the court. This limitation is rooted in the court's concerns about fairness – namely, government should not be permitted to engage in acts of arbitrariness or oppression.[69]

The rational basis test serves as a constitutional floor ensuring legislation bears a rational relationship to a legitimate governmental interest.[70] If the legislation bears no rational relationship to the purported governmental interest, it is viewed as arbitrary and thus violative of the substantive Due Process Clause.[71] In one of the

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244 (1819) (drawing from the voice of the Magna Carta, that an individual is secure from "the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice").

68. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.") (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225-26 (1985)); Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) ("Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court.").

69. See Romer v. Evans, 517 U.S. 620, 633 (1996).

70. *Id.* at 631-33 (holding that a law prohibiting all legislative, judicial, or executive action protecting homosexual persons from discrimination did not bear a rational relation to a legitimate governmental purpose); Heller v. Doe, 509 U.S. 312, 319-21 (1993) (upholding a state statute requiring a lesser standard for involuntary civil commitment of "mentally retarded" individuals than mentally ill individuals); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (upholding a statute that disallowed vendors who had not continually conducted business for eight years from selling in the French Quarter); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (overturning a statute that prevented any members of a household with an individual unrelated to other members of the household from receiving food stamps).

71. *See, e.g.*, City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 676 (1976) (acknowledging that substantive due process proscriptions dictate that a state or local legislative measure is judicially voidable if it is "arbitrary and capricious, bearing no relation to the police power"); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) ("Even in the absence of such aids the existence of facts supporting the

leading land use cases, the U.S. Supreme Court determined that where regulations are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" they violate the substantive Due Process Clause.[72] While the Court upheld the land use regulation at issue in that case, it created a standard to assure that government regulations were rationally related to a legitimate purpose.[73] Similarly, in the housing context, the Court found that the justifications or means offered by the city for a housing ordinance, while legitimate, were not rationally related to the ordinance and thus violated substantive due process. Specifically, the Court held that an ordinance preventing a grandmother from living with her two grandsons was not rationally related to the articulated governmental interests in preventing overcrowding, minimizing traffic and parking congestion and avoiding undue financial burden on the school system.[74] This lack of rational relation was considered by the Court to be arbitrary and thus a violation of the substantive Due Process Clause.[75] In another case involving land use changes, the Court acknowledged that "[i]f the substantive result of the referendum [was] arbitrary and capricious [and bore] no relation to the police power," then the referendum would be invalid pursuant to substantive due process limitations.[76] While in most instances any conceivable legitimate government interest would be sufficient to overcome the finding of

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legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) ("Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."). *See also* Gutzwiller v. Fenik, 860 F.2d 1317, 1328 (6th Cir. 1988) (finding that discrimination against a public university professor on the basis of sex "constitutes an arbitrary and capricious deprivation of the individual's liberty interest in not being terminated for a constitutionally impermissible purpose"); Mahavongsanan v. Hall, 529 F.2d 448, 449 (5th Cir. 1976) (finding academic dismissals from state institutions can be enjoined if "shown to be clearly arbitrary and capricious"); Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975) (finding that if the decision is about academic standards courts will only intervene if the decision was arbitrary).

72. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

73. *Id.*

74. *Moore*, 431 U.S. at 499-500.

75. *See id.* at 502 (noting that the Court's substantive due process history "does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary . . . of the nuclear family").

76. *City of Eastlake*, 426 U.S. at 676.

arbitrariness,[77] the Court has clearly delineated in its substantive due process jurisprudence a foundational limitation that prohibits the most arbitrary governmental actions.[78]

The Court also uses substantive due process doctrine to limit arbitrary governmental action that is so arbitrary or oppressive that it shocks the conscience of the court. The "shock the conscience" test was first employed in the 1951 case *Rochin v. California*, as a way to define what constitutes arbitrary governmental action.[79] The Court found that the action of a police officer who unlawfully entered the defendant's home, assaulted him and ordered a hospital physician to pump his stomach, rose to the level of conscience-shocking behavior that violated the substantive Due Process Clause.[80] In so holding, the Court found the actions of the police "too close to the rack and the screw to permit of constitutional differentiation" and concluded that such action was so brutal and offensive that it failed to comport with traditional ideas of "fair play and decency."[81] The test has been interpreted to limit certain governmental actions, "regardless of the fairness of the procedures used to implement them," and thus serves to prevent government from using its power in an oppressive fashion.[82]

While the "shock the conscience" test is still acknowledged as valid law, its restriction on arbitrary governmental action has been limited in several ways. These limitations, in part, represent the Court's discomfort with the vague, open-ended nature of trying to define "arbitrariness" in the constitutional sense.[83] First, the Court

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77. *See* Curto v. City of Harper Woods, 954 F.2d 1237, 1243 (6th Cir. 1992) (holding that a governmental regulation is valid if it advances a legitimate governmental interest or if it is not an unreasonable means of advancing such an interest) (citing Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 487-88 (1955) ("But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.")).

78. *See, e.g.*, Lyng v. Int'l Union, 485 U.S. 360 (1988); Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974); Berman v. Parker, 348 U.S. 26 (1954); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

79. 342 U.S. 165, 172 (1952).

80. *Id.* at 166-67, 173-74.

81. *Id.* at 172-73.

82. Daniels v. Williams, 474 U.S. 327, 331 (1986).

83. County of Sacramento v. Lewis, 523 U.S. 833, 861 (1998) (Scalia, J., concurring) ("[T]oday's opinion resuscitates the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity, th' ol' 'shocks-the-conscience' test. According to today's opinion, [the 'shocks-the-conscience' test] is the *measure* of arbitrariness when what is at issue is executive, rather than legislative, action."); Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process

limited the "shock the conscience" substantive due process standard to only those instances where no other more-specific constitutional provision governed the issue.[84] The Court also limited the doctrine to non-negligent actions of a government official,[85] finding that the Due Process Clause was intended to secure an individual from an abuse of power by government officials rather than from mere lack of care or negligence.[86] Despite this limitation, the Court acknowledged that due process is intended to protect the individual against arbitrary governmental action and that "by barring certain governmental actions regardless of the fairness of the procedures used to implement them . . . [due process] serves to prevent governmental power from being 'used for the purposes of oppression.'"[87] Finally, the Court created a distinction between executive and legislative action in the context of substantive due process.[88] Specifically, the Court acknowledged that executive abuse of power is cognizable when the action "shocks the conscience of the court," but found that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"[89] The Court continues to adhere to the "shock the conscience" standard as a way to ensure a limitation on arbitrary or oppressive governmental conduct.[90]

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because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.") (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225-26 (1985) (stating that judges who review the substance of a genuinely academic decision "should show great respect for the faculty's professional judgment")).

84. Graham v. Connor, 490 U.S. 386, 395 (1989) (holding that because the Fourth Amendment provides explicit "textual source of constitutional protection against [the conduct at issue], that Amendment, not the more generalized notions of 'substantive due process,' must be the guide for analyzing these claims").

85. *Daniels*, 474 U.S. at 335-36; *see also Collins*, 503 U.S. at 130 (affirming the *Daniels* holding by barring a substantive due process claim on the basis of a city's failure to provide adequate training for its employees).

86. *Daniels*, 474 U.S. at 332 (finding that the action of prison custodians who left a pillow on the stairs that led to injury is far from an example of government abuse of power).

87. *Id.* (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 277 (1856)).

88. *Lewis*, 523 U.S. at 846-49.

89. *Id.* at 846 (citing *Collins*, 503 U.S. at 129) (explaining that "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue"). In the context of executive action "only the most egregious official conduct can be said to be arbitrary in the constitutional case." *Id.* The court acknowledges the cognizable level of executive abuse of power as that which shocks the conscience. However, the court elaborates on the test by explaining that in determining whether an executive action is egregious enough to shock the conscience, courts may consider "a history of liberty protection," "traditional executive behavior," "contemporary practice," and "standards generally applied to them." *Id.* at 847-48 n.8.

90. *See* United States v. Salerno, 481 U.S. 739, 746 (1987) (acknowledging that the

The precise scope of protection against arbitrary action afforded by the substantive Due Process Clause is a subject of much debate.[91] Some courts and scholars construe the substantive Due Process Clause protection against arbitrary governmental action broadly.[92] For example, in *Poe v. Ullman*, Justice Harlan reasoned that substantive due process protections included a "freedom from all substantial arbitrary impositions and purposeless restraints," regardless of whether the imposition abridged a specific express constitutional right.[93] Likewise, in *Hurtado v. California*, the Court, ruling on a criminal defendant's right to a grand jury indictment, held that the substantive Due Process Clause should be construed as an evolving concept under which arbitrary action by the government is impermissible.[94]

Some scholars also view the substantive Due Process Clause as including broad protection against arbitrary governmental action. Professor Richard Fallon explains that "[i]n its commonest form,

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Due Process Clause protects against governmental action that "shocks the conscience").

91. Some commentators refer to the substantive Due Process Clause as a doctrine that "subsists in confusion." *See* Fallon, *supra* note 33, at 309. Others note the "uncertainty and subjectivity of the Court's constitutional analysis of substantive due process." Tepker, *supra* note 25, at 205. Judge Posner states that substantive due process "stinks in the nostrils of modern liberals and modern conservatives alike, because of its association with Dred Scott's case and with Lochner and the other freedom of contract cases, because of its formlessness, . . . and because it makes a poor match with the right to notice and hearing that is the procedural content of the clause." RICHARD A. POSNER, OVERCOMING LAW 179-80 (1995).

92. *See* Fallon, *supra* note 33, at 310 ("Substantive due process doctrine reflects the simple but far-reaching principle . . . that government [action] cannot be arbitrary . . . and there must be a 'rational' or reasonable relationship between [the] government's end and its means."); *Daniels*, 474 U.S. at 331 (stating that the "touchstone of due process is protection of the individual against arbitrary action of government . . . by barring certain governmental actions regardless of the fairness of the procedures used to implement them, [due process], serves to prevent governmental power from being 'used for the purposes of oppression'").

93. 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). Justice Harlan further noted:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgement must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Id.

94. 110 U.S. 516, 530-31, 536, 538 (1884).

substantive due process doctrine reflects the simple but far-reaching principle—also embodied in the Equal Protection Clause—that government cannot be arbitrary."[95] He finds that the overwhelming task of giving content to this basic principle of non-arbitrariness has resulted in a series of avoidance techniques by the Supreme Court.[96] Thus, he argues, the Due Process Clause is more complex than it might appear on the surface and that the doctrine is not susceptible to a basic set of principles or clearly applicable categories.[97] Rather, substantive due process adjudication:

> occurs along a continuum . . . [that] is marked less by interests varying in their fundamentality than by judicial precedents and by what the Supreme Court takes to be widely shared intuitions or principles that impose duties on government and define standards of reasonableness that constrain governmental pursuit even of acceptable goals.[98]

In contrast, other courts and scholars view the substantive Due Process Clause as much more limited in scope, protecting against arbitrary action only when certain fundamental liberty interests are at issue. Adherents of this more limited view of the substantive Due Process Clause argue that when claiming an arbitrary deprivation of a non-fundamental liberty interest, substantive due process does not provide protection and individuals must instead look to the Equal Protection Clause as the available source of protection.[99] For example, Justice Black expressly disagreed with Justice Harlan's view that the substantive Due Process Clause proscribes all arbitrary governmental action, instead advocating that protections do not extend beyond the specific provisions set forth in the Bill of Rights.[100] This more limited view of the protections afforded by the substantive Due Process Clause has been adopted recently by Justice Scalia in his concurrence in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, in which he argues that only those arbitrary and capricious governmental actions that impact a "fundamental liberty

95. Fallon, *supra* note 33, at 310. Fallon notes that substantive due process's "animating commitment can be expressed only in terms that are duly open ended. But that commitment is captured by perhaps the most persistently recurring theme in due process cases: government must not be arbitrary." *Id.* at 322-23.

96. *Id.* at 310, 339-40.

97. *Id.* at 322-23.

98. *Id.* at 323.

99. *See, e.g.*, City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 200-01 (2003) (Scalia, J., concurring).

100. *Compare* Griswold v. Connecticut, 381 U.S. 479, 509-10 (1965) (Black, J., dissenting), *with id.* at 499-500 (Harlan, J., concurring in judgment); *see also* Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

interest" will be subject to substantive due process limitations.[101]

Whether one agrees with the broader or the more narrow construction of the substantive component of the Due Process Clause's limitations on arbitrary governmental action, in those instances where the limitations are applied, courts have expressed common underlying concerns. Specifically, limits on arbitrary governmental action in the substantive due process context exist to ensure that there is a rational relationship between the government's ends and its means. This requirement of rationality ensures that government does not create arbitrary laws and protects against arbitrary, unfair and oppressive governmental conduct. Within the substantive due process context, these arbitrariness limitations ensure a rational and fair system of governance.

b. The Vagueness Doctrine

Vagueness doctrine requires laws to be clear, specific and legally fixed. The clarity requirement mandates that laws provide people of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited.[102] It is rooted in concepts of predictability and fairness that allow individuals to conform their behavior to a known set of rules. Vagueness doctrine also requires that laws be specific enough to avoid arbitrary or discriminatory enforcement.[103] This specificity mandate is predicated upon notions of equality and fairness since, without standards in place, enforcement officials must

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101. *City of Cuyahoga Falls*, 538 U.S. at 200-01 (Scalia, J., concurring). Justice Scalia states:

> It would be absurd to think that all 'arbitrary and capricious' governmental action violates substantive due process—even, for example, the arbitrary and capricious cancellation of a public employee's parking privileges. The judicially created substantive component of the Due Process Clause protects, we have said, certain 'fundamental liberty interests' from deprivation by the government, unless the infringement is narrowly tailored to serve a compelling state interest. (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). Freedom from delay in receiving a building permit is not among these 'fundamental liberty interests.' To the contrary, the Takings Clause allows government *confiscation* of private property so long as it is taken for a public use and just compensation is paid; mere *regulation* of land use need not be 'narrowly tailored' to effectuate a compelling state interest.' Those who claim 'arbitrary' deprivations of nonfundamental liberty interests must look to the Equal Protection Clause, and *Graham v. Connor*, 490 U.S. 386, 395, (1989) (parallel citation omitted), precludes the use of 'substantive due process' analysis when a more specific constitutional provision governs.

Id.

102. Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . .").

103. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

utilize subjective notions of what is proscribed or permissible conduct.[104] Finally, the requirement that government officials be guided by legally fixed standards[105] ensures reviewability of governmental action.

The vagueness doctrine developed during the early twentieth century while courts addressed the growth of the administrative state in the context of economic regulation.[106] The early judicial emphasis on economic regulation shifted with emerging legislative periods. Currently, the degree of vagueness permitted within a regulation varies depending upon the nature of the enactment at issue, the nature of the governmental interest, the feasibility of more precision, and whether uncertainty affects the fact of actual liability or simply the grade of liability.[107] In *Village of Hoffman Estates*, the Supreme Court identified specific areas in which vagueness

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104. *Id.*

105. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (reasoning that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that the public is uncertain as to the conduct it prohibits or judges and jurors are free to decide cases without any legally fixed standards). *See also* Baggett v. Bullitt, 377 U.S. 360 (1964) (invalidating a statute requiring teachers and state employees to take loyalty oaths as a condition of employment); *Giaccio*, 382 U.S. at 400-02 (invalidating statute permitting a jury to impose court costs upon a defendant who was tried and found not guilty of a misdemeanor).

106. *See, e.g.*, Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 242-43 (1932) (modifying an Oklahoma regulatory scheme dealing with extraction of natural resources); Smith v. Cahoon, 283 U.S. 553, 564-65 (1931) (dealing with a statute regulating public transport companies); Cline v. Frink Dairy Co., 274 U.S. 445, 465-66 (1927) (enjoining enforcement of a Colorado anti-trust law as unconstitutionally vague); Connally v. Gen. Constr. Co., 269 U.S. 385, 388, 395 (1926) (striking down a minimum wage law as void-for-vagueness where the law required "not less than the current rate . . . per diem" to be paid); A. B. Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 238-39 (1925) (finding that an act governing the sale of sugar was unconstitutionally vague because it was so indefinite that no one could ascertain the prohibited activity); United States v. L. Cohen Grocery Co., 255 U.S. 81, 89-91 (1921) (invalidating an anti-trust act as unconstitutionally vague), and companion cases; Am. Seeding Mach. Co. v. Kentucky, 236 U.S. 660, 661-62 (1915) (voiding a conviction under a state anti-trust law where it was uncertain as to what a price would have been in the absence of the trust); Malone v. Kentucky, 234 U.S. 639, 639 (1914) (voiding a conviction under an anti-trust law on the grounds the law was unconstitutionally vague); Collins v. Kentucky, 234 U.S. 634, 637-38 (1914) (voiding a conviction under anti-trust law because it was unconstitutionally vague); Int'l Harvester Co. of Am. v. Kentucky, 234 U.S. 216, 223-24 (1914) (voiding a conviction on the grounds that the statute was unconstitutionally vague).

107. John Calvin Jeffries, Jr., *Legality, Vagueness, and The Construction of Penal Statutes*, 71 VA. L. REV. 189, 196 (1985) (explaining that determining what is permissible as compared to impermissible indeterminacy is a difficult issue). As Justice Frankfurter said, "unconstitutional indefiniteness 'is itself an indefinite concept.'" *Id.* (citing Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting)).

standards can vary - economic regulation, civil and criminal penalties, and constitutionally protected rights.[108] When a regulation is economic, the law simply requires fair warning of what is proscribed conduct.[109] Enactments involving civil penalties are provided somewhat less leeway than economic regulations but more leeway than criminal penalties where the most stringent vagueness test is applied.[110]

While most courts and scholars agree that the prohibition against vagueness stems from the Due Process Clause,[111] some scholars have argued that the development of the vagueness doctrine in federal law has non-constitutional roots in the common law.[112] This claim arises from early findings by some courts that the common law mandated that statutes too uncertain to be applied would not be enforced.[113] Other courts have likewise found protections against arbitrary or vague laws in constitutional provisions outside the Due Process Clause. For example, court decisions from the turn of the twentieth century found constitutional prohibitions against vagueness arising out of the separation of

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108. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982) (explaining that for cases involving economic regulation the law simply requires fair warning of what is proscribed. In the context of civil and criminal penalties, the court finds that more exacting standards are required given the greater consequences that accompany imprecision. Finally, in the area of constitutionally protected rights, such as freedom of speech, the court applies a more stringent vagueness test).

109. *Id.* at 498.

110. *Id.* at 498-99.

111. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 588 (1998) ("Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards.") (citing NAACP v. Button, 371 U.S. 415, 432-433 (1963)); Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966) (holding that a statute authorizing the imposition of the costs of prosecution on a defendant acquitted of a misdemeanor charge violates due process because of vagueness and absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory imposition of costs). In the First Amendment context, the protections against vague statutes emanate from the First Amendment to the U.S. Constitution. *See infra* notes 221-28 and accompanying text.

112. Ralph W. Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831, 831 (1923).

113. *See id.*; Note, *Void for Vagueness: An Escape from Statutory Interpretation*, 23 IND. L.J. 272, 283 (1948). Some early cases that found vagueness problems with general criminal laws did not refer to any particular constitutional provision in their analysis. *See, e.g.*, United States v. Evans, 333 U.S. 483 (1948) (holding that where Congress had not attached a defined penalty to a criminal law, the Supreme Court would not do so either); United States v. Brewer, 139 U.S. 278, 288 (1891) (dismissing an indictment as invalid where the underlying statute failed to plainly and unmistakably describe the prohibited conduct); Tozer v. United States, 52 F. 917 (C.C.E.D. Mo. 1892) (invalidating a portion of the Interstate Commerce Act as indefinite and uncertain).

powers doctrine,[114] as well as the Sixth Amendment.[115] Some scholars note that the second prong of the vagueness standard, namely fair enforcement, functions as a *de facto* equal protection guarantee.[116] Other scholars, however, note that the use of the vagueness doctrine to prohibit arbitrary enforcement of laws is misplaced since both vague and specific laws alike are subject to improper enforcement.[117]

No matter its source or the varying standard applied, judicial concerns about arbitrariness still exist. Under modern vagueness jurisprudence, these judicial concerns arise in several contexts and impose various limitations. Overall, the doctrine promotes specific rules in order to create a predictable system in which individuals can conform their behavior, enforcement officials can equally and fairly apply the laws, and courts can effectively review governmental action.[118]

c. Punitive Damages

Though recognized only recently,[119] constitutional limitations on

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114. *See, e.g.*, James v. Bowman, 190 U.S. 127 (1903); United States v. Reese, 92 U.S. 214, 221-22 (1876).

115. Yu Cong Eng v. Trinidad, 271 U.S. 500, 518 (1926); United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921) (reasoning that a vague law denied the accused the right to be informed of the nature and cause of the accusation).

116. *See, e.g.*, Kim Strosnider, *Anti-Gang Ordinances after* City of Chicago v. Morales: *The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 101 (2002) (arguing that the second prong of the vagueness standard functions as a *de facto* equal protection guarantee); Jeffries, *supra* note 107, at 236 (arguing that the vagueness doctrine serves some equal protection purpose).

117. *See, e.g.*, Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 UTAH L. REV. 381, 389 n. 32 ("While arbitrary and discriminatory enforcement is certainly undesireable, it is not at all a harm unique to vague laws.").

118. In utilizing the vagueness doctrine to police arbitrary and selective enforcement of the laws, the doctrine can be said to promote rule-of-law values. *See, e.g.*, Mark L. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 221-24 (1967) (dealing with the problem of discriminatory and arbitrary enforcement); Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956) (describing administration of the vagrancy law in Philadelphia); Jeffries, *supra* note 107, at 215 (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972), for the notion that the standardless vagrancy law permits and encourages an arbitrary and discriminatory enforcement of the law, Jeffries notes that the vagueness doctrine reinforces the rule of law); Strosnider, *supra* note 116, at 116-18.

119. In fact, in 1989, the United States Supreme Court held that neither the Excessive Fines Clause of the Eighth Amendment nor federal common law circumscribed awards of punitive damages in civil cases between private parties. Browing-Ferris Indus. of Vt. Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276-77 (1989) (determining that the claim of excessiveness under the Due Process Clause of the

the award of punitive damages also emanate from the Due Process Clause.[120] The Court found that when a punitive damage award is grossly excessive, "it furthers no legitimate purpose and constitutes an arbitrary deprivation of property."[121] Typically, punitive damages further the legitimate interest of "punishing unlawful conduct and deterring its repetition."[122] However, once the award is grossly excessive it is considered arbitrary and a violation of due process.[123]

Fourteenth Amendment had not been raised in either the District Court or the Court of Appeals and therefore was not considered by the Court). In 1991, the United States Supreme Court first suggested that due process could guard against unreasonable punitive damages in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). Despite this suggestion, the Court in *Pacific Mutual Life Insurance* upheld the punitive damage award that exceeded four times the amount of compensatory damages. *Id.* And, two years later the Court upheld as constitutional a punitive damage award which was five hundred and twenty-six times greater than the actual damages awarded by the jury. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993). It was not until 1996 that the Supreme Court first invalidated a punitive damage award on constitutional grounds. BMW of N. Am. Inc. v. Gore, 517 U.S. 559 (1996). Again, as recently as this term, the Court affirmed the factors set forth in *BMW* and invalidated another punitive damage award as a violation of due process in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

120. *Campbell*, 538 U.S. at 416 ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."). While due process is the most successful current constitutional limitation, parties who have suffered large punitive damage awards have numerous other constitutional challenges. For a discussion of various constitutional challenges to punitive damages, see Michael J. Pepek, Case Note, TXO v. Alliance: *Due Process Limits and Introducing a Defendant's Wealth When Determining Punitive Damages Awards*, 25 PAC. L.J. 1191, 1200 n.64 (1994) (describing various constitutional challenges based on the First Amendment, Confrontation, Self Incrimination, Double Jeopardy, Excessive Fines and Cruel and Unusual Punishment Clauses). *See also* Janice Kemp, *The Continuing Appeal of Punitive Damages: An Analysis of Constitutional and Other Challenges to Punitive Damages Post-*Haslip *and* Moriel, 26 TEX. TECH L. REV. 1, 46-58 (1995) (discussing a variety of constitutional challenges to punitive damages including due process, Eighth Amendment excessive fines provision, equal protection, First Amendment, supremacy clause, double jeopardy, separation of powers, commerce clause and impairment of contracts).

121. *Campbell*, 538 U.S. at 417 (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (O'Connor, J., dissenting)) ("Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category.")).

122. *BMW*, 517 U.S. at 568.

123. *Id.*; *see also* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433 (2001) ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitutional imposes substantive limits on that discretion."); *Campbell*, 538 U.S. at 417-18 (finding that grossly excessive or arbitrary punishments are prohibited by due process).

At the root of an analysis of punitive damage awards[124] are concerns about arbitrariness, fairness and predictability. Constitutional limitations promote predictability by requiring notice of the prohibited conduct as well as the severity of the potential punishment.[125] Constitutional limitations also constrain inconsistent sanctions and limit indiscriminate decision-making by juries.[126] Unlike criminal penalties where defendants are afforded a host of protections, civil punitive damage penalties lack significant protections.[127] Without some protections, juries that have wide discretion and are susceptible to bias might indiscriminately award punitive damages.[128]

At the crux of the limitations on punitive damages is the constitutional requisite of avoiding awards that are so grossly excessive as to be either per se arbitrary or amount to an arbitrary deprivation of property. The underlying concern is that without a constitutional floor, individuals will be unable to conform their behavior and jury awards will be irrationally excessive and inconsistent. In order to accomplish this result, courts attempt to monitor the most irrational, arbitrary and inconsistent results and

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124. The due process limits recognized in these cases are both procedural and substantive. *See Campbell*, 538 U.S. at 416 ("While states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards."). However, it is often difficult to discern which due process protection the court is applying. *See Campbell*, 538 U.S. at 437-38 (Ginsburg, J., dissenting) (explaining that, despite the majority's lack of clarity, substantive due process was the basis of the decision).

125. *See Campbell*, 538 U.S. at 417 ("The reason is that 'elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.'"); *see also BMW*, 517 U.S. at 587 (Breyer, J., concurring) ("This constitutional concern, itself harkening back to the Magna Charta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion.").

126. *See Haslip*, 499 U.S. at 59 (O'Connor, J., dissenting) ("[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process of the law in general is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim."). For an empirical analysis of how juries award punitive damages with a conclusion that the determinations are arbitrary, see CASS SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2003) (synthesizing numerous scholarly research articles which use empirical investigation to explore the apparent irrationality of punitive damages, Professor Sunstein and his colleagues determine that juries make the kind of common-sense judgments most of us would make in similar circumstances, and these common-sense judgments result in awards that are arbitrary and in some respects perverse).

127. *Campbell*, 538 U.S. at 418.

128. *Id.*

thereby promote the system's fairness and predictability.

d. Choice of Law

Since the mid-1930s courts have expressly acknowledged that constitutional principles may permit application of the law of more than one state.[129] To resolve potential conflicts, courts analyze the contacts of the state whose law is being applied to the parties and transaction or occurrence that gives rise to the litigation.[130] If no significant contact or aggregation of contacts exist between the state and the parties or subject giving rise to the litigation, then the application of that state's law is unconstitutional.[131] Without these significant contacts between the state and the parties or subject of the litigation, courts reason, there is not a sufficient state interest to permit its law to resolve the dispute and application of the state's laws would be arbitrary or unfair.[132] Once the constitutional question is resolved, the rules for choosing between the conflicting state laws are determined by state law.[133]

The doctrine of choice of laws emanates from the Due Process Clause of the Fourteenth Amendment[134] and the Full Faith and Credit Clause.[135] Under current jurisprudence, courts do not

129. *See Alaska* Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 544-50 (1935); *see also* Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 72-73 (1954).

130. The analysis is often referred to as two-pronged, which includes both federal constitutional and state law components. This two-pronged analysis can cause some terminological problems. One commentator has distinguished the two prongs by reference to legislative jurisdiction and adjudicative jurisdiction. Under this analysis, when application of a particular state's law in a multi-state case meets federal constitutional requirements, that state has legislative jurisdiction. Assuming that two or more states have legislative jurisdiction, the term choice of law can be utilized for the purely state-law problem of resolving conflicts between the local laws of these states. *See* Terry S. Kogan, *Toward A Jurisprudence Of Choice Of Law: The Priority Of Fairness Over Comity*, 62 N.Y.U. L. REV. 651 (1987). Adjudicative jurisdiction (or judicial jurisdiction or personal jurisdiction or territorial jurisdiction) refers to the power of a state to try a case in its courts. *See* Harold Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 781-86, 807 (1983) (describing relationship between state law inquiry and constitutional inquiry); Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587 (1978).

131. Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981).

132. *Id.* In practice however, courts have only infrequently invalidated a law on constitutional choice of law grounds. Kogan, *supra* note 130, at 654. *Phillips Petroleum Co. v. Shutts*, 427 U.S. 797 (1985), was the first case in thirty-eight years in which "the Court struck down a state court's choice-of-law decision." Kogan, *supra* note 130, at 654.

133. *See Allstate*, 449 U.S. at 308; *Alaska Packers Ass'n*, 294 U.S. at 542.

134. Kogan, *supra* note 130, at 653-54. The Amendment reads, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

135. Kogan, *supra* note 130, at 653-54. The Article reads, "Full Faith and Credit

emphasize the independent impact each of these doctrines has on a choice of law question[136] but instead rely upon the application of both doctrines together, implying that they are perhaps indistinguishable for purposes of choice of law analysis.[137]

There are two broad concerns underlying choice of law doctrine: comity and fairness.[138] While courts address issues of comity by attempting to account for the competing policy choices of states within a federal system, the fairness concern emanates from concepts of non-arbitrariness. Specifically, courts analyze the contacts that exist between the parties and the transaction or occurrence that gives rise to the litigation to ensure that the law being applied is not arbitrary or unfair.[139] By ensuring that there is no arbitrary

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shall be given in each State to the public Acts, Records, and judicial Proceedings of very other State." U.S. CONST. art. IV, § 1

136. *See* Kogan, *supra* note 130, at 654 (explaining that the courts are not clear on how each of these independently impact the analysis in the choice of law context).

137. *See id.* at 654 (citing *Allstate*, 449 U.S. at 308 n.10 (Brennan, J., plurality)). Many scholars and commentators have resigned themselves to the rather indistinguishable nature of the due process and full faith and credit clauses in the choice of law question, and have simply acknowledged that the two clauses together are utilized to address the concerns raised by choice of law questions. *See id.* at 654 n.11.

138. Russel J. Weintraub's *Due Process and Full Faith and Credit Limitations on a State's Choice of Law* was one of the earliest articulations of the two concerns as 'goals' in designing choice-of-law rules. 44 IOWA L. REV. 449, 449-50 (1959). *See also* McCluney v. Joseph Schlitz Brewing Co., 649 F.2d 578, 582 (8th Cir. 1981) (characterizing as traditional concerns "preventing unfairness to the parties and promoting healthier interstate relations"), *aff'd mem.*, 454 U.S. 1071 (1981); LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 274 (The Michie Co. 1986) (identifying "fairness to the protesting litigant and the interests (or lack of interests) of the forum"); EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 3.26, at 95 (West Publ'g Co. 1982) (discussing "the extent of the court's territorial power and the fairness of the exercise of that power"); James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 879-83 (1980) (discussing fairness and interstate relations); Reese, *supra* note 130, at 1594-607 (identifying "fairness" and "interstate and international values" as the considerations); Willis L.M. Reese, *The Hague Case: An Opportunity Lost*, 10 HOFSTRA L. REV. 195 (1981) [hereinafter Reese, *Hague*] ("[A]ll members of the Court agreed that there are constitutional limitations on choice of law and that two values are involved in determining the scope of these limitations. One of the values is fairness to the litigants, and the other is concerned with the needs of the federal system . . . .").

139. *Allstate*, 449 U.S. at 308 ("In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.") (citation omitted); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818-19 (1985) ("[F]or a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."). *See also* Am. Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County, 221

application of state law to a particular conflict, the choice of law doctrine creates a fair and predictable system. In this way, choice of law doctrine promotes predictability by upholding the parties' expectations regarding application of state law. Additionally, the application of state law is governed by a rational relation between the state law and the parties to the conflict. In the absence of connection to a particular state, no fair way would exist to determine which state's laws apply to a particular conflict. Thus, limitations in the choice of law context are focused on creating a system that leads to predictability and fairness.

2. The Nondelegation Doctrine

The nondelegation doctrine, which provides limits on Congress's ability to allocate its legislative powers to other branches of government, emanates from Article I of the U.S. Constitution[140] and serves separation of power principles.[141] One of the basic purposes of the doctrine is to prevent arbitrary decision-making by unelected and unresponsive administrative agents of government.[142] As such, the

F.3d 1211, 1216 (11th Cir. 2000); Hamilton v. Accu-Tek, 47 F. Supp.2d 330, 335 (E.D.N.Y. 1999); Diehl v. Ogorewac, 836 F. Supp. 88, 92 (E.D.N.Y. 1993); Wert v. McDonnell Douglas Corp., 634 F. Supp 401, 404-05 (E.D. Mo. 1986).

140. J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1514 n.211 (2003) ("The nondelegation doctrine, which is derived from Article I, Section 7 and the Due Process Clause, forbids Congress from delegating legislative decisions to agencies."); Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L. J. 1399, 1416-17 (2000) ("The Court traditionally has understood the nondelegation doctrine to flow primarily from Article I or the separation-of-powers principle."). But there are some scholars who argue that the nondelegation doctrine also derives from the Due Process Clause. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1553 (1991) (connecting the nondelegation doctrine to due process); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 733 (1969) (noting that the doctrine may become a facet of due process, or may in the long term shift from a constitutional to a common-law base).

141. The Federalists papers recognized that separation of powers was designed to police arbitrary action. THE FEDERALIST NO. 47, at 337 (James Madison) ("'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control . . . .'") (quoting Montesquieu). *See also* Bressman, *supra* note 140, at 1406-08 (suggesting that broad delegation reinforces democracy because it promotes accountability and public participation); Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 479 n.105 (1989) (identifying that the Supreme Court and commentators attribute the nondelegation doctrine to separation of powers).

142. Darren Summerville, Note, *The Nondelegation Doctrine After* Whitman v. American Trucking Assoc.*: Constitutional Precedent Breathes a Sigh of Relief*, 18 GA. ST. U. L. REV. 627, 636 (2001) ("Like the admittedly lofty goals elucidated in classic nondelegation decisions, the new mode of delegation analysis had a baseline assumption that arbitrary decisionmaking by unelected and unresponsive government

limitations created by the nondelegation doctrine are designed to ensure that unelected administrative agents cannot take action without properly promulgated standards.[143] In the absence of such limitations, the potential for arbitrary decision-making by unaccountable officials is impermissibly heightened.[144]

Underlying the nondelegation limitations are concerns about accountability, reviewability, predictability and equality. The doctrine promotes accountability by ensuring that laws are made by the legislative branch of government[145] and by prohibiting delegations of legislative authority to another branch of government.[146] However, recognizing that government cannot function without some delegation, courts permit delegation where it is accompanied and governed by "intelligible principles."[147] This doctrinal limitation promotes accountability and transparency by requiring that only those subject to political ramifications make laws, thus, allowing the public a political response.[148]

Nondelegation constraints also encourage reviewability by requiring that the legislative branch provide "intelligible principles"

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members should be avoided.").

143. *See generally* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993) (noting that the administrative bureaucracy presents a potential for arbitrariness: it is a decisionmaker without accountability).

144. *Id.*

145. Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part); United States v. Robel, 389 U.S. 258, 276 (1967) (Brennan, J., concurring in result).

146. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) ("The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested.").

147. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406, 409 (1928) ("In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination . . . . So long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."). Once an administrative standard is properly promulgated, it is functionally no different than if Congress had legislated the standard. Bressman, *supra* note 140, at 1416 ("[A]dministrative limiting standards, once promulgated, function no differently than if Congress had written them into the original statute—that is, they bind agencies in implementing the statutory provision to which they apply. In this way, the standards serve to limit administrative discretion and prevent arbitrary administrative decisionmaking."); Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370, 389 (1932) (finding that agencies must follow their own rules until they are properly changed).

148. Mark Seidenfeld & Jim Rossi, *The False Promise of the "New" Nondelegation Doctrine*, 76 NOTRE DAME L. REV. 1, 5 (2000) (noting that in promoting accountability, the nondelegation doctrine also serves rule of law values).

against which courts are able to review agency action.[149] This nondelegation constraint minimizes arbitrary decision-making by agencies and enhances the likelihood of meaningful judicial review.[150]

Concerns of predictability and equality are addressed by the limitations created by the nondelegation doctrine[151] and serve to further "rule-of-law" values which limit arbitrary decision-making by administrative officials.[152] As Professor Jerry Mashaw has stated:

> A consistent strain of our constitutional politics asserts that legitimacy flows from 'the rule of law.' By that is meant a system of objective and accessible commands, law which can be seen to flow from collective agreement rather than from the exercise of discretion or preference by those persons who happen to be in positions of authority. By reducing discretion, and thereby the possibility for the exercise of the individual preferences of officials, specific rules reinforce the rule of law.[153]

These "rule-of-law" values reduce uncertainty[154] and encourage predictability by making the laws known to the public so individuals

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149. Arizona v. California, 373 U.S. at 626 (Harlan, J., dissenting in part); Am. Power & Light Co. v. SEC, 325 U.S. 385, 389 (1945).

150. Am. Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) (per curiam); Seidenfeld & Rossi, *supra* note 148, at 4 ("In his opinion, Judge Williams notes that such ex ante constraints are normatively desirable because they minimize arbitrary decisionmaking by the agency, enhance the likelihood of meaningful judicial review, and help to assure that government is responsive to the popular will.").

151. *See* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 337 (1999) ("The nondelegation doctrine . . . promotes rule-of-law values."); *id.* at 350 ("While constrained administrative discretion [under the new nondelegation doctrine] does not mean congressional lawmaking, it does tend to promote predictability, consistency, and visibility in law, and to ensure against ad hoc discretion by administrators, discretion that might be exercised arbitrarily."). *See also* Clinton v. City of New York, 524 U.S. 417, 448 (1998) (invalidating the Line Item Veto Act as a violation of the constitutional requirements of bicameralism and presentment); Loving v. United States, 517 U.S. 748, 768 (1996) (holding that there is no rule preventing Congress from delegating authority to define criminal conduct, so long as Congress recognizes the conduct as a criminal offense); Mistretta v. United States, 488 U.S. 361, 372 (1989) (finding that so long as Congress sets out an intelligible principle to direct the conduct of a delegated authority, such delegation is not a forbidden legislative action).

152. The "new delegation doctrine" also promotes rule of law values which are designed in part to prevent arbitrary decision-making by administrative officials. *See* Bressman, *supra* note 140, 1424-27 (2000) (arguing that the "new delegation doctrine" promotes rule of law values); Sunstein, *supra* note 151, at 337 (stating that, "[t]he nondelegation doctrine also promotes rule-of-law values").

153. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 138-39 (1997).

154. Seidenfeld & Rossi, *supra* note 148, at 5 n.19 ("If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist.") (citing H.L.A. HART, THE CONCEPT OF LAW 121 (1961)).

can plan their conduct accordingly.[155] Nondelegation limitations, and "rule-of-law values," also promote concepts of consistency by ensuring equal application of the law to similarly situated individuals as opposed to arbitrary treatment of the disfavored minority.[156] These equitable considerations are served by cabining discretionary governmental authority and reducing arbitrary or capricious decision-making.[157] Thus, limitations on delegation and "rule-of-law" values promote predictability and equality which, in turn, protects against the arbitrary discretion of administrators.[158]

While nondelegation principles were articulated by the Court as early as 1825,[159] the use of the doctrine to invalidate governmental action has been very limited.[160] It was not until 1935 that the Supreme Court, in two cases, invalidated congressional delegations on the grounds that the delegations were too broad and provided no standards to guide the executive officials implementing the statutes.[161] Since that time, the Supreme Court has upheld all broad delegations that have been challenged under the nondelegation doctrine.[162]

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155. Sunstein, *supra* note 151, at 337 (finding that the nondelegation doctrine promotes rule-of-law values "by promoting planning by ordinary people subject to law, by giving them a sense of what is permitted and what is forbidden").

156. Seidenfeld & Rossi, *supra* note 148, at 5.

157. Sunstein, *supra* note 151, at 337.

158. *See id.* at 337, 350.

159. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825) (finding that Congress must be permitted to delegate to others at least some authority it could exercise itself); Hampton & Co. v. United States, 276 U.S. 394, 409 (1928) (setting forth the "intelligible principal" standard and upholding delegation to the Executive Branch to revise tariff duties).

160. *See* DeShazo & Freeman, *supra* note 140, at 1459 n.53 (setting out the history of the nondelegation doctrine); David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223 (1985) (explaining the historical challenges to the nondelegation doctrine).

161. Carter v. Carter Coal Co., 298 U.S. 238, 310-12 (1936) (invalidating parts of the Bituminous Coal Conservation Act as an unconstitutional delegation of legislative power to large coal producers); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935) (invalidating the National Industrial Recovery Act provision that allowed trade association and industry groups to establish codes of fair competition as an unconstitutional delegation of power); Panama Refining Co v. Ryan, 293 U.S. 388, 421 (1935) (invalidating a provision of the National Industrial Recovery Act relating to the interstate shipment of oil because Congress provided no policy, standards, or rules to guide the President's discretion in issuing regulations under the statute).

162. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472-76 (2001) (upholding a provision of the Clean Air Act requiring the EPA to promulgate ambient air quality standards); Lichter v. United States, 334 U.S. 742, 785-86 (1948) (upholding delegation of authority to determine excessive profits); Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) (upholding delegation to the SEC to prevent unfair

Given the doctrinal development of the nondelegation doctrine and ongoing concerns about arbitrary governmental action, scholars have debated the doctrine's usefulness and offered varying proposals for reform.[163] As early as 1969, concerns were raised about arbitrary governmental action and the shortcomings of the nondelegation doctrine in addressing these concerns.[164] Professor Kenneth Culp Davis argued that the nondelegation doctrine failed to prevent the

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distribution of voting power); Yakus v. United States, 321 U.S. 414, 426 (1944) (upholding delegation involving commodity prices under the Emergency Price Control Act of 1942); Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 660 (1944) (upholding delegation to Federal Power Commission to determine just and reasonable rates); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225-26 (1943) (upholding delegation to Federal Communications Commission (FCC) to regulate broadcast licensing). There have however been recent decisions in which the congressional delegations of authority have been invalidated on grounds other than nondelegation. *See, e.g.*, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (invalidating the FCC interpretation of a statutory provision as unreasonable under the Chevron test); Clinton v. City of New York, 524 U.S. 417 (1998) (invalidating the Line Item Veto Act as a violation of the constitutional requirements of bicameralism and presentment); Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991) (finding that Congress's conditioning the transfer of the District of Columbia area airports to the local airport authority upon the creation of a review board with control over decisions violated separation of powers); Bowsher v. Synar, 478 U.S. 714 (1986) (finding that Congressional grant of various executive powers to the Comptroller General, an officer removable by Congress, violated separation of powers); INS v. Chadha, 462 U.S. 919 (1983) (finding a plan allowing one house of Congress to veto a determination made by the INS unconstitutional because it violated procedures for lawmaking under Article I); *see also* Sunstein, *supra* note 151, at 330-35 (summarizing the historical development of the nondelegation doctrine).

163. For a summary of various scholarly writings on the nondelegation doctrine, see R. DeShazo & Freeman, *supra* note 140, 1514 n.211. There is vast delegation literature in the law. *See, e.g.*, JOHN H. ELY, DEMOCRACY AND DISTRUST 131-34 (1970) (arguing for a revival of the doctrine); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Davis, *supra* note 140, at 713-15 (arguing that the nondelegation doctrine as originally formulated was insufficient and proposing that administrators themselves confine discretion through the use of standards, principles and rules); Sunstein, *supra* note 151, at 357-59 (arguing that in the modern administrative state, issues of regulation are not best resolved by the nondelegation doctrine but instead through the use of a set of "nondelegation canons" that prevent agencies from acting without clear congressional authority). For a description of two recent opposing views on the relationships between democracy and delegation, see Bressman, *supra* note 140, at 1406-08. The first view, articulated by David Schoenbrod, claims that delegation violates principles of democratic governance by allowing lawmaking by unaccountable bureaucrats. *Id.* at 1406. The second view, represented by Jerry Mashaw and Peter Schuck, claims that delegation reinforces democracy. *Id.* at 1407-08. Mashaw argues this is so because agency lawmaking is subject to Presidential control and the President is more responsive to the public. *Id.* Schuck argues that agency decision-making is more responsive to the public because agencies are accessible to the people and their input at that level is less costly. *Id.*

164. *See, e.g.*, Davis, *supra* note 140.

uncontrolled use of discretionary governmental power[165] and proposed that the doctrine be altered to protect against arbitrary administrative power by shifting the focus on statutory standards to the creation of administrative safeguards and standards.[166] He proposed that this shift include the judicially enforced requirement that administrators structure and confine their administrative power through the creation and application of standards, principles and rules.[167] According to Professor Davis, courts should permit administrative agencies to provide their own standards.[168] Davis' approach briefly appeared to take hold in a series of cases finding that the Due Process Clause requires agencies to supply standards to govern their discretion.[169]

Professor Cass Sunstein argues that there exist far better ways to resolve issues of regulation than through the nondelegation doctrine.[170] In particular, he argues that the proper role of the doctrine is "in statutory construction that imposes floors and ceilings on agency action, and in a set of 'nondelegation canons' that prevent agencies from acting without clear congressional authorization."[171] While he acknowledges that the nondelegation doctrine should be used in the most extreme cases to invalidate open-ended grants of authority to administrative agencies,[172] he advocates that the more effective solution is to utilize the nondelegation canons that he proposes to prevent agencies from acting without congressional authority.[173]

Another scholar, Professor Lisa Schultz Bressman argues the existence of a new delegation doctrine that "requires administrative

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165. *Id.* at 719-22.

166. *Id.* at 725-30 (offering five proposals to alter the doctrine and make it more effective: change the purpose of the doctrine to protect private parties against injustice on account of unnecessary discretionary power; shift from focus on legislative standards to safeguards; if the legislative standards are inadequate then courts should require the administrative agencies to supply the standards; should expand to the creation of safeguards, standards, principles and rules; and should also protect against selective enforcement).

167. *Id.*

168. *Id.* at 728-29

169. *See generally* Ressler v. Pierce, 692 F.2d 1212 (9th Cir. 1982); Jensen v. Adm'r of the FAA, 641 F.2d 797 (9th Cir. 1981); Carey v. Quern, 588 F.2d 230 (7th Cir. 1978); White v. Roughton, 530 F.2d 750 (7th Cir. 1976); Burke v. U.S. Dept. of Justice, D.E.A., 968 F. Supp. 672 (N.D. Ala. 1997); Martinez v. Ibarra, 759 F. Supp 664 (D. Colo. 1991); Baker-Chaput v. Cammett, 406 F. Supp. 1134 (D. N.H. 1976).

170. *See generally* Sunstein, *supra* note 151.

171. *Id.* at 305 (noting the "unmistakable signs of revival" of the nondelegation doctrine).

172. *Id.* at 356.

173. *Id.* at 305-07.

agencies to issue rules containing reasonable limits on their discretion in exchange for broad grants of regulatory authority."[174] She contends that this new doctrine is a more effective way to regulate arbitrary governmental action for a number of reasons including lower transaction costs.[175] Bressman's conception of the delegation doctrine would permit the transfer of lawmaking authority to administrative agencies as long as binding administrative standards exist to restrain agency authority.[176]

In sum, the nondelegation doctrine, in its original and proposed new forms, has as a central purpose to limit arbitrary administrative decision-making. Underlying the doctrine's limitations are concerns about accountability, reviewability, predictability and equality which are addressed by placing limitations on delegations of discretion to agencies, either via "intelligible principles" or through the requirement of agency rules.

3. The Equal Protection Clause

The essence of equal protection doctrine is to encourage that similarly situated individuals not be treated differently.[177] Thus, when the government creates distinctions that are based on arbitrary or irrational purposes, the distinctions offend basic notions of equal protection.[178] Contemporary equal protection analysis emerges from the concept of arbitrariness first articulated in *Yick Wo v. Hopkins*[179] in which the Court stated:

> When we consider the nature and the theory of our institutions of government . . . they do not mean to leave room for the play and action of purely personal and arbitrary power . . . . [T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails . . . .[180]

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174. Bressman, *supra* note 140, at 1415.

175. *Id.* at 1419-22.

176. *Id.* at 1415.

177. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) ("The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person . . . against intentional and arbitrary discrimination.") (citing Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923)); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

178. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 681 (1966) (Harlan, J., dissenting) (stating that the "Equal Protection Clause prevents States from arbitrarily treating people differently under their laws.").

179. 118 U.S. 356 (1886). *See also* J. Michael McGuinness, *The Rising Tide of Equal Protection:* Willowbrook *and the New Non-Arbitrariness Standard*, 11 GEO MASON U. CIV. RTS. L.J. 263, 264 (2001) (stating that "[c]ontemporary equal protection cases evolved from Yick Wo's foundation of non-arbitrariness.").

180. *Yick Wo*, 118 U.S. at 369-70.

Underlying the doctrine are judicial concerns about rationality, equality and fairness. Issues of arbitrary governmental action arise most frequently within the framework of rational basis review, where courts require, at a minimum, that legislative classifications be rationally, not arbitrarily, related to a legitimate government interest and not the product of bias, fear or animus.[181] This requirement of a rational, non-arbitrary, relationship between the government's means and its ends also addresses concerns of fairness and equity by requiring that there exists a permissible non-arbitrary reason for treating similarly situated people differently.

The Equal Protection Clause of the Fourteenth Amendment requires, at a minimum, that a government classification be rationally related to a legitimate government interest.[182] In addition, courts employ a heightened level of scrutiny based upon the historical treatment of certain groups as well as concerns that specific classifications, such as race or gender, typically do not present sound bases for differential treatment.[183] For example, if a fundamental right or suspect class is at issue, courts employ a strict level of scrutiny[184] under which the classification must be necessary to promote a compelling governmental interest.[185] If gender or

181. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-42 (1985).

182. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631-33 (1996); Heller v. Doe, 509 U.S. 312, 319-20 (1993); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988) ("[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review."); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973); Ciechon v. City of Chicago, 686 F.2d 511, 522 (7th Cir. 1982) ("Equal protection demands at a minimum that [government] must apply its laws in a rational and nonarbitrary way."). *See also* RONALD D. ROTUNDA & JOHN E. NOWAK, 2 TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE & PROCEDURE § 14.7 (3d ed. 1999) (explaining that in the absence of fundamental rights or suspect classifications that do not fit under the intermediate level of scrutiny, courts employ rational basis review to determine if the classification rationally related to a legitimate government interest).

183. *City of Cleburne*, 473 U.S. at 440-41 (explaining that classifications based on race, alienage, or national origin are so rarely relevant to legitimate state interests that such classifications should be reviewed under strict scrutiny and that classifications based on gender and illegitimacy also rarely provide reason for differential treatment such classifications are subject to intermediate scrutiny).

184. ROTUNDA & NOWAK, *supra* note 182, § 14.7 (explaining that if a fundamental right or suspect class is at issue, the Court employs strict scrutiny to determine if the legislative classification is necessary to promote a compelling government interest).

185. City of Richmond v. J.A. Crosen Co., 488 U.S. 469, 505-06 (1989) (holding that a city's plan that required prime contractors to subcontract thirty percent of the amount of the contract to "minority business enterprises" did not have a sufficient compelling governmental interest and was not narrowly tailored to remedy the harms caused by past discrimination); Graham v. Richardson, 403 U.S. 365, 372 (1971) (holding that aliens are a good example of a "discrete and insular minority"); Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969) (acknowledging the fundamental right to

illegitimacy is at issue, courts employ an intermediate level of scrutiny[186] under which the classification must bear a substantial relationship to an important governmental interest.[187]

While the Equal Protection Clause has evolved over time,[188] it has been used in various contexts to regulate arbitrary action.[189] For example, the Court recently found that manual recounts ordered by the Florida Supreme Court, without specific standards for implementation, resulted in the "arbitrary and disparate" treatment of voters and thus violated the Equal Protection Clause.[190] In so holding, the Court presupposed the impermissibility of the disparate

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travel even without express textual authorization); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969) (finding that the right to vote provides a foundation for a representative democracy).

186. ROTUNDA & NOWAK, *supra* note 182, § 14.7 (explaining that if gender or illegitimacy is at issue, the Court employs intermediate scrutiny to determine if the legislative classification bears a substantial relationship to an important governmental interest).

187. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (holding that state-supported women-only nursing school that denied enrollment to otherwise qualified males violates the Equal Protection Clause); Craig v. Boren, 429 U.S. 190, 204 (1976) (holding that statistical evidence as to the drunk driving rates among males and females aged eighteen to twenty-one provided insufficient support for gender-based discrimination under an Oklahoma statute); Mathews v. Lucas, 427 U.S. 495, 510, 516 (1976) (upholding denial of benefits to illegitimate children of deceased parents as constitutional based on Congress's failure to presume illegitimate children as dependents who did not live with a parent at the time of death).

188. *See* Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209, 1210 ("The story of the equal protection doctrine's development is well known, from the Fourteenth Amendment's tumultuous adoption during Reconstruction, through its early ineffectiveness in *Plessy v. Ferguson* and its later rise to prominence in the landmark decision *Brown v. Board of Education*, to the recent controversy over use of its Fifth Amendment counterpart to strictly scrutinize affirmative action in *Adarand Constructors, Inc. v. Pena*. Since equal protection's forceful emergence in *Brown*, it has provided the primary constitutional tool to rectify discrimination perpetrated or accommodated by government.") (footnotes omitted).

189. The examples used are not intended to be exhaustive, but instead, merely illustrative of some areas in which the courts regulate arbitrary governmental action.

190. Bush v. Gore, 531 U.S. 98, 104-05 (2000) (finding that the use of standardless manual recounts violates the Equal Protection Clause through its recognition that the Equal Protection Clause requires uniform rules and non-arbitrary treatment). For an earlier example of a voting case in which the Supreme Court found an equal protection violation where irregular weighting systems arbitrarily granted less voting influence based on geographic location, see *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969). In *Moore*, the Court found that the arbitrary formula utilized by the government raised equality concerns by creating a system in which some votes were given more weight than others. *Id.* For other examples in the voting context, see Reynolds v. Sims, 377 U.S. 533, 565-66 (1964); Roman v. Sincock, 377 U.S. 695, 709-10 (1964); Gray v. Sanders, 372 U.S. 368, 379-80 (1963).

treatment of voters.[191] In concluding that without specific uniform standards there could not be equal treatment of voters,[192] the Court found that a fair and equal system would require: adoption of statewide standards; procedures identified to implement the standards; and the opportunity for judicial review of disputed matters.[193]

The Supreme Court's contraception decisions raise similar concerns about equality, fairness and rationality. For example, in *Eisenstadt v. Baird*,[194] the Court found that while states may, in some instances, treat people differently, they cannot do so in a way that is arbitrary.[195] Specifically, the Court reasoned that there must be a rational, non-arbitrary relation between the classification and the purpose of the legislation.[196] Thus, the Court examined the government's two claimed purposes for the law and found that neither proffered purpose was the true purpose.[197] In the absence of a true legitimate purpose for treating individuals differently,[198] the Court found the legislation violated equal protection proscriptions. The Court's analysis evidenced its concern that individuals receive equal treatment as well as a desire to avoid arbitrary governmental action.[199]

Issues of arbitrariness in the equal protection context have also arisen in zoning cases.[200] For example, in *City of Cleburne v.*

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191. *Bush*, 531 U.S. at 105.

192. *Id.* at 106, 109 (expressing concern that not only different counties had different standards, but that standards varied within the same county).

193. *Id.* at 110.

194. 405 U.S. 438 (1972). While some scholars might view *Eisenstadt* as a disguised heightened scrutiny case, the Court did address the classification in terms of arbitrariness. *Id.* at 447.

195. *Id.* at 448-52 (analyzing a statute that distinguished between three classes: married persons who were permitted to obtain contraceptives to prevent pregnancy, but only from a doctor or by prescription; single persons who could not obtain contraception to prevent a pregnancy from anyone; and married or single persons who were permitted to obtain contraceptives to prevent the spread of disease).

196. *Id.* at 447.

197. *Id.* at 448 (examining the state's purported purposes to deter fornication for health concerns).

198. *Id.* at 453 (determining that the unstated purpose of a general prohibition on contraception was impermissible under *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

199. *Id.* at 454 ("'[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.'") (quoting Ry. Express Agency v. New York, 336 U.S. 106, 112-13 (1949)).

200. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 471 n.23 (1985) (holding that mental retardation is not a quasi-suspect classification calling for

Cleburne Living Center, the Court reasoned that in the absence of any rational basis offered for believing that a group home for the "mentally retarded" would pose any special threat to the city's legitimate interests, the governmental decision appeared to rest on an irrational prejudice against "mentally retarded" people and was simply arbitrary.[201] Underlying the Court's analysis was the concern that bias and fear was used as a basis to treat otherwise similarly situated people differently.[202] The Court rejected each of the city's proposed legislative purposes as being based merely on irrational, arbitrary prejudice and thus found a violation of the Equal Protection Clause.[203]

Likewise, in *Village of Willowbrook v. Olech*, the Supreme Court applied the rational basis standard of review and found the government's actions violated the Equal Protection Clause because they were arbitrary and irrational.[204] When the plaintiffs sought to have the municipal government connect their property to a water

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a more exacting standard of judicial review than is normally accorded to economic and social legislation, and that requiring a special use permit for proposed group home for the mentally retarded, without a rational basis for doing so, violates the Equal Protection Clause). *See also* Martin v. Shawano-Gresham Sch. Dist., 295 F.3d 701, 712-13 (7th Cir. 2002) (finding that even where there is no suspect class and no fundamental right involved, an individual may state a "class of one" equal protection claim if she has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment") (citing Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)); Goshtasby v. Bd. of Trs. of the Univ. of Ill., 141 F.3d 761, 771 (7th Cir. 1998) (finding that "discrimination on the basis of age is subject to rational-basis review . . . and 'arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review'") (quoting Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988)).

201. *City of Cleburne*, 473 U.S. at 471 n.23.

202. *Id.* at 448.

203. *Id.* at 447-50 (identifying the city's purposes for the permit as: concerns with the negative attitude of property owners and fear of the elderly; the location of the home next to a school; the location of the home on a flood plain; the size of the home; and the number of individuals who would reside in the home).

204. 528 U.S. 562, 565 (2000) (explaining that the Equal Protection Clause can be the basis of a claim for an individual even where the individual does not allege membership in a class or group where the action of the government was "irrational and wholly arbitrary") In allowing such claims, the Court explained that the purpose of the Equal Protection Clause is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. *Id. See also* McFarland v. Am. Sugar Ref. Co., 241 U.S. 79, 86-87 (1916) (finding that a statute that "bristles with severities that touch the plaintiff alone" was arbitrary and a violation of equal protection); Erwin Chemerinsky, *Suing the Government for Arbitrary Actions*, 36 TRIAL 89 (May 2000) (noting that *Olech* provides that "equal protection claims can be brought by those claiming to have been singled out for discriminatory treatment even if they are a class of one and not a victim of discrimination based on group characteristics").

supply, the municipality conditioned its connection of the water upon obtaining from plaintiffs a thirty-three foot easement.[205] Plaintiffs thereafter alleged a violation of equal protection on the grounds that all other residents were only required to provide a fifteen foot easement.[206] In reaching its conclusion that the government's conduct was impermissibly arbitrary, the Court found that there was no rational basis for the difference in treatment and that such arbitrary, and irrational, differential treatment violated the Equal Protection Clause under even the most lenient standard of review.[207]

Also emanating from the Equal Protection Clause are constitutional limitations upon the use of prosecutorial discretion.[208] Despite the fact that prosecutors are generally granted a substantial amount of discretion, courts are permitted to intervene in two circumstances both of which involve concerns about arbitrariness.[209] If a prosecutorial decision is not rationally related to a legitimate

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205. *Vill. of Willowbrook*, 528 U.S. at 563.

206. *Id.*

207. *Id.* at 564-65.

208. In state cases, these include protections offered by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution as well as state constitutional equal protection provisions. In federal cases these protections are afforded under the equal protection provision within the Fifth Amendment Due Process Clause. *See* Mark L. Amsterdam, *The One-Sided Sword: Selective Prosecution in Federal Courts*, 6 RUTGERS-CAM. L.J. 1, 6-7 (1974). In federal cases, claims of discriminatory enforcement have been based on the right to equal protection embraced within the Due Process Clause of the Fifth Amendment. *See id.* at 5-6. The courts apparently make no distinction on the basis of the clause relied on, and equal protection and due process are in effect interchangeable for purposes of discriminatory enforcement cases. *See id.* The constitutional protections against selective enforcement derive from the protections afforded under the Equal Protection Clause. *See* United States v. Armstrong, 517 U.S. 456, 464-65 (1996) (finding that under the equal protection component of the Fifth Amendment Due Process Clause, the decision to prosecute may not be based on arbitrary classifications such as race or religion); Wayte v. United States, 470 U.S. 598, 608 (1985) (finding that "[i]t is appropriate to judge selective prosecution claims according to ordinary equal protection standards").

209. The limitations on arbitrary prosecutorial actions apply also to specific prosecutorial decisions at trial. For example, a federal prosecutor's decision not to deviate from the sentencing guidelines is subject to equal protection analysis so long as the discretion is exercised with impermissible motive. *See, e.g.*, Wade v. United States, 504 U.S. 181, 183 (1992) (holding that district courts may review a prosecutor's refusal to file a motion seeking reduction below statutory or guideline minimum sentences for defendants providing substantial assistance in the investigation or conviction of persons for other offenses, if the refusal was based on an unconstitutional motive). Courts have also found an arbitrariness limitation in an Immigration and Naturalization Service attorney's authority to initiate deportation proceedings. *See, e.g.*, Cabasug v. INS, 847 F.2d 1321, 1324 (9th Cir. 1988) (equating the INS attorney's authority to initiate deportation proceedings to the decision to initiate prosecutorial discretion); Cervantes v. Perryman, 954 F. Supp. 1257, 1265 (N.D. Ill. 1997).

governmental interest,[210] or if it is based on improper or unjustified traits such as race, gender or religion,[211] then it is viewed as being based on arbitrary standards and violative of the Equal Protection Clause.[212] Thus, courts will review a prosecutor's discretion in instances where an individual can show that the law was not applied to other similarly situated individuals and where selective application was deliberately based upon an impermissible trait such as race, religion or some other arbitrary classification.[213]

Judicial oversight of prosecutorial discretion was the basis of the seminal *Yick Wo* decision, where a San Francisco ordinance was being exclusively applied to those of Chinese ancestry.[214] In its opinion, the Court expressed concerns that the lack of standards[215]

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210. *Wade*, 504 U.S. at 182.

211. *See, e.g., id.* at 186; *Wayte*, 470 U.S. at 608; Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Oyler v. Boles, 368 U.S. 448, 456 (1962); *Ex Parte* Littlefield, 540 S.E.2d 81, 84 (S.C. 2000) ("Although prosecutorial discretion is broad, it is not unlimited. The judiciary is empowered to infringe on the exercise of prosecutorial discretion when it is necessary to review and interpret the results of the prosecutor's actions when those actions violate certain constitutional mandates. For example, the judiciary may infringe on prosecutorial discretion where the prosecutor bases the decision to prosecute on unjustifiable standards such as race, religion or other arbitrary factors."); People v. Abram, 680 N.Y.S.2d 414, 417 (City Ct. 1998) (finding that criminal defendants are entitled to equal protection under the Fourteenth Amendment and interpreting this provision as forbidding public authority from making illegal or improper distinctions between similarly situated persons).

212. Despite the ostensibly broad coverage of its protections, the equal protection limitations on prosecutorial discretion is mired in confusion about its scope and application. In particular, there exist disagreement concerning the appropriate method of raising the claim, the quantum of proof required to prove a claim, and the availability of discovery for the party claiming the violation. *See* Andrew B. Weissman, *The Discriminatory Application of Penal Laws by State Judicial and Quasi-Judicial Officers: Playing the Shell Game of Rights and Remedies*, 69 NW. U. L. REV. 489, 502 (1974). It is undisputed that the party claiming the discriminatory enforcement has the burden of proof. *Id.* at 510; Amsterdam, *supra* note 208, at 19. The injured party also bears the burden of persuasion. Joseph H. Tieger, *Police Discretion and Discriminatory Enforcement*, 1971 DUKE L.J. 717, 738-39. However, there exist no clear standards as to quantum of proof required or the type of proof that is sufficient to substantiate a claim. *See id.* at 738-39; Amsterdam, *supra* note 208, at 15-17. Further, the very proof often needed by an individual to substantiate a claim is often exclusively in the possession of the prosecutor and subject to limited discovery. Amsterdam, *supra* note 208, at 19. Courts have severely restricted access to this discovery by requiring individuals to present both a colorable showing of selectivity as well as the use of improper standards. *See* Stefan H. Krieger, Comment, *Defense Access to Evidence of Discriminatory Prosecution*, 1974 U. ILL. L.F. 648, 650, 660.

213. *See* Weissman, *supra* note 212, at 503 (explaining that mere selectivity in the enforcement of the law, standing alone, does not constitute a denial of equal protection, since prosecutorial authorities must necessarily exercise some discretion in determining whom to prosecute).

214. 118 U.S. 356, 357-59 (1886).

215. *Id.* at 366-67, 372-73 (expressing concerns about partiality or oppression that

subjected individuals to the mere will of the enforcement official,[216] and that there was no rational, non-arbitrary, reason to treat those of Chinese ancestry differently from those of non-Chinese ancestry.[217] One hundred years later, the Court similarly scrutinized the government's "passive enforcement policy" of prosecuting for draft violations only those who were reported by themselves or others.[218] Though the Court ultimately found that the government had treated similarly all reported non-registrants,[219] it held that a decision to prosecute "cannot be deliberately based upon an unjustifiable standard such as 'race, religion or other arbitrary classification.'"[220] These cases share a fundamental concern that a rational connection must exist between the government's purpose and the means chosen to achieve that purpose. This requirement of a rational relation helps to ensure fair and equal treatment of individuals subject to legislation by ferreting out legislation that is based on bias and prejudice, requiring instead that similarly situated individuals be treated equally and ensuring that laws will be rational and fairly applied.

4. First Amendment Speech

The First Amendment to the U.S. Constitution, made applicable to the states through the Fourteenth Amendment,[221] provides in pertinent part that, "Congress shall make no law . . . abridging the freedom of speech."[222] Due to the deeply rooted nature of the constitutional protection of speech, concerns about arbitrary or content-based limitations are particularly heightened.[223] Thus, in a variety of different contexts, the Court's First Amendment jurisprudence focuses on ways to limit or protect against subjective governmental control of the permissible scope of speech. Many of the constitutionally required limitations on governmental action require the fair application of standards and prohibit subjective or content-based decision-making.

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might arise without standards to govern discretion).

216. *Id.* at 366-67.

217. *Id.* at 368.

218. *Wayte*, 470 U.S. at 598-99.

219. *Id.* at 610.

220. *Id.* at 608 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

221. Virginia v. Black, 538 U.S. 343, 358 (2003); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 387 (1993); Employment Div., Dep't. of Human Resources of Or. v. Smith, 494 U.S. 872, 877-78 (1990).

222. U.S. CONST. amend. I.

223. *See* Roth v. United States, 354 U.S. 476, 484 (1957).

The vagueness doctrine stems in part from the Due Process Clause and protects speakers from arbitrary enforcement of vague standards.[224] As in other contexts, a statute implicating speech is facially invalid if people of ordinary intelligence are unable to understand what conduct is prohibited[225] or if a law authorizes or encourages arbitrary or discriminatory enforcement.[226] Where a vague law applies to activity protected by the First Amendment, there is the additional concern that the lack of clarity might inhibit the exercise of guaranteed freedoms [227] and courts will apply the vagueness standard even more stringently than in other contexts.[228]

Arbitrariness concerns have also been addressed within the context of prior restraint doctrine. A significant aspect of that doctrine is the need to guard against arbitrary or content-based governmental restrictions by requiring licensing and permit schemes

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224. For a discussion of the vagueness doctrine in general, see *supra* notes 102-118 and accompanying text. *See also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 588 (1998) ("Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards.") (citing NAACP v. Button, 371 U.S. 415, 432-433 (1963)).

225. *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."); Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . .").

226. *Grayned*, 408 U.S. at 108-09 ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

227. *Id.* ("[W]here a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.") (alteration in original) (citations omitted).

228. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) ("If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 129-30 (1992) (stating that an "impermissible risk of suppression of ideas" exists where "an ordinance . . . delegates overly broad discretion to the decisionmaker"); Families Achieving Independence & Respect v. Neb. Dept. of Soc. Servs., 91 F.3d 1076, 1079-80 (8th Cir. 1996) (finding that unwritten agency policy used to exclude plaintiff from access to building lobby violated First Amendment by being vague and subject to arbitrary enforcement); IDK, Inc. v. Clark County, 836 F.2d 1185, 1198 (9th Cir. 1988) (finding that a law that lacks sufficient guidelines to prevent arbitrary and discriminatory enforcement can be facially challenged under the First Amendment).

that contain adequate substantive and procedural safeguards.[229] Substantive safeguards require narrow, objective and definite standards to protect against capricious governmental restrictions and ensure non-arbitrary decision-making.[230] The procedural safeguards are designed to ensure that any limitation on speech is done so sparingly. For example, prior restraints can only be imposed temporarily,[231] such restraints must allow for prompt judicial review,[232] a presumption exists against the constitutional validity of prior restraints of expression,[233] and any burden of proof is on the person attempting to suppress the speech.[234]

Likewise, in the context of both content-based restrictions and permit applications, the issue of arbitrariness relates to the validity of the delegation of authority. In order to be proper, a legislative or administrative delegation of permit-granting authority must be coupled with clear guidelines which limit official discretion in order to prevent arbitrary discrimination.[235] A permit scheme will be

229. *Nationalist Movement*, 505 U.S. at 130 (finding that a permit scheme "may not delegate overly broad licensing discretion to a government official"); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225-26 (1990) (finding that the "prior restraints doctrine" guards against the threat of government censorship by requiring that public licensing and permit schemes contain adequate substantive and procedural safeguards against arbitrary, or content-based, state action); *see also* New Eng. Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 21 (1st Cir. 2002).

230. *Nationalist Movement*, 505 U.S. at 131 ("To curtail that risk, 'a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.'") (quoting Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969)).

231. Freedman v. Maryland, 380 U.S. 51, 58-59 (1965) ("Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.").

232. *Id.* at 58 ("The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film."); A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 217-18 (1964); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 71 (1963); Cannabis Action Network, Inc. v. City of Gainesville, 231 F.3d 761, 772 (11th Cir. 2000) (explaining that prior restraint on speech, unlike other restrictions, is subject to facial challenge, on the theory that when prior restraint allegedly contains risk of delay or arbitrary censorship, every application of the statute creates impermissible risk of suppression of ideas).

233. *Freedman*, 380 U.S. at 57 ("'[A]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'") (quoting *Bantam*, 372 U.S. at 70).

234. *Id.* at 58 (finding that the burden of proving that the speech is unprotected expression lies with the censor).

235. *See, e.g.*, *Nationalist Movement*, 505 U.S. at 132-133, 137 (finding that an

considered facially invalid in the absence of clear standards to guide the discretion of the government official administering the permit scheme.[236] The government is prohibited from making content-based restrictions on speech because it allows the government to select which speech it supports.[237] Governmental limitations on the time, place and manner also raise concerns about arbitrary limitations on speech. While the government can utilize time, place and manner restrictions so long as the restrictions are not arbitrary,[238] courts will uphold the validity of a restriction only if it is narrowly tailored to serve a significant government interest and if ample alternatives for communication exist.[239]

Finally, even when the government acts in a proprietary fashion it remains subject to some First Amendment constraints. The fundamental limitation imposed when the government is acting in a

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ordinance that failed to provide standards for the application of a parade or assembly permit fee vested unconstitutional unbridled discretion in a government official); Kunz v. New York, 340 U.S. 290, 294 (1951) (explaining that legally unrestrained discretion delegated to administrative bodies or officials to regulate activities protected by the First Amendment violates the constitution); Stonewall Union v. City of Columbus, 931 F.2d 1130, 1134 (6th Cir. 1991) (remarking that unguided administrative permit-awarding discretion enables illegitimate governmental discrimination animated by anticipated speech content or the speaker's politics).

236. *See Kunz,* 340 U.S. at 294-95; *see also* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152-53 (1969) (condemning permit systems that give an administrative official discretion to grant or deny a permit based on broad criteria unrelated to the regulatory purpose of the permit); Staub v. City of Baxley, 355 U.S. 313, 322 (1958) (finding that an ordinance that regulates enjoyment of constitutional freedoms, if contingent on the discretionary grant of a permit by an official, is an unconstitutional censorship of those freedoms); Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939) (finding that the process of issuing permits allowed for the arbitrary suppression of free speech).

237. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-49 (1986) ("[T]he fundamental principle that underlies [the] concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.'") (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972)).

238. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981) (stating that a government regulation that allows for arbitrary application is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view"); Church of Am. Knights of Ku Klux Klan v. City of Gary, Ind., 334 F.3d 676, 683 (7th Cir. 2003) (finding that the requirement of 45 days advance notice requirement, as a time, place and manner restriction, was arbitrary).

239. *Nationalist Movement,* 505 U.S. at 130 ("[A]ny permit scheme controlling the time, place and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.") (citing United States v. Grace, 461 U.S. 171, 177 (1983)).

proprietary fashion is that the restraints must not be arbitrary or capricious.[240] Thus, despite the fact that the government may be acting in a proprietary manner, it is still subject to the basic limitation that its restrictions on free speech cannot be arbitrary.[241]

In each of these areas courts are concerned about arbitrary limitations upon free speech. The mechanisms by which courts police arbitrariness focus on the creation of narrow and specific standards to guide discretion and limit the opportunities for subjective, content-based limits upon speech. The creation of these standards allows for clear rules and equal application of these rules to similarly situated individuals.

B. The Principles of Non-Arbitrariness

The preceding sections provided an analysis of the diverse arenas in which courts address concerns relating to arbitrary governmental actions. Examining these varied doctrines, several underlying themes emerge. In each of the various substantive areas, the essential judicial concerns center around concepts of rationality, clarity, predictability, equality, accountability and reviewability. Courts have attempted to address these concerns in a variety of ways. This section will identify and develop four principles of non-arbitrariness. First, there must be a rational relation between the government's action or classification and the purported interest. Second, laws, and the rules or standards to implement them, must be clear to create a predictable system. This principle allows individuals to conform their behavior accordingly and requires enforcement officials to be guided by objective rather than subjective standards. Third, these rules must be equitably and fairly applied. Finally, there must be accountability based on the rules and the ability of judges to review governmental action in accordance with such rules. The Article will address each of these principles below.

1. Rationality

Embedded in both the substantive Due Process and Equal

240. Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974) (determining that a city acting in a proprietary manner can restrict advertising options on a city bus so long as the policies and practices governing access to the transit system's advertising space are not arbitrary, capricious, or invidious); United States v. Kokinda, 497 U.S. 720, 725-26 (1990) (finding that the government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business, but its action is valid in these circumstances unless it is arbitrary, capricious, or invidious).

241. *Lehman*, 418 U.S. at 303 ("Because state action exists, however, the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious.").

Protection Clauses are concepts and requirements of rationality. Under the rational basis standard of review employed in both doctrines, courts must determine if the governmental action or classification is rationally related to a legitimate governmental interest.[242] The requirement of rationality creates limitations on arbitrary governmental action by mandating that decision-making not be subjective or indiscriminate.[243] This rational relation requirement is illustrated in a variety of contexts. In the substantive due process area, courts require a rational relationship between the means and the ends of the legislation in order to ensure that laws are not based on arbitrary or irrational justification.[244] In the equal

242. For application of the rational basis standard in the substantive due process context, see City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 676 (1976) (finding that substantive due process proscriptions dictate that a state or local legislative measure is judicially voidable on its face if it necessarily compels results in all cases which are "arbitrary and capricious, bearing no relation to the police power"); Vill. of Euclid v. Ambler Realty Co, 272 U.S. 365, 395 (1926) (holding that land-use regulations violate the Due Process Clause if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"). *See also* Gutzwiller v. Fenik, 860 F.2d 1317, 1328 (6th Cir. 1988) (finding that tenure decisions at a public university, made on the basis of an individual's sex, can constitute arbitrary and capricious conduct that can violate substantive due process and equal protection doctrines); Mahavongsanan v. Hall, 529 F.2d 448, 449 (5th Cir. 1976) (finding academic dismissals from state institutions can be enjoined if "shown to be clearly arbitrary and capricious"); Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975) (finding that if the decision is about academic standards courts will only intervene if the decision was arbitrary). For application of the rational basis standard in the equal protection context, see Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988) ("[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review."); Ciechon v. City of Chicago, 686 F.2d 511, 522 (7th Cir. 1982) ("Equal protection demands at a minimum that [government] must apply its laws in a rational and nonarbitrary way.").

243. This rationality requirement arises in a variety of contexts. For examples of cases involving prosecutorial discretion, see Wade v. United States, 504 U.S. 191 (1992); Wayte v. United States 470 U.S. 598 (1985); Bordenkircher v. Hayes, 434 U.S. 357 (1978); Yick Wo v. Hopkins, 118 U.S. 356 (1886). For an example of a case involving zoning, see City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

244. *See, e.g., Forest City Enters., Inc.*, 426 U.S. at 676 (acknowledging that substantive due process proscriptions dictate that a state or local legislative measure is judicially voidable if it is "arbitrary and capricious, bearing no relation to the police power"); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) ("Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."); *Vill. of*

protection area, courts require that a government classification be rationally related to a legitimate governmental interest so that similarly situated individuals are not treated differently.[245] In the prosecutorial discretion context, governmental decisions not rationally related to a legitimate governmental interest are arbitrary and thus violate the Equal Protection Clause.[246] In each of these examples, the rational relation requirement allows courts to regulate governmental arbitrariness by placing a check on indiscriminate action.

2. Clear Rules and Standards

The requirement that laws and regulations be set out with clarity is a theme woven throughout legal jurisprudence. It addresses concerns that individuals should be able to adapt their behavior and that enforcement officials should have objective standards to guide their decision-making.[247]

Euclid, 272 U.S. at 395 (finding that land-use regulations violate the Due Process Clause if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"); *see also Gutzwiller*, 860 F.2d at 1328 (finding that denial of tenure at public university made on the basis of individual's sex is arbitrary and capricious and can violate substantive due process); *Mahavongsanan*, 529 F.2d at 449 (finding academic dismissals from state institutions can be enjoined if "shown to be clearly arbitrary or capricious"); *Gaspar*, 513 F.2d at 850 (finding that if the decision is about academic standards courts will only intervene if the decision was arbitrary).

245. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 110 (2000) (holding that procedures for presidential ballot recount violated the Equal Protection Clause); Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (holding that a homeowner can bring a claim under equal protection as a class of one if a governmental entity required a different commitment than from other homeowners); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (overturning state statute that prevented homes for the mentally retarded from being zoned in a particular area because the Court could not find a rational basis for believing that the group home posed a specific threat to the city's legitimate interests); Eisenstadt v. Baird, 405 U.S. 438, 451-55 (1972) (overturning state statute that allowed married persons to receive contraceptives but prevented single persons from obtaining contraceptives as violative of the Equal Protection Clause because the law does not have a rational basis for treating similarly situated individuals differently).

246. *See, e.g.*, Wade v. United States, 504 U.S. 181, 186-87 (1992) (holding that a prosecutor's decision not to move for a reduced sentence where the defendant provided information about other crimes, may have been based on the government's assessment of costs of moving for a reduced sentence, thus constituting a rational relationship to a legitimate governmental interest); Bordenkircher v. Hayes, 434 U.S. 357 (1978) (asserting that a prosecutor consciously exercising selectivity in law enforcement is not a constitutional violation as long as the selectivity is not based on an arbitrary classification); Oyler v. Boles, 368 U.S. 448 (1962) (holding that selectivity in enforcing West Virginia's recidivist statute did not in itself violate equal protection unless based on an unjustifiable standard such as religion or race).

247. The Court has reasoned that there must be sufficient standards for the public

The premise that individuals should have clear knowledge of the laws that apply to them, in order to adequately conform their behavior, underlies many of the substantive legal areas discussed above. Without such a requirement, "the law [is] so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim."[248] For example, a basic principle underlying the vagueness doctrine is that laws should be sufficiently clear to provide people of ordinary intelligence with a reasonable opportunity to understand what conduct is prohibited.[249] Thus, if a law is so lacking in standards that individuals cannot be certain what conduct is prohibited, it violates the vagueness doctrine.[250] Similar concerns about fair notice to the public also exist in the punitive damages and choice of law contexts where significant jurisprudence requires fair notice[251] and predictability.[252] Finally, one of the basic requirements of the nondelegation doctrine is that delegations to administrative agencies be accompanied by "intelligible principles." As in the above contexts, this "intelligible principles" requirement is designed to allow individuals subject to administrative decision-making to be

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to know what conduct is prohibited. *See* Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . ."). The Court has used the rationale that there must be sufficient standards for enforcement purposes. *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.").

248. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting) ("[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process–of the law in general–is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim.").

249. *See, e.g.*, Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939) (finding that a law fails to meet the requirements of due process if it is so vague and standardless that the public is uncertain as to the conduct it prohibits); *Giaccio*, 382 U.S. at 402-03 (finding that a laws fails to comport with due process requirements if it is so vague that it leaves the public unaware of what conduct is prohibited).

250. *Giaccio*, 382 U.S. at 402-03 ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . .").

251. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 414 (2003) ("The reason is that '[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.'") (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (2003)).

252. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 306-07 (1981) (noting that the predictability of the result is one of the factors considered by a lower court in examining conflict-of-law issues).

better able to plan their affairs.[253]

In addition to providing fair notice, clear laws serve to avoid arbitrary enforcement by providing government officials with guidelines to direct their discretion. These guidelines limit subjective, indiscriminate and capricious enforcement of the laws through the creation of standards upon which officials can base their decisions. The concern for avoiding subjective and indiscriminate enforcement is addressed in a number of the substantive areas discussed above. For example, in the context of First Amendment protected speech, courts are unwilling to allow content-based discretion for fear that decisions will be based on bias or prejudice.[254] Instead, narrow, objective and definite standards are required to protect against capricious governmental restrictions and ensure non-arbitrary decision-making.[255] Similarly, under the vagueness doctrine, courts require clear and legally-fixed standards to protect against indiscriminate governmental action.[256] This requirement of clear rules and standards regulates arbitrary governmental action by creating sufficient clarity, so that individuals can conform their behavior and government enforcement officials have standards to guide their discretion.[257]

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253. Sunstein, *supra* note 151, at 337 (asserting that the nondelegation doctrine promotes planning by citizens "subject to the law, by providing them a sense of what is permitted and forbidden").

254. *See, e.g.*, Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 133 (1992) (reasoning that a county ordinance without standards or objective factors allows officals to encourage and discourage certain views through arbitrary setting of fees); Kunz v. New York, 340 U.S. 290, 294 (1951) (explaining that legally unrestrained discretion delegated to administrative bodies or officials to regulate activities protected by the First Amendment violates the constitution); Stonewall Union v. City of Columbus, 931 F.2d 1130, 1134 (6th Cir. 1991) (remarking that unguided administrative permit-awarding discretion enables illegitimate governmental discrimination animated by anticipated speech content or the speaker's politics).

255. *Nationalist Movement*, 505 U.S. at 132-33 (finding that a permit scheme may not delegate overly broad licensing discretion to a government official); FW/PBS, Inc. v. Dallas, 493 U.S. 215, 225-26 (1990) (finding that "prior restraint doctrine" guards against the threat of government censorship by requiring that public licensing and permit schemes contain adequate substantive and procedural safeguards against arbitrary, or content-based, state action); *see also* New Eng. Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 21, 25 (finding that permits regulating leafleting are proper if they are based on narrow, objective and definite criteria) (1st Cir. 2002).

256. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards . . . ."); Papachristou v. City of Jacksonville, 405 U.S. 156, 170-71 (1972) (holding that the terms "poor people, nonconformists, dissenters, idlers" provide insufficient guidance to police officers and leaves enforcement susceptible to bias and prejudice).

257. *Kinton*, 284 F.3d at 25-26.

3. Fair and Equitable Application

A number of the substantive legal areas discussed above evidence attempts to avoid the arbitrary and inequitable treatment of similarly situated people on the basis of prejudice, bias or discrimination. The substantive area of law in which courts most frequently address these issues is in equal protection doctrine where, at a minimum, irrational or arbitrary discrimination is prohibited[258] and any government created distinctions must have a rational basis.[259] For example, in the voting context, the requirement of equal and fair application of the law ensures that each individual vote carries the same weight regardless of geography.[260] Likewise, courts require that zoning regulations be fairly and evenly applied[261] and that prosecutors avoid selective enforcement of criminal laws.[262]

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258. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564-65 (2000) (holding that the Equal Protection Clause can be the basis of a claim for an individual even where the individual does not allege membership in a class or group where the action of the government was "irrational and wholly arbitrary"). In allowing such claims, the Court explained that "'the purpose of the equal protection clause . . . is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" *Id.* at 564 (quoting Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923)).

259. *See supra* notes 182, 194-207 and accompanying text.

260. *See* Bush v. Gore, 531 U.S. 98, 104-05 (2000) (finding that the use of standardless manual recounts violates the Equal Protection Clause through its recognition that the Equal Protection Clause required uniform rules and non-arbitrary treatment). The Court stated, "[e]qual protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id. See also* Moore v. Ogilvie, 394 U.S. 814, 819 (1969); Reynolds v. Sims, 377 U.S. 533, 562-63 (1964); Roman v. Sincock, 377 U.S. 695, 709-10 (1964); Gray v. Sanders, 372 U.S. 368, 379-80 (1963).

261. *Vill. of Willowbrook*, 528 U.S. at 564-65 (determining that the government's actions violated the Equal Protection Clause because there was no rational, non-arbitrary, basis for the different easements required by the municipality); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 471 n.23 (1985) (holding that mental retardation is not a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded to economic and social legislation, but that under the rational basis test, requiring a special use permit for a proposed group home for the mentally retarded violates Equal Protection Clause in that the requirement, in absence of any rational basis in the record for believing that the group home would pose any special threat to city's legitimate interests, appeared to rest on an irrational prejudice against mentally retarded).

262. For a discussion of how constitutional limitations upon the use of prosecutorial discretion emanate from the Equal Protection Clause, see Amsterdam, *supra* note 208, at 305. For an analysis of how equal protection is used to limit selective enforcement, see *Wade v. United States*, 504 U.S. 181, 186 (1992) ("[A] defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant's race or religion."); *People v. Abram*, 680 N.Y.S.2d 414 (N.Y. Misc.,

The requisite of fair and equitable application also exists outside the equal protection framework. For example, in the punitive damages context courts attempt to prevent wide variations in damages awards and will find that an irrationally excessive award violates due process.[263] Similarly, the nondelegation doctrine's "intelligible principles" requirement promotes concepts of equality by requiring administrative agencies to be guided by standards that limit discretion.[264] In each of these substantive areas, the requirement of fair and equitable application of the rules promotes the goal of avoiding the arbitrary and differential treatment of similarly situated individuals.

4. Accountability and Reviewability

The legal system depends upon the ability of the public to hold government officials accountable and the ability of our judicial system to review governmental action to assure its legal validity.[265] These concepts of accountability and reviewability are rooted in separation of powers principles.[266] The concept of accountability

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1998) (finding that criminal defendants are entitled to equal protection under the Fourteenth Amendment and interpreting this provision as forbidding public authority from applying or enforcing an admittedly valid law "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances").

263. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (noting that Fourteenth Amendment Due Process prohibits "the imposition of grossly excessive or arbitrary punishments on a tortfeasor").

264. *See* Seidenfeld & Rossi, *supra* note 148, at 4-5 (explaining that the nondelegation doctrine serves rule of law values and promotes concepts of equality by ensuring equal application of the laws to similarly situated individuals); Sunstein, *supra* note 151, at 337 (explaining that the nondelegation doctrine serves equality values by cabining discretionary governmental authority and reducing arbitrary or capricious decision-making).

265. The nondelegation doctrine promotes judicial review of governmental action and enables the public to hold government officials accountable. *See, e.g.*, United States v. Robel, 389 U.S. 258, 274-76 (1967) (Brennan, J., concurring in result); Arizona v. California, 373 U.S. 547, 626 (1963) (Harlan, J., dissenting in part). Judge William's decision in *American Trucking Associations v. EPA* provides an analysis of the issue of judicial review of governmental action. *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1038 (D.C. Cir. 1999) (per curiam), *modified and reh'g denied*, 195 F.3d 4 (D.C. Cir. 1999) (per curiam), *cert. granted sub nom.*, Browner v. Am. Trucking Ass'ns, 529 U.S. 1129 (2000), *cert. granted*, Am. Trucking Ass'ns, v. Browner, 530 U.S. 1202 (2000) (stating that constraints on agencies are normatively desirable because they minimize arbitrary decision-making by the agency, enhance the likelihood of meaningful judicial review and help to assure that government is responsive to the popular will).

266. Some drafters of the Federalist Papers recognized that separation of powers was designed to police arbitrary action. THE FEDERALIST NO. 47 (James Madison) ("'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control.'") (quoting Montesquieu). *See also*

requires that government actors ultimately have political responsibility. In the context of administrative agencies, accountability is designed to ensure that non-elected bureaucratic agents are not permitted to make laws. The nondelegation doctrine regulates this by mandating that only elected officials, subject to the political will of the people, should enact laws[267] and that any legislative delegation of authority be accompanied by "intelligible principles" to guide the administrators.[268] In this way, questions of social policy are made only by those government officials responsible to democratic political will. If there were no such limitations and unelected administrative officials were permitted to act without oversight, their control of the laws would be impermissibly expansive.[269] In these ways, accountability mandates curb the worst instances of arbitrary action by unelected government officials.[270]

In addition to accountability, the legal system relies upon judicial review of agency action to ensure that governmental actions accord with legal and constitutional limits.[271] Concerns about effective reviewability arise in the vagueness and nondelegation contexts.[272] The vagueness doctrine's requirement that there exist clear and specific legal standards is designed to ensure effective court review of agency action.[273] Similarly, the nondelegation doctrine's requirement that delegations to administrative agencies be accompanied by "intelligible principles" enhances the likelihood of meaningful judicial review by requiring standards upon which courts can assess compliance.[274] In the absence of such standards courts

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Bressman, *supra* note 140, at 1408; Farina, *supra* note 141, at 479 n.105 (identifying that the Supreme Court attributes the nondelegation doctrine to separation of powers).

267. United States v. Robel, 389 U.S. 258, 276 (1967) (Brennan, J., concurring in result); Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

268. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409-10 (1928).

269. *See Robel*, 389 U.S. at 281-82 (Brennan, J., concurring in result).

270. *See id.*

271. Arizona v. California, 373 U.S. at 626 (Harlan, J., dissenting in part).

272. *Id.*

273. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (reasoning that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that the public is uncertain as to the conduct it prohibits or if it permits judges and jurors to decide cases without any legally fixed standards); *see also* Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966) (voiding on grounds of vagueness a statute which permitted a jury to impose court costs upon a defendant); Baggett v. Bullitt, 377 U.S. 360 (1964).

274. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("So long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."). The Court has also discussed how this standard allows courts to effectively review agency action. *See, e.g.*, Arizona v. California, 373 U.S. at 626 (Harlan, J., dissenting in part) (finding

have no ability to determine whether an agency action comports with the law.

IV. DISCRETION AND ARBITRARINESS IN THE ADMINISTRATION OF WELFARE

The changes made to the welfare system in 1996, with the passage of the Welfare Reform Act, created a system of devolution and increased discretion while at the same time calling into question the long-established procedural due process protection previously relied upon by welfare recipients. While devolution and increased discretion alone are not inherently problematic, and may even be beneficial,[275] the convergence of devolution, increased discretion and the questionable benefit of reliance on procedural due process raise concerns about how to hold local welfare administrators accountable. With these ongoing questions about bureaucratic accountability, the new welfare program creates a particularly well suited paradigm through which to explore principles of non-arbitrariness.

This section compares the pre-1996 model of welfare administration to the post-1996 model and notes the features of this new model that have increased caseworker discretion and decreased their accountability. Because neither constitutional procedural due process protections nor administrative law protections assuredly resolve the problem of local governments operating without rules, regulations, policies or procedures, this section looks to other substantive areas of the law that have grappled with similar issues of discretion. The section concludes by applying the principles derived from these substantive areas to the current welfare system. By application of these principles to the administration of a welfare system without rules, regulations, policies or procedures, it becomes apparent that the system in place is impermissibly irrational, unclear, inequitable and unaccountable.

A. The New Model of Welfare Administration - Increased Discretion

Passage of the Welfare Reform Act changed the cash assistance program to adults with dependent children from AFDC to TANF. In addition to the name change, many programmatic changes were made. Several of the changes to the TANF program have the potential to lead to increased arbitrary action by government

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that adequate standards provides the means to assess how the agencies have complied with the legislative mandates); Am. Power & Light Co. v. SEC, 329 U.S. 90, 104-06 (1946) (requiring Congress to clearly delineate the policy in which an agency generally must follow).

275. *See supra* note 28 and accompanying text.

officials.[276] In fact, empirical data evaluating the implementation of welfare reform raises concerns that such arbitrary governmental action is in fact occurring.[277] These features that exacerbate the potential for arbitrary action include: a shift from rule-based decision-making to discretionary decision-making by welfare administrators; a change from eligibility based on written criteria to eligibility based on contract terms defined by the government; and the new devolved, and at times privatized, system of welfare administration. This section will discuss briefly each of these features.

The new administrative model abandons the prior model's reliance on rules, instead vesting local welfare administrators with increased discretion.[278] Under the prior model, non-professional welfare administrators provided benefits based on a set of generally applicable rules[279] that formed the basis of a legally recognized

276. Given the fact that welfare administration now occurs at the state, local, and at times privatized levels, there is no one system that can be analyzed. Because states vary widely in the implementation of TANF, there can be no absolute assertions that will apply in every welfare context. However, as one author has noted some "trends" can be identified. Diller, *supra* note 19, at 1147.

277. REBECCA GORDON, APPLIED RESEARCH CENTER, CRUEL AND UNUSUAL: HOW WELFARE "REFORM" PUNISHES POOR PEOPLE 18, *available at* http://www.arc.org/downloads/arc010201.pdf (Feb. 1, 2001) ("How well has devolution worked? Have different jurisdictions around the country in fact developed varied policies that fit the needs of local welfare clients? Survey results demonstrate that policies do indeed vary at every level by state, by county, by individual welfare office, down to the daily decisions made by each caseworker. In fact, the one quality common to the welfare system in all the locations where the survey was given is their overwhelmingly arbitrary nature. Rather than bringing forth a more finely-tuned set of policies, the survey suggests that in many cases devolution has exacerbated existing inequalities and created new ones."); APPLIED RESEARCH CENTER, FALLING THROUGH THE CRACKS: HOW CALIFORNIA'S WELFARE POLICY KEEPS FAMILIES POOR 29, *available at* http://www.arc.org/welfare/downloads/fallingthrucracks.pdf (July 14, 2003) [hereinafter FALLING THROUGH THE CRACKS] ("The application of welfare rules and regulations in the state of California is rife with arbitrary decisions, errors, and illegal practices on the part of county administrators.").

278. Diller, *supra* note 19, at 1126-27 ("The administrative regimes that are replacing [the old administrative model] tend to have a number of common characteristics. The new regimes tend to give much greater power to ground-level employees. These employees are accorded broad discretion to make judgments in individual cases. They are encouraged to influence recipients through persuasion and advice and have broader powers to sanction recipients viewed as uncooperative. A system that was principally legal in nature is becoming delegalized, shorn of the rules and procedures that characterize a system of laws.").

279. In the late 1960s, the model of welfare administration changed from a social work model in which professional social workers applied broad discretionary rules to a legal bureaucratic model in which non-professional welfare administrators provided benefits based on a set of generally applicable rules. *Id.* at 1135-40.

entitlement.[280] This shift from the former rule-based model to one based on discretionary decision-making entails several elements. Initially, the new model creates substantive provisions that require discretionary decisions. For example, in the context of a welfare administrator implementing work requirements, a number of discretionary decisions arise including: whether a client is able to work; what types of activities constitute "work activities"; whether suitable child care is available to the recipient; and, if the issue of missed appointments arises, whether the recipient had a valid excuse.[281] Likewise, a welfare caseworker has discretion to determine which recipients are exempt from the time limits[282] or are eligible for an up-front one time lump sum welfare diversion,[283] thus controlling which applicants will proceed with the filing of an application and which will be dissuaded from ever filing in the first place.[284] Further, unlike the prior welfare model where workers had a single discrete function, workers now have responsibility for a range of administrative functions following a client from application through termination.[285] This broadening of caseworker authority means that a single caseworker can have enormous influence over a recipient's

280. *See* Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (stating that "benefits are a matter of statutory entitlement for persons qualified to receive them"); King v. Smith, 392 U.S. 309, 317 (1968) (finding that federal statutory criteria mandated that benefits be provided to all eligible individuals).

281. Diller, *supra* note 19, at 1148.

282. 42 U.S.C. § 608(a)(7)(C)(i), (iii) (2000). The statute includes a hardship exception that permits a state to exempt a family from the sixty month time limit if a hardship exists or if the family includes an individual who has been "battered or subjected to extreme cruelty," as defined by the statute. *Id.* The statute permits states to exempt only twenty percent of their caseload. *Id.* § 608(a)(7)(C)(ii); *see also* 45 C.F.R. 264.1(c) (2003); 64 Fed. Reg. 17,845-48 (Apr. 12, 1999).

283. Diversion programs are designed to keep potential welfare applicants from ever getting on the welfare rolls by providing an up-front, lump sum payment in lieu of ongoing cash assistance. For a review of various state diversion programs, see STATE POLICY DOCUMENTATION PROJECT, FORMAL CASH DIVERSION PROGRAMS, *available at* http://www.spdp.org/tanf/divover/divover.pdf (last visited Nov. 24, 2004). Diller explains that there are several types of diversion policies all of which seek to dissuade the applicant from filing an application. Diller, *supra* note 19, at 1152-57. The first type of diversion occurs when the welfare caseworker offers the applicant a one time cash assistance payment in lieu of ongoing cash assistance. *Id. at 1153.* Thus, the client never even applies for welfare and instead takes the one time payment. A second policy that serves as a diversion is the requirement that applicants engage in job search activities while their application is pending. *Id.* at 1154. A final component of many diversion programs is the focus on alternative resources available to the client. *Id.* at 1155.

284. *See* Diller, *supra* note 19, at 1153.

285. *Id.* at 1161-62 (explaining that the aggregation of tasks into one case worker's role has occurred in whole or in part in a number of states including Oregon, Massachusetts and Wisconsin).

case, thus multiplying the impact of his or her discretion. While there certainly are many workers who try to do the "right" thing with their discretion, in the absence of actual rules to guide such discretion, there exists a risk of arbitrary action even on the part of well-intentioned caseworkers.[286]

A second programmatic shift with the potential to substantially increase arbitrary action is the change from eligibility based on a written set of criteria to eligibility based on contract terms decided by the government. Under the new welfare system, in order to receive assistance recipients must meet a set of individually negotiated contractual obligations that form the basis for the maintenance of assistance,[287] as well as potential sanctions.[288] These obligations are

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286. *See* Evelyn Z. Brodkin, *Inside the Welfare Contract: Discretion and Accountability in State Welfare Administration,* 71 SOC. SERV. REV. 1, 7 (1997) (calling into question "[t]he notion that increased discretion is a positive feature of welfare casework" by providing historical examples of the biased, arbitrary and capricious decisions made by caseworks given discretion); JOEL F. HANDLER & ELLEN JANE HOLLINGSWORTH, THE "DESERVING POOR": A STUDY OF WELFARE ADMINISTRATION 205-11 (1971) ("The malaise of welfare administration is staggering. Flexible administration, which is supposed to work to the advantage of the client, really works to permit regulation at whim and to increase client dependency. The bureaucracy is at present uncontrollable and therefore arbitrary and unjust.").

287. The Welfare Reform Act requires that each individual be assessed, prior to receipt of assistance, to determine his or her "skills, prior work experience, and employability." 42 U.S.C. § 608(b)(1) (2000). On the basis of this assessment, the state agency may develop a formal agreement that sets forth the employment goals of the recipient, the obligations of the recipient, and "describes the services the state will provide" to the recipient. *Id.* §608(b)(2)(A)(i)-(v). All fifty states and the District of Columbia require some type of written agreement that is signed by the recipient. *See* STATE POLICY DOCUMENTATION PROJECT, FINDINGS IN BRIEF: TANF APPLICATIONS, *available at* http://www.spdp.org/tanf/applications/appsumm.htm (last modified Mar. 03, 2000) [hereinafter TANF APPLICATIONS]. Sixteen states require recipients to sign "employability contracts" only, which focus exclusively on employment related issues. *Id.* Eighteen states require "responsibility contracts," which proscribe conduct in matters in addition to employment obligations. *Id.* These additional matters include child school attendance, child immunization, cooperation with child support enforcement, parenting training and agreements to achieve self-sufficiency. Seventeen states require recipients to sign both "employability plans" and "responsibility contracts." *Id.*

288. For a summary of the state sanctions that accompany failure to comply with employment contracts or personal responsibility contracts, see STATE POLICY DOCUMENTATION PROJECT, PERSONAL RESPONSIBILITY CONTRACTS: EXEMPTIONS AND SANCTIONS, *available at* http://www.spdp.org/tanf/tanfapps.htm (June 1999). For a summary of general state sanction policies, see HEIDI GOLDBERG, CENTER ON BUDGET AND POLICY PRIORITIES, A COMPLIANCE-ORIENTED APPROACH TO SANCTIONS IN STATE AND COUNTY TANF PROGRAMS (Oct. 1, 2000), *available at* http://www.cbpp.org/3-28-01tanf.pdf [hereinafter GOLDBERG, A COMPLIANCE-ORIENTED APPROACH TO SANCTIONS IN STATE AND COUNTY TANF PROGRAMS]. In general the statute contains both mandatory and optional sanctions that states may impose. States must impose sanctions for: child support non-cooperation. 42 U.S.C. § 608(a)(2) (2000) (establishing

created by welfare administrators and can include employment-related responsibilities[289] as well as personal responsibilities such as child school attendance, child immunization, cooperation with child support enforcement and parenting training.[290] Within this context, welfare caseworkers take on the role of contract negotiators,[291]

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that if "an individual is not cooperating in establishing, modifying, or enforcing a support order with respect to a child of the individual" and no good cause exemption applies, the state must either deduct no less than 25% of the assistance grant or terminate assistance to the family). States must also impose sanctions for failure to participate in work activities. *Id.* § 602(a)(1)(A)(ii), (B)(iv) (2000) (establishing that states must require work after two years, and unless a state opts out, they must require participation in community service after two months). The statute expressly provides that a state may sanction a family if: an adult fails to ensure that minor children attend school, or if the family includes an adult between 20-51 years of age who does not have or is not working toward a secondary school diploma or its equivalent unless the adult is determined by a professional to lack such capacity. *Id.* § 604(i)-(j).

289. Thirty-three states require recipients to sign "employability plans," which focus exclusively on employment related issues. *See* STATE POLICY DOCUMENTATION PROJECT, EMPLOYABILITY PLANS, *available at* http://www.spdp.org/tanf/applications/applicep.pdf (May 1999) (including Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

290. Thirty-five states require recipients to sign "personal responsibility contacts." *See* STATE POLICY DOCUMENTATION PROJECT, PERSONAL RESPONSIBILITY CONTRACTS: OBLIGATIONS, *available at* http://www.spdp.org/tanf/prcreq/index.htm (June 1999) [hereinafter PERSONAL RESPONSIBILITY CONTRACTS: OBLIGATIONS] (including Alabama, Alaska, Arizona, Arkansas, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming). These requirements range from the innocuous, such as job search obligations, to more punitive requirements, such as child school attendance, drug and alcohol programs, and agreements to achieve self-sufficiency.

291. *Compare* WINIFRED BELL, AID TO DEPENDENT CHILDREN 25, 153-54 (1965) (explaining that during the New Deal era Aid to Dependent Children (ADC) was administered by case workers who were trained social workers), *with* Diller, *supra* note 19, at 1195 (explaining that unlike the old social work administrative model, under the new TANF administrative scheme, caseworkers do not require professional training and in many offices are not required to complete any educational training beyond high school). Professor Gilman writes:

> [F]ront-line workers generally now engage in a variety of counseling and evaluative tasks. These include educating applicants about the TANF program; assessing their work histories and attempts to obtain employment; reviewing their eligibility for entitlement benefits such as SSI, Medicaid, and food stamps; determining their eligibility for cash grants, loans, or other services to divert them from the TANF program; assisting them in securing child support from noncustodial parents; helping them with job searches;

wielding large amounts of discretion in defining the terms of a contract for benefits.[292] This authority to set contract terms, especially given the lack of rules and standards governing permissible contract terms, increases caseworker discretion and creates the potential for arbitrary action.

Finally, the devolution of authority for welfare administration as well as the privatization of portions of some states' welfare administration also impact the discretion afforded administrators. The issues raised by devolution are especially heightened in those states that have further devolved authority from state to local governments.[293] Discretion appears to increase as government becomes smaller and more local because authority is more concentrated in fewer government officials and there are fewer checks to curb improper actions.[294] The devolution of administrative

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assessing their child care and transportation needs, as well as domestic violence problems or alcohol or drug abuse; drafting individualized plants to attain economic self-sufficiency; and assisting them in locating job training, GED, ESL, and other skill building activities.

Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 580 (2001). *See* MARY JO BANE & DAVID T. ELLWOOD, WELFARE REALITIES: FROM RHETORIC TO REFORM 8-27 (1994) (providing a historical review of the changing role of the welfare administrator); LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935, 102-05, 162-64 (1994) (providing a historical analysis of the caseworker as social worker).

292. *See* Diller, *supra* note 19, at 1157-58 (explaining that personal responsibility agreements or contracts represent an additional set of rules that caseworkers have the discretion to apply).

293. *See generally* LOVEJOY & RYAN, *supra* note 13, at 9 (describing devolution schemes in Colorado, Maryland, North Carolina, Ohio, and Wisconsin and explaining that increased discretion is also accompanied by a lack of administrative accountability mechanisms); *see also* Cimini, *supra* note 2, at 127-29 (detailing a survey of the sixty-three county governments administering welfare and showing that thirty-six of those counties were operating "without specific local policies or procedures. Of the thirty-six operating without written policies or procedures, thirty-four employ other incomplete tools, such as state plans, flow charts, or checklists to assist in the administration of the program," while two counties had no written policies, "no flow charts, no graphs, nor any inter-office memoranda to guide workers in the administration of the program." Further, there were five counties "using old AFDC policies to administer the new TANF program."); JOEL F. HANDLER, DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT 41-47 (1996) (describing the general problems devolution creates for domestic social program).

294. McGuinness, *supra* note 179, at 266 (noting that Americans "from all walks of life need constitutional protection from increasingly arbitrary and oppressive government power, more often at the local level" and that smaller, local governments, with their pervasive, harassing and potentially arbitrary or discriminatory regulations, pose a greater threat to civil liberties than state and federal governments). *See also* Knight v. Vernon, 214 F.3d 544 (4th Cir. 2000) (considering the case of a jailer who was fired for not supporting the Sheriff in a local election); Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999) (considering the matter of a

authority to local governments not only increases discretion, it also decreases accountability, in part because traditional rules of administrative law do not definitively constrain devolved actors.[295] For example, administrative procedure acts and freedom of information laws often do not apply to local government or private contractors administering welfare programs.[296]

This trend toward increased discretion is present both in states that have contracted out to private corporations[297] and those that have adopted private management techniques in the administration of welfare.[298] The increase in discretion in this context is, in part, related to the adoption of private management techniques that create broad non-rule based systems designed to achieve identified outcomes unrelated to fairness, equity, clarity or accountability.[299]

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police officer who was punished for advocating civilian handgun use, contrary to the Police Chief's opinion); JAMES BOVARD, LOST RIGHTS 1-6, 49-51 (1994).

295. Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts For Welfare-To Work Services*, 28 FORDHAM URB. L.J. 1559, 1560 (2001) (stating that this erosion of administrative law structures diminishes democracy in three ways: "[f]irst, the rules of the new contractual regime are not generated by processes that require or invite public participation, even those analogous to the imperfect models of administrative rulemaking. Second, the new contractual regime lacks the transparency we have come to expect of rule-bound welfare administration .... Third, there is no effective method, and scant tools, by which citizens can obtain needed information to judge the efficacy of the new system.").

296. Diller, *supra* note 19, at 1190, 1197 n.392 (explaining that "the Supreme Court adopted a narrow definition of 'agency' for purposes of the federal Freedom of Information Act (FOIA) [and found] ... that grants of federal funds 'generally do not create a partnership or joint venture with the recipient, nor do they serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision.'") (quoting Forsham v. Harris, 445 U.S. 169, 179-80 (1980)).

297. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 104 (a)(1)(A) (authorizing the use of TANF funds to administer the TANF program "through contracts with charitable, religious or private organizations"); Bezdek, *supra* note 295, at 1566-67 (noting that in contrast to government agencies, private contracted service providers have the additional component of compensation that may affect both the quality of service as well as the entity's accountability). For historical analysis of privatization in the social services context, see Gilman, *supra* note 291, at 581-92. For an overview of trends in social service privatization, see U.S. GEN. ACCOUNTING OFFICE, SOCIAL SERVICES PRIVATIZATION: EXPANSION POSES CHALLENGES IN ENSURING ACCOUNTABILITY FOR PROGRAM RESULTS, GAO/HEHS-98-6 (1997). For analysis of the pros and cons of privitization, see Matthew Diller, *Going Private - The Future of Social Welfare Policy?*, 35 CLEARINGHOUSE REV. 491 (2002). For an analysis of how privitization impacts litigation, see Steve Hitov & Gill Deford, *The Impact of Privitization on Litigation*, 35 CLEARINGHOUSE REV. 590 (2002).

298. Diller, *supra* note 19, at 1177-86 (describing the "entrepreneurial government" model utilized in the current administration of welfare).

299. *Id.* at 1175 (stating that "rather than exert direct authority over tasks

Additionally, the increase in discretion has not been accompanied by a professionalization of welfare workers' roles or by an increase in their education.[300] Further, because important policy decision are not always in written form, some key policy decisions will avoid public input usually available under notice and comment requirements.[301] Finally, with increasing discretion and an absence of rules, the effectiveness of individual hearings and lawsuits to challenge unfettered discretion decreases.[302]

Studies on the impact of welfare reform have shown some disturbing problems. One study conducted in ten cities and rural areas across the country revealed problems with discrimination, chaos, confusion and unpredictability.[303] For example, white female respondents in Hartford, Connecticut, reported receiving cash assistance for children who were not yet born, while African American women had to wait for the birth and supply proof prior to an increase in cash assistance.[304] The survey also found that fifty-two percent of Native American women and forty-seven percent of African American women who received job training were sent to "Dress for Success" classes, compared to only twenty-six percent of white women.[305] Likewise, one third of all respondents had been sanctioned in some form ranging from loss of benefits to incarceration[306] and once sanctioned, more than sixty percent of the individuals reported that they were not informed of their right to a fair hearing.[307]

Another study based in California concluded that, "[t]he application of welfare rules and regulations in the state of California is rife with arbitrary decisions, errors, and illegal practices on the part of county administrators."[308] That report found "routine, illegal and unjust use of sanctions," the miscalculation of legitimate

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performed by lower level workers, central administrators should identify desired outcomes and shape incentive structures so that workers strive to achieve these outcomes").

300. *Id.* at 1195-96 (comparing the social work model employed during the new deal to the entrepreneurial model's absence of professionalism).

301. *Id.* at 1196.

302. *Id.* at 1200-01 (explaining that as welfare caseworkers have responsibility for a broader range of activities that are not subject to rules, the efficacy of hearings is undermined. Additionally, in the absence of rules requiring a particular administrative response, individual hearings become a less useful means of ensuring that similarly situated individuals are treated alike).

303. Gordon, *supra* note 277, at 4-5.

304. *Id.* at 34.

305. *Id.*

306. *Id.* at 5.

307. *Id.*

308. FALLING THROUGH THE CRACKS, *supra* note 277, at 25.

exemptions and the denial of job training and educational opportunities.[309]

Similarly, this author's informal survey of welfare implementation in Colorado revealed administration without policies or procedures.[310] When questioned about how they implemented the program without guidelines or standards, some workers explained that local policies were unnecessary because "it is just something [they] do,"[311] or because "it is common knowledge,"[312] or because "workers have been doing it so long there is no need to tell them what to do."[313] Other county workers explained that written policies are unnecessary "because everyone is treated the same."[314]

These informal and preliminary studies tend to indicate that problems may in fact exist with a system of unfettered discretion. At the least, they illustrate the importance of further analysis of the problem.

B. The Need For a New Solution

In light of these aspects of the new welfare administrative model, the potential exists for increased arbitrary governmental action.[315] Here, however, unlike the procedural due process cases

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309. *Id.* at 1-4.

310. *See supra* note 2 and accompanying text.

311. Telephone Interview by Libby Hilton with Sandy Knight, Custer County caseworker (July 24, 2000). A copy of the interview is on file with the author.

312. Telephone Interview by Libby Hilton with Las Animas County caseworker/receptionist (July 24, 2000). A copy of the interview is on file with the author.

313. Telephone Interview by Libby Hilton with Debbie Evans, Teller County caseworker (July 24, 2000). A copy of the interview is on file with the author.

314. Telephone Interview by Libby Hilton with Lauri Biscado, Cheyenne County caseworker (July 24, 2000). A copy of the interview is on file with the author.

315. Debate about the relative merits and failures of rules and discretion in judicial and administrative proceedings is currently salient in the context of mandatory sentencing laws. *See, e.g.*, Linda Greenhouse, *Chief Justice Attacks a Law As Infringing On Judges*, N.Y. TIMES, Jan. 1, 2004, at A14; John W. Gonzalez, *ABA Chief Welcomes Relaxed Rules on Detainees*, HOUS. CHRON., Feb. 7, 2004, at A33; Stuart Taylor Jr., *No More Second Chances? Thanks to Congress and Ashcroft, Federal sentencing shows too little common sense*, LEGAL TIMES, Jan. 26, 2004, at 62. The debate regarding rules versus discretion is longstanding as well. *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY 25 (1969) (describing "both the need for discretion and its dangers"); PAUL E. DOW, DISCRETIONARY JUSTICE, A CRITICAL INQUIRY 67-68 (1981) (documenting abuses of judicial discretion in criminal proceedings); GARY C. BRYNER, BUREAUCRATIC DISCRETION, LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 6-13 (1987) (outlining various and competing theories about bureaucratic discretion in administrative contexts); ADMINISTRATIVE DISCRETION AND PUBLIC POLICY IMPLEMENTATION 14-50 (Douglas H. Shumavon & H. Kennet eds. 1985). For a bibliographic reference to this debate, see Diller, *supra* note 19, at 1140 n.73.

that grew out of the welfare rights movement,[316] the issue is no longer simply the right of the individual whose benefits are denied or terminated to notice and an opportunity to be heard. Instead, part of the dilemma is more fundamental: how can governments be compelled to create rules, regulations, policies or procedures to govern their administration of a welfare benefits program?

In the first instance, one might look to constitutional procedural due process doctrine or to the statutory protections afforded by the administrative procedure acts for answers.[317] However, reliance upon these protections does not adequately hold local welfare administrators accountable. The existence of a protected property interest sufficient to entitle welfare recipients to procedural due process protections is no longer certain[318] in light of the constitutional reality that the existence of a property interest depends upon the content of the federal or state law governing the

316. *See* Atkins v. Parker, 472 U.S. 115, 128 (1985) (finding that food stamp benefits are statutory entitlements, thereby creating a property interest in eligible recipients); Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (recognizing that a recipient's interest in the continuation of disability benefits constitutes a property interest for procedural due process purposes); Bd. of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (addressing what administrative procedures were required in a public university before refusing to renew an untenured faculty member's contract); Perry v. Sindermann, 408 U.S. 593, 603 (1972) (finding that a property interest in renewal of a teacher's contract may exist within a de facto tenure system); Richardson v. Belcher, 404 U.S. 78, 80-81 (1971) (finding implicitly a property interest in benefits under the Social Security Act); Richardson v. Perales, 402 U.S. 389, 401-02 (1971) (finding implicitly a property interest in Social Security Disability benefits); Goldberg v. Kelly, 397 U.S. 254, 254 (1970) (holding that procedural due process requires a pretermination evidentiary hearing be held when public assistance payments to welfare recipient are discontinued); Youakim v. McDonald, 71 F.3d 1274, 1288-89 (7th Cir. 1995) (finding that foster care benefits amount to an entitlement for eligible individuals to receive benefits under state law).

317. Diller, *supra* note 19, at 1188-90 (explaining that both the federal and state Administrative Procedure Acts were created to address problems of administrative accountability and that the protections afforded by the Administrative Procedure Acts are strengthened by freedom of information statutes and open meeting requirements that enable the public to gain access to agency information).

318. In the two cases that have squarely addressed the existence of a property interest in welfare post passage of the 1996 Welfare Reform Act, the existence of a constitutionally protected property interest is unclear. *Compare* West Virginia *ex rel.* K.M. v. W. Va. Dep't of Health and Human Res., 575 S.E.2d 393, 402 (2002) (holding that the welfare recipient's due process rights under the federal constitution do not require a pre-termination hearing before ending TANF cash assistance because Congress and the West Virginia legislature found that recipients are no longer entitled to cash assistance), *with* Weston v. Cassata, 37 P.3d 469, 476-77 (Colo. Ct. App. 2002) (holding that although there is no longer an "absolute entitlement" to welfare benefits, "once welfare recipients have complied with statutory standards and have begun receiving welfare benefits the right to welfare benefits [becomes] a property right [which] cannot be compromised without procedural due process protections").

benefits program at issue.[319] Thus, in the context of welfare benefits, a question arises as to whether or not such a benefit amounts to a legal entitlement.

Application of these constitutional principles reveals the conundrum created by the tension between the concept of a legal entitlement and increased discretion. To constitute a legal entitlement, an individual must have a "legitimate expectation" to receive the benefit.[320] This legitimate expectation must be based upon reasonable and objective grounds, the existence of which are determined by analyzing independent sources of law such as legislation creating benefits.[321] The Court has found an entitlement where there exists "explicitly mandatory language in connection with . . . specific substantive predicates" designed to limit official discretion.[322] Thus, if a statute contains mandatory, substantive criteria limiting the government's discretion, then one's expectation is more likely to be classified as reasonable and subject to procedural due process protections.[323] In the absence of mandatory, substantive criteria, or where government discretion is unfettered, the interest is more likely to be interpreted as a mere desire not subject to procedural due process protections.[324] The practical implication of this analysis is that the more discretion that is afforded administrators, the less likely it is that procedural due process

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319. *See Roth*, 408 U.S. at 577.

320. *See id.* at 577-78 (explaining that there has to be "more than an abstract need or desire" for the benefit); *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) ("The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'") (quoting Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11-12 (1978)).

321. *See Roth*, 408 U.S. at 577 ("Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."). It is also arguable that the contracts entered into between the government and the individual welfare recipient constitute a form of property for constitutional procedural due process purposes. *See* Cimini, *The New Contract, supra* note 3, at 249 (arguing that the concept of a social contract and the existence of actual legal contracts between the government and individual welfare recipients create a property interest under the Due Process Clause).

322. Hewitt v. Helms, 459 U.S. 460, 472 (1983). *See also* Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 454 (1989).

323. *Cf.* Gardner v. Mayor of Baltimore, 969 F.2d 63, 68 (4th Cir. 1992) (reasoning that a claim of entitlement turns on the amount of discretion the government has in denying or approving zoning permit).

324. *See id.* (explaining that where the agency has discretion it defeats the claim of a property interest). For other examples of how discretion impacts the finding of a property interest in municipal land use cases see also, Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir. 1989); RRI Realty Corp. v. Inc. Vill. of Southampton, 870 F.2d 911, 918 (2nd Cir. 1989); Carolan v. City of Kansas City, 813 F.2d 178, 181 (8th Cir. 1987).

protections exist for recipients.[325]

If the protections afforded by the procedural Due Process Clause only exist when government officials are bound by existing substantive standards, then the doctrine fails to protect those most in need. When a government bureaucrat is permitted to act without fixed or substantive rules, and instead by her own unfettered discretion, the procedural Due Process Clause offers little or no protection. As one scholar has stated:

> [n]o regime would seem more threatening of the citizen's autonomy, security and dignity than being at the mercy of a bureaucrat whose behavior is unchannelled by fixed, substantive rules. No circumstance would seem to cry louder for the interposition of the constitution between the individual and government power. And yet, the more discretion positive law confers on officials - the closer the legal regime comes to the nightmare vision we call Kafkaseque - the more certain it is that due process will not intervene.[326]

Thus, under the current framework, procedural due process protections may not apply in the very instances where procedural monitoring is most crucial.[327]

Similarly, the protections afforded by the federal Administrative Procedure Act do not apply to states[328] and generally, state Administrative Procedure Acts do not apply to local governments.[329]

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325. Cynthia Farina and Richard Fallon describe why "process is most 'needed' where decisions are discretionary" and the judiciary's response to these reasons. Farina, *supra* note 66, at 223-27; *see also* Fallon, *supra* note 33 at 328 (acknowledging that a potential interpretation of the Due Process Clause in which protections are offered based upon state law "would allow states to evade due process" limitations by failing to recognize the existence of property).

326. Farina, *supra* note 66, at 222.

327. Mashaw, *Dignitary Process*, *supra* note 66, at 438; Lawrence Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323, 340 (1987) (explaining that when discretion increases, more "procedure rather than less is warranted").

328. 5 U.S.C. § 551 (1994) (defining agencies that are subject to the federal administrative procedures act as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency"). Lisa Shultz Bressman provides an explanation of why the Administrative Procedures Act was created. *See* Bressman, *supra* note 25, at 471-72 (explaining that one of the early models of the administrative states was the expertise model that "conceptualized agencies as professionals or experts, disciplined" by their specialized knowledge). The rationale was that allowing decisions to be made by experts would protect against arbitrary action. *Id.* However, the model focused on agency competence as opposed to agency procedures and thus raised concerns about fairness and participation. *Id.* at 472. It was these concerns that the APA initially was designed to address. *Id.*

329. MODEL STATE ADMIN. PROC. ACT § 1-102 (1981) (defining agency as "a board, commission, department, officer, or other administrative unit of this State, including the agency head, and one or more members of the agency head or agency employees or

Thus, there exists a gap in protection for welfare recipients whose benefits are administered by local governments operating with broad discretion in the absence of rules, regulations, policies or procedures.

C. Application of Non-Arbitrariness Principles to Welfare Administration

Absent the ability to rely on constitutional procedural due process or statutory Administrative Procedure Act protections, questions arise as to whether another protection prevents a government agency from administering a cash assistance program in a lawless manner. In particular, do the four principles of non-arbitrariness identified in section three provide some basis upon which to regulate government officials who act arbitrarily and, if so, what remedies or protections do they offer?

The Article concludes that the non-arbitrariness principles apply to the administration of a cash assistance welfare program administered without rules, regulations, policies or procedures. In such a system, the government has a group of similarly situated individuals, such as welfare recipients in New York City. The government wants to identify and create distinctions between them in order to implement the program in a meaningful way. For example, the welfare worker might provide childcare assistance for recipient A and not recipient B because A completed a worker training program and B did not. The article concludes that in such a situation the government should have guidelines that rationally relate to their underlying purpose, that these guidelines need to be clear and transparent, that they be fairly and equitably applied and that they serve as the basis for accountability and reviewability. Further, the Article concludes that the remedy offered by application of these non-arbitrariness principles is potentially more useful than the notice and hearing remedies provided by traditional procedural due process.[330] In the absence of rules or regulations to govern administration of a benefits program, the non-arbitrariness principles mandate that government agencies create standards to guide their welfare decisions and that there be fair and equal

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other persons directly or indirectly purporting to act on behalf or under the authority of the agency head . . . . The term does not include a political subdivision of the state or any of the administrative units of a political subdivision . . . ."); MODEL STATE ADMIN. PROC. ACT § 1 (1961) (defining agency as "each state [board, commission, department, or officer], other than the legislature or the courts, authorized by law to make rules or to determine contested cases").

330. *See* Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970) (holding that welfare recipients are entitled to "timely and adequate notice detailing . . . proposed termination" of assistance "and an effective opportunity to defend by confronting any adverse witnesses and by presenting . . . arguments and evidence orally").

application of those standards.

The first principle of non-arbitrariness is the requirement of rationality. Specifically, governmental action or classification must be rationally related to a legitimate governmental interest so that decisions are not subjective or indiscriminate.[331] Though concerns as to the subjective and indiscriminate decision-making by welfare bureaucrats have existed for some time, these concerns are exacerbated within the current model of welfare administration.[332]

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331. Various cases demonstrate the application of the rational basis standard in the substantive due process context. *See* Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 676 (1976) (finding that substantive due process proscriptions dictate that a state or local legislative measure is judicially voidable on its face if it necessarily compels results in all cases which are "arbitrary and capricious, bearing no relation to the police power"); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (holding that land-use regulations violate the Due Process Clause if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"); Gutzwiller v. Fenik, 860 F.2d 1317, 1328 (6th Cir. 1988) (finding that a gender-based dismissal was arbitrary); Mahavongsanan v. Hall, 529 F.2d 448, 449-50 (5th Cir. 1976) (finding academic dismissals from state institutions can be enjoined if "shown to be clearly arbitrary or capricious"); Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975) (finding that if the decision is about academic standards courts will only intervene if the decision was arbitrary). Various cases demonstrate the application of the rational basis standard in the equal protection context. *See* Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988) ("[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review."); Ciechon v. City of Chicago, 686 F.2d 511, 522 (7th Cir. 1982) ("Equal protection demands at a minimum that a [government] must apply its laws in a rational and nonarbitrary way.").

332. Many scholars have laid out concerns about inequality or unfairness in welfare administration pre-welfare reform. *See* Mashaw, *supra* note 34, at 818-20 (raising concern with an AFDC system that functioned on broad standards, wide discretion and a coercive relationship between the case worker and the welfare recipient); Edward V. Sparer, *The Role of the Welfare Client's Lawyer*, 12 UCLA L. REV. 361, 363-66 (1965) (raising concern about arbitrary decision-making by caseworkers); HANDLER & HOLLINGSWORTH, *supra* note 286, at 200 (finding that there is an enormous amount of discretionary authority at the local level as a result of the jurisdictional structure, the structure of welfare rules, the nature of the work, and the lack of supervision). Scholars have also raised concerns about inequality in welfare administration in the post-welfare reform era. *See, e.g.*, Susan T. Gooden, *All Things Not Being Equal: Differences in Caseworker Support Toward Black and White Welfare Clients*, 4 HARV. J. OF AFR. AM. PUB. POL'Y 23, 32 (1998) (examining Virginia's welfare administration post-welfare reform and finding that black welfare recipients received less discretionary transportation assistance and received less caseworker support for increasing formal education than their white counterparts. Gooden also found that white welfare recipients benefit considerably from the discretionary actions of their caseworkers and concluded that if differences in caseworker discretion were not addressed early, the differences between black and white welfare recipients may be incorrectly attributed to work ethic, personal motivation or attitude); Brodkin, *supra* note 286, at 20 (finding that welfare recipients lacked power to challenge the administration of welfare programs); Karen Houppert, *You're Not Entitled!: Welfare "Reform" Is Leading to Government Lawlessness*, THE NATION, Oct. 25, 1999

By way of example, assume that an agency rule specified that job training be provided only to those individuals in blue sweaters. Though this rule would clearly be irrational, would it be impermissible? If we were to apply the non-arbitrariness principles discussed here, the "blue sweater rule" would be irrational and, thus, impermissible. In this manner, application of principles of rationality would protect against irrational discretion and help ensure that agency decisions are not entirely absurd or indiscriminate.[333]

The second principle of non-arbitrariness—clear rules and standards—serves two discrete functions by first providing fair notice to individuals so that they can conform their behavior,[334] and second requiring an objective basis for enforcement.[335] Both of these requirements are relevant to the current model of welfare administration.

The concern that individuals have fair notice is particularly relevant to the welfare context where recipients face a minefield of requirements to receive and maintain their benefits. Without clear knowledge of the rules and standards their conduct will be judged by, welfare recipients are unable to deliberately conform their behavior to maintain eligibility. This is especially important in light of the reality that individuals threatened with sanctions face severe financial consequences, including the complete termination of assistance.[336] A system that does not allow recipients to know the

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(concluding that governments and agencies implementing welfare reform are acting lawlessly in the new devolved model of welfare administration).

333. Judges have expressed concerns regarding absolute discretion. *See* United States v. Wunderlich, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting) ("Law has reached its finest moments when it has freed man from the unlimited discretion of some rule, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.").

334. *See, e.g.*, Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . .").

335. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) (holding that an ordinance preventing a person from making noise on grounds adjacent to a school while in session constituted a clear standard).

336. Under the Welfare Reform Act, states are mandated to sanction recipients who fail to engage in work activities and who fail to cooperate with child support enforcement. 42 U.S.C. §§ 607(e), 608(a)(2) (2000). Federal law, however, prohibits a state from imposing a sanction for refusal to comply with work requirements on a family with a child under age six if child care is unavailable, and imposes sanctions on states that violate this mandate. *Id.* § 607(e)(2); 45 C.F.R. §§ 261.15, 261.56(a)(1), 261.57 (2004). Further, the statute permits a state to reduce, by an amount the state considers appropriate, assistance to a family when an individual fails without good

actions that will result in punishment renders it impossible for welfare applicants or recipients to plan their affairs and structure their behavior to maintain eligibility.

The lack of clear rules and standards also gives rise to concerns about subjective, indiscriminate enforcement in the administration of welfare benefits. Without clear standards, welfare administrators, acting as enforcement officials, are potentially guided by nothing more than individual whims and preferences. In fact, without objective standards, administrators have little else to rely on in making their decisions. However, if clear and objective standards are in place, welfare administrators have guidelines to govern their discretion and to insulate their decisions from prejudice.

The principle that rules be fairly and equitably applied also helps to avoid arbitrary or discriminatory treatment of similarly situated individuals.[337] Since at least the mid-1960s scholars have recognized the potential for unequal and unfair treatment of welfare applicants and recipients.[338] The new model of welfare

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cause to comply with other responsibilities mandated by his or her individual agreement. *See* 42 U.S.C. § 608(b)(3) (2000). These work activities, child support enforcement obligations, and other responsibilities comprise the obligations placed upon recipients under the Individual Responsibility Plans. *See id.* § 608(b)(2)(A)(ii); *see also* U.S. GENERAL ACCOUNTING OFFICE, WELFARE REFORM: STATE SANCTION POLICIES AND NUMBER OF FAMILIES AFFECTED 9 app. II (2000) (providing a complete list of the federal statutory provisions regarding which sanctions are mandatory by states and which are optional.) Various summaries detail sanctions and good cause. *See e.g.*, GOLDBERG, A COMPLIANCE-ORIENTED APPROACH TO SANCTIONS IN STATE AND COUNTY TANF PROGRAMS, *supra* note 288, at apps. A, B; MARK GREENBERG ET AL., CENTER FOR LAW AND SOCIAL POLICY, WELFARE REAUTHORIZATION: AN EARLY GUIDE TO THE ISSUES 8, 11-12 (July 2000), *available at* http://www.clasp.org/publications/welfare_reauthorization_an_early_guide.pdf (describing the position of some advocates who claim "that the extent of state discretion in sanction policy has contributed to the numbers of families leaving welfare without work, and to the deepening of poverty for the poorest female-headed families"); MARK GREENBERG & STEVE SAVNER, CENTER FOR LAW AND SOCIAL POLICY, A DETAILED SUMMARY OF KEY PROVISIONS OF THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES BLOCK GRANT OF H.R. 3734, THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 37-42 (Aug. 1996), *available at* http://www.clasp.org/pubs/TANF/detail.pdf.

337. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 369-70 (1886) ("When we consider the nature and the theory of our institutions of government . . . they do not mean to leave room for the play and action of purely personal and arbitrary power. . . . [T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems . . . intolerable in any country where freedom prevails."); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (finding that there was no rational basis to treat those who are mentally retarded differently from others who are not); U.S. Dep't Of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (finding that equal protection guarantees protect against "bare congressional desire to harm a politically unpopular group").

338. *See, e.g.*, Mashaw, *supra* note 34 (raising concern with an AFDC system that functioned on broad standards, wide discretion and a coercive relationship between the

administration, with increased discretion afforded to individual case workers, only heightens these concerns.[339] In the absence of written rules or standards, decisions by individual caseworkers will likely vary from day to day as well as between caseworkers. This inequity will create different results between similarly situated welfare recipients depending upon potentially impermissible or arbitrary factors such as caseworker bias. Given the underlying jurisprudential concern that rules be fairly and equitably applied, it is likely that a system without rules and standards is impermissible.[340]

The fourth principle of non-arbitrariness is accountability and reviewability of governmental action in accordance with the law. This principle, stemming from the doctrine of separation of powers, requires that the public be able to hold government officials accountable and that the judiciary be able to review governmental action to assure it comports with the law. Welfare administrators are not exempt from such accountability concerns. In the absence of any rules or standards that have been created through proper delegation, welfare administrators would avoid accountability for their decisions and recipients would be unable to exercise their political power to change troubling or problematic welfare policies. In addition, a lack of rules or standards upon which to judge agency action would render meaningless the requirement that courts be able to review agency actions. Thus, in order to meet accountability and reviewability requirements, standards and rules must exist and be applied in a consistent and meaningful way.

In summary, the four non-arbitrariness principles have significant implications for the current administration of welfare benefits. Application of these principles would promote the creation of a rational system of welfare laws, based on clear rules and standards, which are equitably and fairly applied and for which the welfare administrators could be held accountable and their decisions reviewed by the judiciary.

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case worker and the welfare recipient); Sparer, *supra* note 332, at 363-66 (raising concern about arbitrary decisionmaking by caseworkers); HANDLER & HOLLINGSWORTH, *supra* note 286, at 200 (finding that there is an enormous amount of discretionary authority at the local level as a result of the jurisdictional structure, the structure of welfare rules, the nature of the work, and the lack of supervision).

339. *See supra* notes 276-86 and accompanying text.

340. In the late 1970s early 1980s a series of court decisions found the absence of rules and standards impermissible. *See, e.g.*, Ressler v. Pierce, 692 F.2d 1212 (9th Cir. 1982); Jensen v. Admin. of the FAA, 641 F.2d 797 (9th Cir. 1981); Carey v. Quern, 588 F.2d 230 (7th Cir. 1978); White v. Roughton, 530 F.2d 750 (7th Cir. 1976); Burke v. United States, 968 F. Supp. 672 (M.D. Ala. 1997); Martinez v. Ibarra, 759 F. Supp 664 (D. Colo. 1991); Baker-Chaput v. Cammett, 406 F. Supp. 1134 (D.N.H. 1976).

V. CONCLUSION

This Article attempts to examine the legal implications of the local administration of cash assistance welfare programs without rules, regulations, polices or procedures to guide governmental decision-making. A number of legal and practical changes render less certain those procedural due process protections that traditionally provided security to welfare applicants and recipients. Among these changes is the fundamental question of whether welfare recipients maintain a property interest in the receipt of benefits. Also uncertain in the era of devolution is the applicability of federal and state administrative procedure acts, especially in states where the administration of benefits is devolved to local governments or is operated by private entities. Finally, even if such traditional protections did apply, the remedy generally offered - namely a right to notice and a hearing - does not address the more fundamental issue of what, if any, jurisprudential concepts exist to mandate that the administration of government benefit programs operate according to rules, regulations, policies or procedures.

To address these questions, this Article focuses upon concepts of arbitrariness. Historically, prohibitions on arbitrariness are deeply rooted in the foundational concepts of our current system of laws and are found in modern and diverse areas of our jurisprudence. Though pervasive in scope, the core concepts of non-arbitrariness are simple: to promote governmental action that is rational, fair and equitable and for which it is accountable. Through an exploration of current judicial concerns about arbitrary governmental action, this Article has sought to set forth themes illustrating the underlying concerns with arbitrary governmental action. Four principles, or themes, underlie these concerns. First, laws must be based on a rational connection between government ends and the means employed to achieve them. Second, the laws must be clear, creating a system predictable enough that individuals can conform their behavior and enforcement officials can make objective decisions. Third, laws must be consistently and uniformly applied in a way that creates a reasonably fair system of laws. And finally, agencies must be held accountable and courts must be able to review claims that the agency has failed to act in accordance with governing requirements.

The concept of arbitrariness and the themes underlying it have significant applicability to the current model of welfare administration with its heightened potential for arbitrary governmental action. Courts addressing arbitrary governmental action in a variety of substantive areas have expressed concern as to the appropriateness of a government operating in the absence of rules, regulations, policies or procedures. In the context of welfare some of those concerns include: whether the rules are rational;

whether similarly situated welfare recipients are treated alike; whether applicants or recipients have notice of the standards governing their behavior; and how to effectuate accountability and reviewability in the absence of rules or standards. Within this context, this Article proposes that application of non-arbitrariness principles to the current administration of welfare requires, at a minimum, the creation of rules, standards and procedures to govern the distribution of benefits as well as the fair and equitable application of such rules and standards to welfare applicants and recipients. While legal principles alone may not resolve all of the issues raised in this article, they do represent one way in which wronged individuals can seek redress and thus provide a necessary first step for the assertion of rights.